

THE TIMES LAW REPORTS.

EDITED BY

THE HON. ARTHUR RUSSELL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XIV.

(1897-98.)

LONDON :

PRINTED AND PUBLISHED BY GEORGE EDWARD WRIGHT,

AT THE TIMES OFFICE, PRINTING HOUSE SQUARE.

[Entered at Stationers' Hall]

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Court of Appeal (Lord Halsbury, L.C., } 1897.
Rigby, and Collins, L.J.J.) } Oct. 25.

JAY AND ANOTHER V. BUDD.*

Practice—Writ—Substituted service—Defendant out of jurisdiction—Order 9, r. 2.

A writ for service within the jurisdiction was issued against a person who was at the time in England. Before the writ was served he went out of the jurisdiction, but not for the purpose of evading service.

Held, by Lord Halsbury, L.C., and Collins, L.J., Rigby, L.J., dissenting, that an order for substituted service of the writ could be made.

This was an appeal from the refusal of a Judge at Chambers to make an order for substituted service of the writ in the action.

The writ was issued against the defendant, a British subject, for service within the jurisdiction to recover a sum of money. It appeared from the affidavits filed on behalf of the plaintiffs that on October 5, 1897, the defendant, in answer to a letter from the plaintiffs, had an interview with one of the plaintiffs at their office in London, when the latter informed the defendant that he had heard that the defendant was leaving England and that his firm would require payment of their account. The defendant offered to give a post-dated cheque for the amount, which the plaintiff refused, stating that his firm would in all probability take bills for the amount. The defendant then left the office, no arrangement for payment having been come to. Upon October 6 the writ in the action was issued, and on the same day a clerk of the plaintiffs' solicitors, being instructed by telegraph, served a copy of the writ on the defendant, who was then on board a steamship in Southampton Docks about to sail for Jamaica. A gentleman, who was present, and who stated that he was the defendant's solicitor, asked the clerk to produce the original writ, which the clerk was unable to do, as the writ had only been issued in London that morning. The defendant's solicitor thereupon said that the service was not complete. The defendant sailed the same day for Jamaica, and the plaintiffs did not know any address in Jamaica where he could be found or communicated with, nor did they know when he was returning to England. It was stated in a letter from the defendant's solicitor that the defendant before leaving had delegated all matters of business to his manager in London. It was not alleged that the defendant had left England for the purpose of evading service of the writ. The Judge at Chambers having refused to order substituted service, the plaintiffs applied *ex parte* to the Court of Appeal for an order for substituted service.

Mr. MACASKIE, for the plaintiffs, contended that the order should be made. The defendant was within the jurisdiction when the writ was issued, and, therefore, the writ could have been personally served upon him before

he left. In "*Fry v. Moore*," 23 Q.B.D., 395; and "*Wilding v. Bean*" (1891), 1 Q.B., 160, the defendant was out of the jurisdiction when the writ was issued, and, therefore, the writ could never have been personally served upon him. The doubt expressed in "*De Bernales v. Bennett*" (10 *The Times L.R.*, 419), as to whether substituted service can be ordered in the case of a writ for service out of the jurisdiction was not applicable to the present case. He also referred to "*Adler v. Mills*" (1 *The Times L.R.*, 308).

The COURT allowed the appeal, Rigby, L.J., dissenting.

The LORD CHANCELLOR said that the old practice, where personal service could not be effected, was attended with great expense and inconvenience, and the rules under the Judicature Acts were intended to get rid of the expense and difficulty which stood in the way of honest litigants bringing reluctant opponents into Court. The great object of all such provisions was, on the one hand, that the person who had a claim against another should be enabled to bring his claim into Court, and, on the other hand, that the person against whom the claim was made should have an opportunity of answering the claim. Whether a person knew of the litigation against him or not, it had been provided that he must be properly summoned before the Court. By Order 9, r. 2, "If it be made to appear to the Court or a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service . . . as may seem just." These words were very general, and he could not introduce into them an exception in the case of a person leaving the country upon hearing of the litigation against him. The question was whether prompt personal service could not be effected. If so, substituted service could be ordered, if the Court or Judge thought it in the interest of justice to do so in the particular case. It seemed to him that every element existed in this case which entitled the Court to make the order. The debtor and creditor knew each other well, and the former had practically admitted that he owed the debt. He received a copy of the writ, and left the country without giving any information as to his movements, and leaving no address, knowing well that he would thereby evade—though it was not suggested that he intended to evade—service of the writ. In his opinion the order for substituted service should be made. His lordship would regret if he were compelled to place a narrow construction on the rule. The service should be upon the defendant's solicitor, and upon the person to whom the defendant had intrusted the management of his affairs, and the defendant must have two months for entering an appearance.

LORD JUSTICE RIGBY dissented. He did not know of any case where substituted service had been ordered in the case of a person who was at the time out of the jurisdiction. In his opinion the Judges would not have ordered substituted service in such a case, unless the defendant went abroad to evade service of the writ.

which was not the case here. The affidavits did not specify precisely the time on October 6 when the writ was issued. It seemed to him that "Wilding v. Bean," and other cases in this Court, showed that substituted service could not be ordered when the defendant could not, at the time, as he thought, of the application being made, be personally served. It was clear that in this case the defendant could not have been served with this writ at the time when the application for an order for substituted service was made. In his opinion the order should be refused.

LORD JUSTICE COLLINS agreed with the Lord Chancellor. The writ was issued before the defendant left the country, and a copy was actually served upon him, which would have been good service if the defendant's solicitor had not required the original writ to be produced. This was a writ for service within the jurisdiction, and they were not fettered by the law as to writs for service out of the jurisdiction. The case fell within the terms of Order 9, r. 2. In his opinion there was no case which debarred the Court from giving effect to the words of the rule and making the order. If, on the other hand, the writ had been issued after the defendant had left the jurisdiction, the only means of reaching him would have been by a writ for service out of the jurisdiction, unless, indeed, the defendant left for the purpose of evading service of the writ. That was so held in "Fry v. Moore" and "Wilding v. Bean."

[Solicitors for the plaintiffs, Francis and Johnson.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Oct. 26.

RAYNES V. BALLANTYNE.*

Ship—Charterparty—Construction—Exemptions from liability—Negligence.

This was an appeal from the judgment of Mr. Justice Kennedy at the trial of the action with a special jury. The action was brought by the charterers of a ship against the owners to recover damages for injury caused to a pier belonging to the plaintiffs in consequence of negligence on the part of the defendants' servants. The alleged negligence consisted in unskillfulness in the management of the loading of the ship with a cargo of limestone, whereby the ship was caused to beat and work against the pier. The defendants contended that they were exempted from liability by express words contained in the charterparty to the effect that the owners should not be responsible for loss or damage of any kind arising from the neglect of the master or crew. The question was whether the case came within that exemption. On the part of the plaintiffs it was argued that before the case could be brought within the exemption it must first be brought within the contract of the charterparty, and that what they complained of was not a breach of that contract, but a breach of the general duty not to damage other people's property. The contract of the charterparty was a contract to load the cargo and carry it from the wharf, and that contract had been performed. The cause of action was a breach of a duty which did not arise from the charter at all. The defendants argued that the words of the exemption ought not to be narrowed in the way suggested by the plaintiffs, which would have the effect of making them apply only to loss or damage to the cargo. The jury having found that the damage to the pier had been caused by the neglect of the defendants' servants, the learned Judge gave judgment for the plaintiffs. The defendants appealed.

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Mr. Joseph Walton, Q.C., and Mr. Carver appeared for the defendants; Mr. Pickford, Q.C., and Mr. Horridge for the plaintiffs.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether what the defendants had done was within the exemption. He thought that Mr. Justice Kennedy had not come to the right conclusion. What was the charterparty a contract for? It was argued that it was only a contract for the carriage of goods, and that there had been no breach of that contract. But according to his view that was not the real meaning of this charter. It was a time charter, and by it the vessel was to be placed at the disposal of the plaintiffs for 12 months, who required it for going to and from their jetty for the purpose of exporting merchandise. He thought that the clause on which the controversy turned relieved the defendants from liability for negligence in anything arising under the charter, and that what was complained of here was negligence in carrying out part of the duty which the defendants were bound to perform under the charter. In his opinion, therefore, the appeal should be allowed and judgment entered for the defendants.

LORDS JUSTICES RIGBY and COLLINS delivered judgments to the like effect.

[Solicitors—Pritchard, Englefield, and Co., for the plaintiffs; W. A. Crump, for the defendants.]

Court of Appeal (Lindley, M.R., } 1897.
Chitty, L.J.) } Oct. 26.

F. PINET ET CIE. V. MAISON PINET (LIMITED).*

Trade Name—Imitation—Using own name—Tendency to deceive—Injunction.

This was an appeal by the plaintiffs from an order of Mr. Justice Kekewich, dated August 6 last, refusing to grant the interlocutory injunction claimed by them. The plaintiffs are the well-known boot and shoe manufacturers of Paris and elsewhere, and their goods are commonly known throughout the United Kingdom as "Pinet's" boots and shoes. They recently discovered that boots and shoes not of their manufacture were being sold under the name of "Pinet's" by the defendant company. That company was incorporated in the early part of the present year (a) to acquire and take over the business of Louis Marius Pinet (trading as Maison Pinet) as then carried on by him in London; and (b) to carry on business in England and elsewhere as bootmakers and shoemakers, and especially makers of boots and shoes for the purpose of increasing height and to be used for walking, riding, cycling, tennis, dancing, shooting, fishing, or any other purpose." The business carried on by L. M. Pinet was a small and recently established business in the manufacture and sale of "elevators," being contrivances for adding height to short persons, and was not a business in boots and shoes. The plaintiffs alleged that the incorporation of the defendant company under the name of Maison Pinet (Limited) was merely a contrivance by means of which persons having no right to the name of Pinet might be enabled to compete with the plaintiffs; that the defendant company were advertising and offering for sale boots and shoes not being of the plaintiffs' manufacture, under the name of Pinet's, and were describing the same as "celebrated," notwithstanding that the same were quite unknown; and that confusion and deceit must necessarily result. The plaintiffs accordingly commenced this action, and then moved before Mr. Justice Kekewich for an interlocutory

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

injunction, to restrain the defendant company, their servants, and agents, until judgment in the action or further order, from carrying on business as manufacturers or vendors of boots or shoes under the name of "Maison Pinet (Limited)" or under any other name or description of which the name "Pinet" formed part and which was so arranged or contrived as by colourable imitation of the plaintiffs' trading style or otherwise to be calculated to represent or lead to the belief that the defendant company were carrying on the plaintiffs' business, and from in any other manner representing or acting so as to lead to such belief as aforesaid. The learned Judge, however, did not think fit to make any order on the motion. From that decision the plaintiffs now appealed.

Mr. Moulton, Q.C., and Mr. L. B. Sebastian were for the appellants.

Mr. E. BRODIE COOPER for the respondent company contended that the respondents' business had been limited to a particular class of goods of a special make; that they were not selling and had not sold boots of an ordinary description; that therefore the respondents were not carrying on the same business as the appellants; that no fraud on the part of the respondents had been proved; and that, short of fraud, the mere fact of the respondents' name being the same as the appellants did not entitle the appellants to an injunction.

Their LORDSHIPS reversed the decision of Mr. Justice Kekewich and allowed the appeal.

The MASTER of the ROLLS said that the case struck him as a tolerably simple one within certain limits. It appeared that L. M. Pinet carried on business as a boot and shoe manufacturer under the name of "Maison Pinet," but his business was practically confined to specially made boots and shoes for the purpose of adding to height. Their Lordships were not, therefore, embarrassed in the present case with any evidence to the effect that Maison Pinet before the defendant company was formed did any extensive amount of business in boots and shoes of the ordinary French make under the name of Maison Pinet or Pinet at all. The evidence which the Court had before it showed that to be so. That was the state of things in February, 1897. In February, 1897, the defendant company were formed primarily for the purpose of acquiring and carrying on the business of L. M. Pinet under the name of Maison Pinet (Limited). If that had been all the Court would probably never have heard of this action, but the defendant company, in their memorandum of association, stated distinctly that they did not intend to confine their business, and if they could they would sell any kind of boots and shoes; they would not be content with a few orders such as Maison Pinet had before 1897; they would not be content to confine their business to that; they would do what business they could. It was merely throwing dust in one's eyes to say that the company would not if they could sell as many French boots and shoes as they found they could dispose of. The defendant company being formed for this purpose would, if they could, develop at the expense of the plaintiffs the business of L. M. Pinet and sell all they could. That was a *prima facie* case for an interlocutory injunction. But the plaintiffs asked the Court to go beyond what was necessary for their protection—at all events on an interlocutory application. The form of the injunction must be the same as in "Montgomery v. Thompson" ([1891] A.C., 217), and the defendant company must be restrained from carrying on their business as manufacturers of boots and shoes under any name or description of which "Pinet" formed part without clearly distinguishing the boots and shoes made or sold by the defendants from those made or sold by the plaintiffs.

LORD JUSTICE CHITTY delivered judgment to the same effect.

[Solicitors—Wilson, Bristows, and Carpmael, for the appellants; George Boyd Wickes, for the respondent company.]

Chan. Div. }
(Kekewich, J.) }

1897.
Oct. 26.

BOOTH V. THE SALVATION ARMY BUILDING ASSOCIATION (LIMITED).*

Mortgage—Construction of mortgage deed—Covenant—Fetter on redemption.

This was an application, by originating summons, by "General" Booth, of the Salvation Army, against the defendant association, now in liquidation, and its liquidators, relating to a mortgage, dated July 9, 1892, by the "General" to the association of the copyright of the Salvation Army's weekly journal, the *War Cry*, and made in consideration of an advance by the association to the "General" of two sums of £1,500 each. The mortgage contained a covenant by the mortgagor for payment to the mortgagees of £3,570 by 84 monthly payments of £42 10s. each, with a proviso that the mortgagees might at any time give the mortgagor 14 days' notice demanding repayment of the two sums of £1,500 each advanced, with interest at 5 per cent. The association was formed in 1884 for the purpose of lending money to the "General" upon the security of property held by him in trust for or in connexion with the Salvation Army, the loans being repayable by monthly instalments. The "General" had repaid 57 of the 84 payments or instalments under the mortgage, and, upon the association recently going into liquidation, the liquidators on April 27 last served on the "General" a 14 days' notice demanding payment of the two sums of £1,500 each and interest to date, offering thereupon to repay the sums already paid by him to the association. The effect of that, according to the "General's" view, was that while, as regarded the principal, he would only have to pay the balance remaining unpaid, he would, as regarded interest, be charged with interest on the whole of the principal from the date of advance to the date of repayment of the balance of principal—that is, he would be charged with interest on principal sums already repaid. His contention accordingly was that, upon the construction of the mortgage and upon the equitable principles applicable to mortgages, particularly the rule against "clogging the equity of redemption," he could not be prevented from redeeming, or be called upon to pay interest on principal that had in fact been paid. The result was that the sum claimed to be due by the association was £1,319 17s. 9d.; whereas the amount asserted by the "General" to be due from him was only £1,074 12s. 6d., or £245 5s. 3d. less than that demanded by the association. To have this question decided the "General" took out this summons, claiming a declaration that in redeeming the property comprised in the mortgage he was not chargeable with interest on any principal moneys already repaid, and an account.

Mr. RENSHEAW, Q.C., and Mr. SARGANT, for the plaintiff, contended that the claim of the defendants was in reality for a "bonus" in excess of the mortgagor's liability for principal, interest, and costs, and, therefore, within the rule laid down by "Marquis of Northampton v. Salt" (45 Ch.D., 190; [1892] A.C., 1) and other cases against "clogging the equity of redemption."

Mr. WARRINGTON, Q.C., and Mr. C. T. MITCHELL for the defendants, contended that the mortgage did

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

not contain any covenant for payment of a bonus, but that it was simply a mortgage containing a covenant by the mortgagor to pay, on demand, the principal with interest from the date on which the advance was made, with the addition of a covenant by the mortgagor for payment by monthly payments, and a provision that on the discharge of the mortgage debt the monthly payments would be taken into account. The only right of redemption the mortgagor had was on satisfaction of his primary liability to pay the two sums of £1,500 and interest. This was a bargain between the parties; there was nothing oppressive in it, because they deliberately contracted that redemption should be on those terms, and those terms only.

MR. JUSTICE KEKEWICH said there was express authority for holding that such a proviso as was contained in this mortgage deed was bad as clogging the equity of redemption, but, notwithstanding that was the principle of law, it behoved a Judge to be extremely careful how he interfered with freedom of contract; therefore it must not be concluded that such a proviso had no effect without careful consideration. Now, what was the true construction of this deed? Mr. Booth desired an advance of £3,000. He was willing to give as security for that advance and interest the copyright in this weekly journal, the *War Cry*. What was the mortgage? There was no covenant to pay £3,000 with interest at a certain date. There was, first of all, an assignment of the copyright of the *War Cry* upon certain terms as to holding, selling, and so forth. Then there was a covenant for payment of £3,570 by, his Lordship ventured to say, monthly "instalments," for he did not see any difference between monthly "payments" and monthly "instalments." That sum was, then, to be paid by those instalments. It was quite open to the Court, without any affidavit, to see by calculation that the sum included both principal and interest; and it must of necessity refer to the £3,000 agreed to be advanced, with interest, payment of which was contracted to be secured in that way. Stopping there, one saw a plain transaction, a mortgage of the *War Cry* to secure £3,000 with interest, which £3,000 and interest was to be paid by certain monthly instalments; and this was the bargain between the parties. The mortgagor was only entitled to redeem on payment of those monthly instalments. Then came the proviso, which it was impossible to read otherwise than as a plain provision not open to any question, that the mortgagees might, by giving 14 days' notice, require payment of the whole £3,000 with interest at 5 per cent., and they were entitled, according to the wording of the proviso, to say, "When you have paid that, then we will repay to you the money you have paid under your covenant." In his Lordship's opinion the clear construction was that the mortgagor was bound to pay £3,000 and interest at 5 per cent. If so—and his Lordship was satisfied this was the proper view, and after argument he could not see this was not the true construction—then the case was one of clogging the equity of redemption. What did that mean? The authorities did not bear directly on the present case, and he took the rule from the statement by Lord Hennen in "*Salt v. Marquis of Northampton*" ([1892] A. C., at p. 23):—"I accept, as not now open to question, the maxim that what is once a mortgage remains a mortgage, and may be redeemed on payment of the sum for which it was intended merely as a security." What was the sum for which it was intended that this deed should be a security? Upon the construction his Lordship had no doubt that it was for payment of £3,000 with interest, payable by monthly instalments. Anything interfering with that bargain interfered with the equity of redemption, and that settled the question.

Then upon what terms should redemption be permitted? He did not decide that the mortgagor was entitled to redeem; but, assuming that he was now entitled to redeem, his Lordship held that he must pay what was now due from him on the footing of the original loan being £3,000, with interest which must be calculated at the rate of 5 per cent. on the £3,000; and that each monthly payment of £42 10s. must be taken as so much principal and so much interest; that left so much principal due and so much interest due upon that until payment. Of course, the mortgagor must pay all proper mortgagees' costs of redemption.

[Solicitors—Ranger, Burton, and Frost; Snell, Sons, and Greenip.]

Q.B. Div. (Wright and)
Kennedy, JJ.)

1897.
Oct. 27.

PHILLIPS V. LONDON SCHOOL BOARD—COCKERTON V.
THE SAME.*

Education Acts—School Board—Power to establish superannuation fund—Deductions from teacher's salary—Validity.

These were appeals by the plaintiffs, Miss Phillips and Mrs. R. K. Cockerton, from judgments of his Honour Judge Lumley Smith, sitting at the Westminster County Court. In the first case the facts were as follows:—The plaintiff, who has now married, was from 1888 to 1897 on the permanent staff of the School Board, first as assistant teacher and afterwards as head mistress at a certain salary. When she entered the service no superannuation fund existed, and it was admitted that no express statutory power enabling a School Board to establish such a fund exists or ever existed. In 1888 the School Board decided to establish such a fund and promulgated a scheme for forming it by means of deductions from the salaries of the teachers, the scheme to remain in force for two years, after which, if Parliamentary powers were not obtained, the deductions were to be repaid. The plaintiff agreed in writing to come under the scheme. In 1889 the School Board determined to extend the period of two years to five years, and the plaintiff consented in writing to this extension. On March 24, 1893, the School Board gave the plaintiff the option of having the deductions from her salary with interest returned to her or of joining the superannuation fund. The plaintiff on April 13, 1893, in writing elected to join the superannuation fund. In Cockerton's case the facts were similar, except that when the plaintiff entered the service of the School Board the scheme was in force and she was required to come under it when she entered the service. The actions were brought to recover the amounts of the deductions. The County Court Judge found that the deductions were made with the consent of the plaintiffs, and that they were not in law entitled to recover them, and gave judgment for the defendants. The plaintiffs appealed.

MR. JELF, Q.C. (Mr. Organ with him), appeared for the plaintiffs, and submitted that the contracts between the plaintiffs and the School Board for the deduction of the contributions from the salaries were *ultra vires*, and that therefore the contributions were recoverable. The School Board had no power to constitute itself an insurer.

MR. RAM appeared for the defendants, but was not called upon.

MR. JUSTICE WRIGHT, in giving judgment, said that by section 35 of the Elementary Education Act, 1870, the School Board for London was empowered to

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

appoint officers and teachers to hold office during the pleasure of the Board, and to assign them such salary as it might think fit. As a matter of fact some expenses of management of the fund had been paid out of the rates. In his opinion the plaintiff in the first case was not entitled to recover the contributions she had made to the fund. They had throughout been placed to a particular fund in pursuance of a contract between the plaintiff and the School Board, and, in order to recover them back, the plaintiff must show that the contract was void or illegal. No ground was suggested for the contract being void or *ultra vires*. It was said that certain charges for the purpose of managing the fund had been thrown upon the rates. Even if that were so there was no evidence of any contract between the plaintiff and the School Board that the rates should be charged with the expenses. Even if the contract between the plaintiff and the School Board were *ultra vires*, it would be difficult to see how the plaintiff could recover money that had been paid to a particular fund with her consent. He thought that under section 35 of the Act the School Board was perfectly competent to assign a remuneration partly payable annually and partly cumulative until the expiration of the service or some other period. He was not sure it was wrong for the School Board to charge the rates with the expenses of the management of the fund, but it was not necessary to determine that point. There was no difference in Mrs. Cockerton's case. She agreed to accept her appointment on the terms that the deductions should be made.

MR. JUSTICE KENNEDY concurred.

Appeal dismissed. Leave to appeal granted in both cases.

[Solicitors—Baker and Nairne, for the plaintiffs; C. E. Mortimer, for the defendants.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Oct. 28.

IN THE MATTER OF AN ARBITRATION BETWEEN
RICHARDSONS AND M. SAMUEL AND CO.*

Ship—Charterparty—Demurrage—Exceptions—
Liability of charterers.

This was an appeal from the judgment of the Divisional Court (Mr. Justice Grantham and Mr. Justice Wright) upon a special case stated in an arbitration. The facts as stated in the case were as follows:—By a charterparty dated February 10, 1896, made between Richardsons (hereinafter called the plaintiffs), as owners of the steamship Nanshan, and M. Samuel and Co. (hereinafter called the defendants), as charterers, it was agreed that the ship should proceed to Batum and there load a cargo of petroleum in cases from a factory belonging to a person hereinafter referred to as Bnito, and therewith proceed to Saigon. The defendants had contracted with Bnito for the purchase from him of the cargo to be loaded in the Nanshan. The charterparty contained the following clauses:—"The Act of God, the Queen's enemies, insurrections, war, riots, strikes, lock-outs, accidents to railway, factories, or machinery, loss or damage from fire on board, in hulk or craft, or on shore, arrests and (or) restraint of princes, rulers, and people, or other causes beyond charterers' control"
"The cargo to be loaded as tendered by shippers and as fast as they may deliver, but the average rate to be not less than 10,000 cases per working day, Sundays and holidays excepted. . . . Lay days for

loading and discharge to commence 24 hours (Sundays and holidays excepted) after receipt by the charterers' agent of written notice of steamers' readiness in berth to receive and discharge respectively. Charterers to have the right of keeping the steamer ten days on demurrage over and above the said laying days at 6d. per net register ton per day." The Nanshan arrived at Batum on April 2, 1896, and notice of her readiness to receive her cargo was given to Bnito on that day. All oil shipped from Batum came by railway from Baku in tank wagons. The railway was under the control of the Government. The oil was brought in the wagons to factories at Batum and was there discharged into reservoirs belonging to the respective factories. It was then drawn off by the factory workmen into tins which were packed in cases and thus shipped. Owing to floods in the early part of 1896 the railway was partially destroyed, and the supplies of oil were in consequence insufficient to meet the shipping requirements at Batum, and on April 3 there was no substantial quantity of oil at the Bnito factory or anywhere else in Batum, and, owing to like causes, no oil arrived there between April 3 and April 13. Down to April 14 no means existed by which the Bnito factory could have obtained a supply of oil with which to load the Nanshan. At the end of March or beginning of April, as there was no immediate prospect of getting any oil, the workmen employed at the Bnito factory were dismissed. On April 14 the oil began to arrive again at Batum, and by April 16 sufficient oil had arrived at the Bnito factory to enable the work of filling and packing the cases to be resumed there on April 17, and from that time the supplies were sufficient. The work of filling the cases was resumed at the factory on April 20, but as the men had to be collected and got to work again the work proceeded slowly at first. On April 2, when the Nanshan arrived, there were two other steamships waiting at Batum under charter to persons other than the defendants to load oil from the Bnito factory. When the factory resumed work on April 20 these two ships were loaded, in accordance with the practice of shippers at Batum, before the Nanshan, and the loading of the Nanshan was not commenced until May 8, and was not completed until May 14. If the Nanshan had been loaded before the other two ships, and the workmen had not been absent from the factory, her loading could have begun on April 17. The Nanshan's cargo was 75,500 cases, so that under the charterparty the defendants were entitled to eight lay days for loading. The defendants had no control over the actions of Bnito. The question for the Court was what demurrage, if any, was payable by the defendants to the plaintiffs, the defendants contending that, under the exceptions in the charterparty, they were not liable for the delay which arose from the accident to the railway and the absence of the workmen from the factory. The Divisional Court held that the eight lay days ran from April 17 and that the plaintiffs were entitled to £436 16s. The defendants appealed.

Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton appeared for the defendants; Mr. Pickford, Q.C., and Mr. Scrutton appeared for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was what damages for demurrage the plaintiffs were entitled to recover under the charterparty. The contract was a contract by which the defendants undertook to load the ship at Batum through their agent at the rate of 10,000 cases per working day, subject to certain exceptions. The accident to the railway prevented any possibility of loading until April 17. The charterers' agent had discharged his workmen on account of the accident to the railway in order to save his own

pocket, and so the loading was delayed, and it was contended that that gave the defendants extra days for loading. That point arose upon the exceptions in the charterparty. Under which words in the exceptions did the fact of Bnito not having sufficient workmen for loading come? It was said that it came under the exception of "accidents to railway," because the accident to the railway prevented the oil from coming to Batum, and that in consequence, in order to save his own pocket, Bnito discharged his men. His Lordship did not agree with that contention. Those words meant an accident to the railway which prevented the oil from being sent down to Batum. But the oil was there by April 17, ready to be loaded. Therefore that exception did not apply. The real cause was that the charterers' agent had not enough men to load the oil on to the ship. It was then said that the exception of "other causes beyond charterers' control" applied. Those words could not cover the acts of Bnito which he thought fit to do for his own benefit. The words must be read *ejusdem generis* with the previous words. It was then said that the defendants were entitled to load the ship in turn, and that Bnito was entitled to load the other two ships first. The answer was that the contract was not a contract to load in turn, but a contract to load from a certain date. Nor, in his opinion, did the exception of strikes or lock-outs apply. The words strike or lock-out in this charterparty had their well-known meaning of a strike or a lock-out in connexion with a trade dispute. Bnito dismissed his workmen because he had no work for them to do. That was not a strike or a lock-out. The conclusion he had come to was that the defendants were entitled to keep the ship unloaded until April 17, but that they should then have commenced the loading.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Thomas Cooper and Co., for the plaintiffs; Waltons, Johnson, Bubb, and Whatton, for the defendants.]

O.B. Div. (Wright and Kennedy, J.J.) } 1897.
Oct. 28.

STOKES V. ARKWRIGHT.*

Mine—Fencing entrance—Metalliferous Mines Regulation Act, 1872, sec. 13—Liability of "person interested."

This was an information of H. A. Stokes, Inspector of Mines for the Midland District. It stated that F. C. Arkwright, of Willersley Castle, Cromford, in the county of Derby, on October 21, 1896, in the parish of Matlock, being the owner of or a person interested in the minerals of an abandoned mine, failed to fence it, the shafts and entrance being situate within 50 yards of a public highway, contrary to section 13 of the Metalliferous Mines Regulation Act, 1872 (35 and 36 Vict., c. 77). At the hearing the respondent was proceeded against as being a "person interested." The justices dismissed the information subject to a case setting out these facts. The mine is a mine from which lead and other minerals were obtained. Lead-mining there is regulated by the Derbyshire Mining Customs and Mineral Courts Act, 1852, and by the articles and customs established by that Act. This became a public Act under the interpretation Act, 1889 (52 and 53 Vict., c. 63, s. 9). The re-

spondent is owner in fee simple of the soil in which the mine is situated. The Crown, as the owner of the Duchy of Lancaster, has the sole right to mining dues or royalties in respect of all lead ore gotten from the mines. Prior to 1857 the mine had been worked by the Ball Eye Company, since when the working of the mine as a lead mine has been discontinued. In 1862 the mine was transferred to a man named Burton, who never worked it and died soon after. The justices, therefore, found as a fact that the mine was abandoned before the Metalliferous Mines Regulation Act, 1872. Among the minerals contained in the mine other than lead are calc spar and calc (barytes), through which the vein of lead runs. Neither the lead nor the calc spar or calc (barytes) are in fact exhausted in the mine. The respondent becomes entitled to the calc spar and calc (barytes) after, but not until, it has been raised and brought to the surface by persons working for lead ore. The value of calc spar varies from 1s. to £1 per ton, and calc (barytes) is about 13s. a ton. The respondent is entitled to no dues or royalties from lead ore and can grant no mining rights as to lead ore. A public path runs within 50 yards of two shafts and a side entrance, which were wholly unfenced. It was contended for the appellant that as the respondent, as owner of the soil, was entitled at common law to all minerals other than lead, and was entitled under the customs referred to to sell and dispose of all minerals other than lead, he was a person "interested in the minerals of the mine" within section 13 of the Metalliferous Mines Regulation Act, 1872, and liable as such to a penalty.

The Solicitor-General (Sir R. Finlay, Q.C.), Mr. H. Sutton, and Mr. E. W. Garrett appeared for the appellant, the inspector; Mr. Dugdale, Q.C., and Mr. Hextall for the respondent.

SIR R. FINLAY contended that calc spar and calc (barytes) were minerals in which the respondent had an interest. He was the only person interested and was therefore liable. If he was not liable to fence there was no one who was. He referred to the judgments in the case of "Duke of Devonshire v. Stokes" (13 *The Times* L.R., 376, and in 61 *J.P.*, 406, 76 *L.T.*, 424).

MR. DUGDALE contended that calc spar and calc (barytes) were merely subsidiary minerals, and not minerals within the meaning of the Act. They were not merchantable. "Evens v. Mostyn" (2 *C.P.D.*, 547) showed that the person interested in the dues could be treated as owner. The Duchy of Lancaster was entitled to the dues, and, being therefore owner, was liable to fence. That answered the difficulty raised by the Solicitor-General. The respondent had no real interest in the calc spar or calc (barytes) till it was brought up to the surface. He was not, therefore, a person interested in the minerals of the mine.

MR. JUSTICE WRIGHT said the appeal must be allowed. Mr. Arkwright was proprietor of the soil, and no one else was proprietor of anything in the soil. As such proprietor he was interested in the minerals other than lead. This was a lead mine. When, however, other minerals of a marketable value, as here, the calc spar and calc (barytes), were raised with the lead, they were minerals within the meaning of the Act. Mr. Arkwright was interested in them in a double capacity—first, as owner of the soil, and, secondly, when brought up to the surface under the customs and articles. He was therefore liable to fence the mine.

MR. JUSTICE KENNEDY concurred.

[Solicitors—F. J. and C. J. Braikenridge, for Small and Talbot, Burton-on-Trent; the Treasury Solicitor, for the appellant.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.)

1897.
Oct. 29.

IN RE CLARK—EX PARTE CLARK.*

Bankruptcy—Receiving order—Jurisdiction to make—Bankruptcy Act, 1883, sec. 103—Construction.

This was an appeal against a receiving order made by Mr. Justice Day at chambers upon a judgment summons. The debtor was a Chilean subject against whom a creditor named Schulze had recovered judgment in this country on May 11, 1897, on a bill of exchange. In July, 1897, when the judgment debtor was temporarily in this country on business, he was served with a judgment summons in respect of the judgment debt. Upon the hearing of the judgment summons Mr. Justice Day made a receiving order against the debtor under section 103, subsection 5, of the Bankruptcy Act, 1883. That section provides that where under section 5 of the Debtors Act, 1869, application is made by a judgment creditor for the committal of a judgment debtor the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, make a receiving order against the debtor. The debtor appealed, and contended first that, assuming an order of committal could have been made under section 5 of the Debtors Act, 1869 (that is, that the debtor either has or has had since the date of the judgment the means to pay and has refused or neglected to pay), there was no jurisdiction to make a receiving order under section 103 of the Bankruptcy Act, 1883, inasmuch as the requirements of section 6, subsection 1 (d), of that Act had not been complied with. This latter section provides that a bankruptcy petition shall not be presented against a debtor unless he is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England. He contended that these conditions precedent also applied to the making of a receiving order upon a judgment summons. The debtor further contended that, if the above contention was wrong, he had not since the date of the judgment had the means to pay the debt, and that, therefore, the Court had no jurisdiction to commit him, and consequently no jurisdiction to make a receiving order. There were other points raised which are not material for the purposes of this report.

Mr. Muir Mackenzie appeared for the debtor; Mr. H. Reed, Q.C., and Mr. Hansell for the judgment creditor were not called upon.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it was contended that there was no jurisdiction to make the receiving order under section 103 of the Bankruptcy Act, 1883, upon the ground that the debtor was not a person against whom a bankruptcy petition could be presented, inasmuch as a petition could only be presented against a debtor who was domiciled in England, or who within a year before the date of the presentation of the petition had ordinarily resided or had a dwelling-house or place of business in England. He did not stop to inquire whether or not the evidence showed that the debtor came within that category, because in his opinion that question became immaterial. The Court had to decide what was the true construction of section 103. In his opinion the construction of that section was that when the Judge had jurisdiction to commit the debtor under section 5 of the Debtors Act, 1869, he might, in lieu of making the committal order, and in mercy to the

debtor, make a receiving order against him. The Judge would have jurisdiction to commit if the debtor had since the date of the judgment the means to pay and had refused to pay the judgment debt either wholly or in part. The Judge therefore had jurisdiction to make a receiving order if there was evidence before him of the possession of means to pay as above stated. His Lordship then went into the evidence, and said that the evidence satisfied him that the debtor had since the date of the judgment the means to pay the judgment debt either wholly or in part. The receiving order was therefore rightly made.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Harwood and Stephenson, for the appellant; Hilberty, for the respondent.]

Q.B.Div. (Wright and }
Kennedy, JJ.)

1897.
Oct. 29.

MORLEY V. CARTER.*

Landlord and Tenant—Agricultural Holdings Act, 1883—Compensation for improvements—Time for giving notice of claim—Validity of notice.

This motion raised a question whether the Registrar of the Halifax County Court was right in refusing to appoint an arbitrator under the Agricultural Holdings Act, 1883, when applied to by a tenant. The facts were these. The landlord, James Carter, let a certain farm and buildings at Ovenden, near Halifax, on a yearly tenancy. It was provided in the agreement that there should be a six months' notice to terminate the tenancy, the land to be given up on February 2, and the buildings on May 1, of any year. On June 18, 1896, the tenant gave notice of his intention to quit on February 2, and on February 2 he gave up the agricultural land. On February 26 he gave notice, intended to be a notice under section 7 of the Act, of his intention to claim for compensation under the Act. On May 1 he went out of possession of the buildings. He then appointed his arbitrator to assess the compensation and called on the landlord to appoint a second arbitrator. This the landlord neglected or refused to do, and the tenant applied under section 9 (6) of the Agricultural Holdings Act, 1883 (46 and 47 Vic., c. 61), to the County Court of the district for the appointment of an arbitrator. The Registrar, however, refused on the ground that the notice of claim was not given by the tenant two months before the termination of the tenancy, as required by the 7th section of the statute. The contention of the landlord was that, for the purposes of the Agricultural Holdings Act, the tenancy terminated when the tenant gave up the agricultural land in accordance with the terms of the notice to quit given by the tenant. The case came up on appeal from the refusal of the Registrar. A query was raised whether it was a proper question for appeal, and whether the more appropriate remedy was not a rule for a *mandamus*. Both parties, however, concurred in asking the Court to decide the main question without regard to the form of the proceedings.

Mr. W. Beverley appeared for the tenant; Mr. Clavell Salter for the landlord.

Mr. BEVERLEY contended, on the authority of the case "*In re Paul—ex parte the Earl of Portarlington*" (24 Q.B.D., 247), that the end of the holding meant the end of entire holding. It followed that the tenancy here was not terminated till May 1, when possession had been given up of both buildings and land. If that

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

was so, the notice of intention to claim compensation was given more than two months before the determination of the tenancy. The Registrar ought, therefore, to have appointed an arbitrator.

MR. SALTER contended that no portion of the holding was agricultural at the time when the notice was given. He cited "*Black v. Clay*" (1894, A.C. 368).

THE COURT upheld the decision of the Registrar in refusing to appoint an arbitrator.

MR. JUSTICE WRIGHT said there was no real doubt in the case. By section 1 of the Act, where a tenant had made an improvement comprised in the first schedule on his "holding," he was to get compensation. By section 54 nothing in the Act was to apply to a "holding" that was not at any rate partly agricultural or partly pastoral. Subject to that reservation "holding" was defined by section 61 as being "any parcel of land held by a tenant." The Act contemplated that compensation should be given on the determination of an agricultural tenancy. By section 7 two months' notice was required before the determination of the tenancy, otherwise the tenant could not proceed. Here, after the land had been given up in accordance with the notice, there was no "holding" left on the tenant for which compensation could be required. The notice of claim was, therefore, bad. As to the case of "*Re Paul—ex parte Earl of Portarlington*," which had been cited for the tenant, the judgment there was based on the fact that the tenant kept on 200 acres of land.

MR. JUSTICE KENNEDY concurred.

[Solicitors—Turner and Co., for Percy Naylor, Keighley; Bower, Cotton, and Bower, for Longbottom and Sons.]

Court of Appeal (Lindley, M.R., } 1897.
Lord Ludlow and Chitty, L.JJ.) } Oct. 30.

THE LONDON FREEHOLD AND LEASEHOLD PROPERTY COMPANY (LIMITED) v. BARON SUFFIELD.*

Deed—Escrow, what is—Mortgage—Solicitor to mortgagor one of the mortgagees.

A deed may be an escrow though delivered to some person who is a party taking under it.

This was an appeal from a decision of Mr. Justice Kekewich (reported in *The Times* of May 22). The action arose out of the frauds of the notorious Llewellyn Malcolm Wynne. The object of the action was to set aside a mortgage deed for £9,000 (which was never, in fact, paid to the plaintiffs the mortgagors), on the ground that the deed was, immediately after its execution by the plaintiffs, handed to Wynne, as their solicitor, to be held by him on their behalf until the loan was advanced, and that, as the loan never had been advanced, the deed had since remained with Wynne simply as an escrow. Mr. Justice Kekewich refused to order the deed to be set aside. The plaintiffs appealed. The appeal was heard in August last.

Mr. Bramwell Davis, Q.C., and Mr. R. C. Hawkins appeared for the plaintiffs; Mr. Renshaw, Q.C., Mr. P. O. Lawrence, Q.C., and Mr. Daniel Jones for the defendants the Arthur trustees; and Mr. Whinney for the defendant the trustee in bankruptcy.

This morning the MASTER of the ROLLS delivered the judgment of the Court dismissing the appeal. He said:—This is an appeal by the plaintiffs from a decision of

Mr. Justice Kekewich refusing to set aside a mortgage executed by them for securing £9,000 to Lord Suffield and others, who were the trustees of a settlement called Arthur's settlement. In order to understand the facts it is necessary to refer to the many characters filled by Mr. Wynne. He was one of the trustees of Arthur's settlement, and in that character he was one of the mortgagees. He was also a solicitor carrying on business in partnership with his brother Campbell Wynne under the name of Wynne and Son, and Wynne and Son were the solicitors of the trustees. He was also carrying on the business of a banker in partnership with his brother. He was also the managing director of the plaintiff company, and in May, 1886, Wynne and Son were appointed managers and bankers of the company at a commission. Wynne and Son were also solicitors to the company and Wynne and Son's office was the office of the company, and Wynne and Son's conveyancing clerk Tyler was the secretary of the company. This relation of Wynne and Son to the plaintiff company is all-important in this case. As bankers and managers, Wynne and Son kept the company's accounts, and it was their duty as managers to pay the company's money received by them as managers into their bank. Payment to Wynne and Son for the plaintiff company was in point of law payment to the plaintiff company. Moreover, it would be in accordance with the ordinary course of business for a banker who had to pay money for one customer to another to effect such payment by book entries—i.e., by debiting one customer and crediting another in their respective accounts; and it would not be necessary that any cash should actually pass from the one customer to the other. Child and Co. were Wynne and Son's bankers. In May, 1892, Wynne and Son, as the solicitors of Arthur's trustees, received a sum of £9,500 and paid it into Child's Bank to the credit of their own account. This sum had to be re-invested in the names of the trustees and it appears from the correspondence that one of the trustees, Mr. Somerset, knew that Wynne and Son had the money in their hands for reinvestment. The plaintiff company had some mortgages created by them amounting to £9,183 or thereabouts, and bearing interest at 5 per cent., and one of these mortgages, for £1,600, had been called in. As early as February, 1893, Wynne had suggested to the directors of the plaintiff company the expediency of raising money at 4½ per cent. in order to pay off these mortgages, and the directors agreed to the suggestion. With a view to raising the money necessary for carrying out this scheme, a valuation of the properties mortgaged was made in February, 1893, by Lang and Co. Wynne appears to have ordered this, but the directors knew about it and authorized it, and the company ultimately paid for it. Between February and June, 1893, a sum of £9,000 was mentioned as the sum to be raised. The mode of raising it and all the details of the arrangement were left to Wynne. He told the board he had clients who would lend it, and when the deed was executed, if not before, he referred to the lenders as the Arthur trustees. In the accounts kept by Wynne and Son there are entries which, if reliable, show that on June 1, 1893, Wynne and Son transferred £9,000 from their account with the trustees to the credit of the plaintiff company. The account to which the £9,000 was carried was headed "The London Freehold and Leasehold Property Company Mortgage Account." This ledger credit of June 1, 1893, is impugned by the plaintiff company as a fictitious entry not made at the time but at some later date in order to give some colour to the mortgage deed afterwards executed. Worley and Ryder, two of the directors, say they never knew anything of this entry, but this is not surprising as they left all the accounts to Wynne and Son, and

*Reported by H. B. HEMMING, Esq., Barrister at-Law.

never troubled themselves about any books except the minute-books and the company's pass-book with Wynne and Son. The £9,000 does not appear in the pass-book; but this is accounted for because the £9,000 was not to be drawn upon or used for the general purposes of the company, but was to be appropriated and applied by Wynne and Son for the special purpose of paying off the existing mortgages on the property comprised in the mortgage to the Arthur trustees. His Lordship then discussed the evidence upon this point, and came to the conclusion that the plaintiff company had failed to prove that the entry in question was fictitious or fraudulent. The effect of it will be considered presently. He then continued as follows:—In addition to the mortgage for £9,000, with which we are alone concerned in the present case, another mortgage by the company to other persons for £5,500 was contemplated, and on June 12, 1893, Wynne and Son, by letter, informed Worley and Ryder that they (Wynne and Son) had arranged for the transfer of mortgages for £14,500. It is clear that this referred to the arrangements made for the above-mentioned mortgages for £9,000 and £5,500. At about this time, instructions were given by Wynne and Son to counsel to prepare the £9,000 mortgage. Wynne and Tyler attended to this. The draft was settled by counsel on June 15, and Tyler had it back before June 22. On June 19 Worley and Ryder were informed by Wynne and Son that a meeting of the board would be held on the 22nd. A meeting of the directors of the plaintiff company was accordingly held on June 22, 1893. An agenda paper for the meeting was prepared by Tyler, and this paper stated that part of the business would be to seal the £9,000 and £5,500 mortgages. The directors present on the 22nd were Wynne, Worley, and Ryder. Tyler, the secretary, was also present. The mortgage for £9,000, engrossed for execution but with date and days for payment left in blank, was produced and discussed, and a statement of the properties the mortgages on which were to be paid off was also produced. After explanations by Wynne, it was "resolved that the seal be affixed to the mortgage for £9,000 on Victoria Warehouses and Bury-street, and that for £5,500 on all the properties subject to prior mortgages." Both these mortgages were accordingly sealed with the company's seal. Both Worley and Ryder signed the £9,000 mortgage as directors. Tyler also signed it as secretary. The blanks were not filled up. The document thus sealed was given to or left with Wynne; but in what capacity is by no means clear. Worley, Ryder, and Tyler have all given evidence as to what took place when the £9,000 mortgage was sealed, and it is contended by counsel for the plaintiffs that the mortgage was merely an escrow, and never became a perfected deed. We are unable to come to this conclusion. It is in our opinion clear that the deed was sealed and delivered by the company, acting through its directors and secretary, as a deed—i.e., as a perfect instrument—and that it was so executed in order that it might be used as an operative deed for the purpose of carrying out the contemplated arrangement by which several mortgages bearing interest at $5\frac{1}{2}$ per cent. might be replaced by one mortgage bearing interest at $4\frac{1}{2}$ per cent. After discussing the evidence on this point, his Lordship continued as follows:—On June 28, 1893, Wynne and Son wrote to Colonel Lloyd, one of the Arthur trustees, and told him that the money received by the Arthur trustees had been invested on this mortgage. This letter was written in answer to some inquiry made by him. The date of the mortgage, December 20, 1893, was, we were told, filled in by the law stationer when it was sent to be stamped. The blanks left for the days of payment have never been filled in. The mortgage deed appears to

have been kept by Wynne and Son in a box in which they kept miscellaneous deeds likely to be wanted for temporary purposes or to be stamped. This box was known as the temporary box. It was distinct from the Arthur trustees' box and also from the plaintiff company's box. The mortgage deed was found there after Wynne's bankruptcy, which occurred in March, 1895. The mortgage was not entered in the company's register of mortgages, nor was it registered in the Middlesex Registry until May 22, 1897, the day after Mr. Justice Kekewich gave judgment in the present action. It seems that at about the same time, and with a view to such registration, one of the Arthur trustees executed the mortgage. But this, of course, cannot affect the rights of the parties. Such is the history of the impeached deed. After further discussing the evidence, his Lordship continued:—The plaintiffs seek to set aside this £9,000 mortgage on the following grounds, viz.—first, on the legal ground that the mortgage never was executed as a deed, but was only an escrow; secondly, on the equitable ground that the mortgagees never gave and that the company never got the consideration for which the mortgage was given. As regards the invalidity of the mortgage as a deed, it is urged that, although sealed, the mortgage was handed to Wynne, not as one of the mortgagees nor as solicitor to the mortgagees, but as solicitor to the plaintiff company, to be delivered to the mortgagees or to be kept by him as their solicitor only when the £9,000, or at least some of it, reached the plaintiff company or was applied in paying off the other mortgages which the company had arranged to pay off. Mr. Justice Kekewich decided this point against the plaintiff company. We take the same view. We are not prepared to go so far as to say that, as Wynne was himself one of the mortgagees and a party to the deed, it could not in point of law be an escrow in his hands. Counsel for the defendants contended that the mere fact that Wynne was himself one of the mortgagees was fatal to the deed being an escrow. They contended that to be an escrow the deed must be delivered to some person not a party taking under it; in short, to a stranger. In support of this contention reliance was placed on *Co. Lit.*, 31, 36; *Shep. Touchstone*, 65; and "*Whitton's Case*" (*Cro. Eliz.*, 520). No doubt the language used in the authorities referred to and reproduced in other works on real property and conveyancing is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that where there are several grantees and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to show the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by authority to exclude it. We hold such evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, beginning with "*Murray v. Lord Stair*" (2 B. and C. 82), and ending with "*Watkins v. Nash*" (20 Eq. 202). Upon the evidence, however, we come to the conclusion that the mortgage was a complete deed and that it was given as such to Wynne in order to enable him to carry out the arrangements to which we have before alluded; and to carry them out as he thought proper. There remains the more difficult question whether the deed being good at law can be impeached in equity. The mere fact that no cash passed when the deed was executed is not enough to invalidate it. The directors knew perfectly well that no cash passed. They were not informed how Wynne intended to carry out the arrangement, but they left

him to carry it out as he thought best. It is contended that he had no authority to receive the £9,000 except in cash, but he had the cash from the trustees for investment. Whether the plaintiff company got it from him is another matter. If the credit entry of June 1, 1893, is a trustworthy entry made by Wynne and Son, who had the trustees' money to invest and who were the plaintiff company's managers and bankers, the entry will represent a real transaction between the plaintiff company on the one side and the Arthur trustees on the other. For Wynne and Son, as the managers and bankers of the company, had implied authority from the company to place to their credit any money placed in Wynne and Son's hands for the company or directed to be paid to the company; and Wynne and Son had ample authority from the Arthur trustees to deal with their money in Wynne and Son's hands by debiting them with it and carrying the amount to the credit of any one who banked with Wynne and Son and who gave a proper mortgage for it. We have come to the conclusion that the credit entry was made to represent a real transaction and that if it had been known and questioned at the time no one would ever have complained of it as in any way irregular or improper. But when Wynne and Son became bankrupt and it was then discovered that they had not carried out the arrangements which were contemplated, the plaintiff company very naturally quarrelled with every step in the transaction. But the case does not by any means depend solely on the foregoing considerations. As between the plaintiff company on the one side and the Arthur trustees on the other the plaintiff company have, in our opinion, no equitable right to set aside the mortgage. After again referring to the evidence, his Lordship continued:—The plaintiff company have, in our opinion, enabled their managers and bankers to make representations to the mortgagees that their money was invested on the security of property belonging to the plaintiff company. Such representation has been made; the mortgagees had every reason for believing it to be true, they did believe it to be true, and they acted on that belief by ceasing to inquire after their money. They were not bound to make any further inquiry. Had they done so it is obvious that the deed would have been produced to them. These circumstances turn the scale against the plaintiff company and distinguish this case from "Wall v. Cockerell" (9 Jur., N.S., 447), which was so much relied upon by the counsel for the appellants. In "Wall v. Cockerell" there was no authority to borrow on the security of the impeached deed; there was no relation of banker and manager on the one side and customer on the other; there was no money of the mortgagees in the hands of the agent of the mortgagor; there was no credit in account. Moreover, the mortgagor was induced to execute the mortgage by misrepresentation. Lord Chelmsford distinctly said so, and Lord Westbury merely said it was not necessary to put the case so high. In "Coupe v. Collyer" (62 L.T., N.S., 928) the impeached deed was held to be only an escrow; there was there no relation of banker and customer; and the mortgagees never placed money in the hands of the mortgagor's solicitor for investment. On these grounds we are of opinion that the decision appealed from was correct. We have purposely abstained from saying anything about notice to either party through Wynne of what he did or knew. The case turns on the facts and not on any doctrine of notice. The appeal must be dismissed with costs. Lord Ludlow having agreed to this judgment before his retirement, it can be passed and entered as the judgment of the Court which heard the case and be dated August 10.

[Solicitors—Davidson and Morriss; Lawrence, Graham, and Co.; Hasties.]

Q.B. Div. (Lindley, M.R., }
Chitty, L.J.)

1897.
Oct. 30.

GRAY V. SYLVESTER.*

Local Government—Bye-law—Validity—Selling Newspapers.

This was a special case stated by justices for the county of Southampton. An information was preferred by the appellant against the respondent at Ryde Petty Sessions charging him with unlawfully selling a weekly newspaper on the Sandown esplanade contrary to the bye-laws of the sanitary authority, the Sandown Urban District Council. It was proved or admitted that the sea beach and foreshore at Sandown were vested in the Sandown Urban District Council for the purposes of public walks or pleasure grounds by virtue of the provisional order of the Local Government Board, duly confirmed by the Local Government Board's Provisional Orders Confirmation (Caistor Union, &c.) Act, 1877. By section 7 of the same Act the Sandown Local Board were authorized (subject to the provisions of the Public Health Act, 1875) to make bye-laws and regulations with reference to the sea beach and foreshore along the whole frontage of their district (no reference being made to the esplanade, which was constructed on part of the sea beach or foreshore subsequently to the passing of the Act). In pursuance of that section and of section 164 of the Public Health Act, 1875, the Sandown Local Board, then being the sanitary authority for the urban sanitary district of Sandown, in 1892 duly made certain bye-laws, of which the one in question was as follows:—

"A person shall not on any part of the sea beach, foreshore, or esplanades sell or offer or expose for sale any commodity or article, or let to hire or offer or expose for hire any chair, seat, or other thing except by direction of the sanitary authority or in such part or parts of sea beach, foreshore, or esplanades (if any) as the sanitary authority may by notice affixed or set up thereon from time to time appoint for the purpose, and every person who shall offend against such bye-law shall be liable to a penalty of 40s."

The justices were of opinion, on the authority of "Munro v. Watson" (51 J.P., 660) and "Johnson v. Mayor of Croydon" (16 Q.B.D., 708), that the bye-law was illegal, inconsistent, unreasonable, and repugnant to the law of England, in that it enabled the sanitary authority of Sandown to legalize a nuisance or prohibit a lawful act which was not a nuisance. The justices, therefore, dismissed the information.

Mr. Macmorran, Q.C., appeared for the appellant; Mr. C. A. Russell, Q.C., and Mr. Dunlop Hill for the respondent.

The COURT allowed the appeal.

The MASTER of the ROLLS said that in coming to a decision on this case it was necessary to look at the statutory authority under which the bye-law was made and at the language of the bye-law. Under the local Act in question the local authority had power to acquire the foreshore and lay out thereon an esplanade, and to make bye-laws and regulations with reference to the sea beach and foreshore along the whole frontage of the district. Under that section the local authority had made the bye-law in question. The justices had come to the conclusion that the bye-law was invalid as being more extensive than the circumstances of the case required. His Lordship was not prepared to go that length. In his opinion the bye-law was not unreasonable or *ultra vires*. The cases relied on by the justices were decided under the Municipal Corporation Act,

1882, the language of which was very different, and the bye-laws made under that Act were addressed to a different subject-matter from the present. It was one thing to make a bye-law for the good government of a town and another for the regulation of an esplanade on the sea shore. For the latter purpose it was not unreasonable for the local authority to say that nothing should be sold on the esplanade without their direction. The appeal would, therefore, be allowed.

LORD JUSTICE CHITTY delivered judgment to the same effect.

[Solicitors—Wood, Bigg, and Nash, for Woodridge and Wilton, Sandown, for the appellant; Hopwood, Stroughill, and Hopwood, for the respondent.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) }

1897.
Nov. 1.

PENTON V. BARNETT.*

Landlord and tenant—Ejectment—Forfeiture for breach of covenant—Claim for rent—Conveyancing Act, 1881, sec. 14.

By claiming rent accrued due after alleged causes of forfeiture a plaintiff does not waive the forfeiture so as to be disentitled to recover possession in the action.

This was an appeal from the judgment of Mr. Justice Ridley at the trial of the action without a jury. The action was brought by a landlord against a tenant to recover possession of the demised premises, and for rent and mesne profits. The lease under which the defendant held the premises contained a general covenant to repair and also a covenant to repair on notice, and there was power for the landlord to re-enter on breach of either. In 1896 the premises were out of repair, and on September 22 the landlord gave the tenant notice under section 14 of the Conveyancing Act, 1881, specifying the particular breaches of covenant complained of, and requiring the tenant to remedy them or make compensation in money for them. The tenant failed to comply with this notice, and the premises, in fact, continued out of repair till the trial. The plaintiff commenced the action by issuing his writ on January 14, 1897. By his statement of claim he claimed possession of the premises for breach of covenant, a quarter's rent due on December 25, 1896, and mesne profits from December 25 till judgment. The defence was that the plaintiff, by bringing this action to recover rent which accrued due after the alleged causes of forfeiture, had waived the alleged forfeiture, and was not entitled to recover possession of the premises. The learned Judge at the trial gave judgment for the defendant on the claim for possession. The plaintiff appealed.

Mr. R. WALLACE, Q.C., and Mr. J. D. CRAWFORD, for the plaintiff, argued that this was a case of a continuing breach, and there had been no waiver. On a breach of covenant the landlord had an option whether he should exercise his power of re-entry, and that option remained until he did re-enter. On January 14, when he commenced his action, the plaintiff was entitled to possession, and to rent for the completed quarter up to December 25, and to mesne profits from December 25 to January 14. The facts in the case of "Dendy v. Nicholl" (4 C.B., N.S., 376) were different from the facts in this case, but the principle of that case was in the plaintiff's favour.

Mr. H. D. GREENE, Q.C., and Mr. POULTER, for the defendant, contended that the exact point in question had been decided by Mr. Justice Wright in the defendant's favour in the case of "Bevan v. Barnett" (13 *The Times Law Reports*, 310). The notice which was given on September 22 was a three months' notice, and expired on December 22. On the latter date the plaintiff had an option whether he should treat the defendant as a trespasser. By claiming rent from him up to December 25 he elected to treat him as a tenant, and could not after that maintain an action of ejectment.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the contention was that the landlord could not maintain an action of ejectment, because by claiming rent he had affirmed the tenancy. It was clear that if a landlord demanded rent he thereby treated his tenant as a tenant, and that if he brought an action of ejectment against him he treated him as a trespasser. Here the plaintiff showed an intention to treat the defendant as his tenant up to December 25, but the breach of covenant continued, and there was nothing inconsistent in the plaintiff treating the defendant as a trespasser from December 25 to January 14. If it were not for the Conveyancing Act he thought the case would be perfectly clear against the defendant. Section 14 of that Act provided that, before an action could be brought to enforce a forfeiture for breach of covenant, the lessor must give the lessee notice of particulars of the breaches complained of, so that the lessee might have an opportunity of remedying them or making compensation in money for them. The defendant contended that he had not received any notice with regard to the breaches between December 25 and January 14. But the premises were in the same state of disrepair at the date of the writ as at the time when the notice was given, and in his opinion the requirements of the section had been satisfied. He did not understand the case of "Bevan v. Barnett." He thought the learned Judge in this case had been wrong, and that the appeal must be allowed.

LORDS JUSTICES RIGBY and COLLINS delivered judgments to the same effect.

[Solicitors—Lee and Pembertons, for the plaintiff; Finch and Turner, for the defendant.]

Q.B. Div. (Lindley, M.B., }
and Chitty, L.J.) }

1897.
Nov. 1.

THE MAYOR, &C., OF LIVERPOOL V. BRADY.*

Waterworks—Liverpool—Constant supply—Liverpool Waterworks Acts, 1862 and 1866—Construction.

In this case the Liverpool Corporation appealed by case stated against a conviction by justices for neglecting on March 29, 1897, to supply water to the respondent, the occupier of No. 6, Hill-street, Prescott.

Mr. Joseph Walton, Q.C., Mr. Macmorran, Q.C., Mr. Swift, and Mr. White appeared for the Liverpool Corporation; and Mr. Channell, Q.C., and Mr. Hope for the respondent.

The Liverpool Corporation were empowered by Acts of Parliament to supply water, among other districts, to the district of Prescott. Those Acts, subject to the provisions contained in them, incorporated the Waterworks Clauses Act, 1847, section 35 of which lays the undertaking under the obligation of laying on a constant supply of water at such a pressure as would make it reach the highest storey of the highest house within

their district, if so required to do by as many owners or occupiers as that the aggregate amount of water rate should be one-tenth of the expense of laying down the requisite pipes. The Liverpool Waterworks Act of 1862, section 25, provides as follows:—"The water to be supplied by the corporation under the Waterworks Acts and this Act respectively need not be laid on under a pressure or supplied to an elevation greater than can be afforded by gravitation from their works." The Liverpool Waterworks Act of 1866, section 32, provides as follows:—"The corporation shall, at the request of the owner or occupier of any house or part of a house in any street in which any water pipe belonging to the corporation shall be laid, or of any person who under the provisions of this Act or of any of the recited Acts, or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier a sufficient supply of water for their domestic uses at the rents in the Liverpool Waterworks Act, 1862, prescribed, unless prevented by unusual drought, frost, or other unavoidable cause or accident, or during necessary repairs, or during any year in any part of the first six months whereof the storage reservoirs of the works of the corporation at Rivington shall be reduced to one-half the quantity they are capable of containing, and the corporation shall not be obliged in any of the above events to have the water constantly laid on or at such pressure as will make the water reach the top storey of the highest houses within the limits of supply, but the corporation shall afford the best supply in their power, regard being had to the probable requirements of the persons within the district of supply and the probable quantity of water the corporation may have undisposed of." The waterworks comprised in the undertaking of the corporation included the Rivington, Montrey, and Vyrnwy reservoirs and the Norton Tower. From neither of these could water be supplied to the houses in Hill-street by gravitation. Between the years 1869 and 1871 the corporation constructed an elevated tank at Prescott, the bottom of which was 307' 14ft. above the ordnance level. The houses in Hill-street, including the respondent's house, stood, as to their top storeys, at about 300ft. above the ordnance level. The practice of the corporation was to pump water into the tank between the hours of 6 a.m. and 6 p.m., except on Saturday and Sunday, when pumping ceased at 3 p.m. and at 12 noon respectively. Between those hours all the premises in Prescott had a constant supply, but after pumping had ceased the supply was discontinued. On behalf of the corporation it was contended that section 25 of the Act of 1862 relieved them of the obligation to give a constant supply of water to the respondent's house. The point raised by the respondent was that section 25 was repealed by implication by section 32 of the Act of 1866. It was further contended that the tank at Prescott formed part of the works of the corporation, and that, inasmuch as by an alteration of the present system of pipes a constant supply could be afforded from that tank by gravitation, the corporation were not relieved from their liability under section 25. The reply to this on behalf of the corporation was that the tank was constructed voluntarily and did not form part of the "works" of the corporation within the meaning of section 25 of the Act of 1862, and that, inasmuch as the tank itself could not be supplied without the aid of pumping, the houses supplied from the tank, though by gravitation, could not be said to be supplied by gravitation within the meaning of section 25.

The MASTER of the ROLLS, in delivering judgment, said that the respondent's house was in a street which, so far as the supply of water was concerned, had been appropriated by the Liverpool Corporation; the corporation had erected a tank and had laid down mains

and pipes to supply it. Those were the facts with which the Court had to deal. Upon the question, therefore, what would have been the position of the corporation had they not taken steps to supply the respondent's house, he would express no opinion. Section 25 of the Act of 1862 contained an important provision exempting the corporation from laying on water under a pressure greater than could be afforded by gravitation. But then came section 32 of the Act of 1866. He would not say that section 25 of the Act of 1862 was repealed by section 32 of the later Act. But it was clear that the respondent was an occupier of a house in a street in which a water pipe belonging to the corporation was laid; such a person was entitled under that section to demand a constant supply of water, subject to certain qualifications. If the corporation had not thought it worth while to lay on water in the respondent's street that would have been a different question. But where, as in the present case, the corporation had chosen to lay down pipes, section 32 of the Act of 1866 became the operative section, to the exclusion of section 25 of the Act of 1862.

LORD JUSTICE CHITTY, in the course of his judgment, said that section 32 of the Act of 1866 rendered section 25 of the Act of 1862 inapplicable in the present case. It partially repealed the section in the earlier Act, so that the latter section did not relieve the corporation from the obligation expressed in the former.

Q.B. Div. (Wright and
Kennedy, JJ.)

1897.
Nov. 1.

BAKER V. WILLIAMS.*

Local Government—Bye-law—Validity—Regulation made by local authority under Act of Parliament—Ventilation of cowsheds.

This was a special case stated by magistrates for the borough of Southport raising the question as to the validity of a bye-law or regulation made by the mayor and corporation of Southport providing that in cowsheds in the borough there must be 800 cubic feet of free air space for each animal. The appellant, a dairyman and cowkeeper, had been convicted for contravening the regulation, which purported to be made under the Contagious Diseases (Animals) Act, 1878, and the Dairies, Cowsheds, and Milk Shops Order of 1885, and was dated April 8, 1890. It was contended—(1) that the regulation in question was one that could not be made by the mayor, aldermen, and burgesses as the local authority under the Order of 1885; (2) that the word "ventilation" in the 13th section of such Order did not authorize any regulation with regard to the quantity of air space; (3) that the provisions of section 34 of the Contagious Diseases (Animals) Act, 1878, did not, nor did section 9 of the Act of 1886, or any other provision of either Act, authorize the making of any order of the Privy Council regulating air space or free air space; and that, therefore, in so far, if at all, as the Dairies, Cowsheds, and Milk Shops Order of 1885 imposed any restrictions as to air space, or purported to authorize the making of any regulations by the local authority as to air space, such order was invalid.

Mr. Moulton, Q.C., Mr. Pickford, Q.C., and Mr. Horridge with him, appeared for the appellant; Mr. Macmorran, Q.C., and Mr. G. H. Pollard for the respondents.

Mr. MOULTON contended that the power given to make regulations with regard to ventilation of cow-

sheds did not include that of making regulations as to the amount of air space. Ventilation and air space were entirely distinct things. Cattle in a cattle truck on a railway had plenty of ventilation, though they were packed as tight as they could stand. The Order in Council was *ultra vires* and the rules were nullities. He cited the "Institute of Patent Agents v. Lockwood" (1894] A.C., 347).

Mr. MACMORRAN, Q.C., contended that the Order in Council included, and rightly included, provisions for air space as well as ventilation. Therefore the borough authority was entitled to make regulations in respect thereof. He cited "*Ex parte Kingstown*" L.R., Ir., 18 C.L., 509; "*Ex parte Foreman*" (18 Q.B.D., 393); "*Reed v. Harvey*" (5 Q.B.D., 186).

The Court upheld the validity of the bye-law.

Mr. JUSTICE WRIGHT said that by section 34 of the Contagious Diseases (Animals) Act, 1878, the Privy Council were empowered to make orders subject to the provisions of the Act for the lighting, ventilation, cleansing, and water supply of cowsheds and dairies, and for authorizing a local authority to make regulations for the purposes aforesaid. By section 58 such an order was to have the effect of an Act of Parliament. In 1885 the Privy Council made an Order under the Act. By section 7 of that Order it was provided that it should not be lawful for a cowkeeper to begin to occupy a dairy or cowshed unless he first made provision to the reasonable satisfaction of the local authority "for the lighting and the ventilation, including air space and the cleansing," &c., of the same. By section 8 it was provided that it should not be lawful for a cowkeeper to occupy any cowshed, whether old or new, "as long as the lighting and the ventilation, including air space and the cleansing," &c., were not such as were proper. By section 13 (b) a local authority had power granted to make rules for "regulating the lighting, ventilation, cleansing, drainage, and water supply of dairies and cowsheds." The question was, Did those words give the power to the local authority to make regulations for air space as well as ventilation? It was rather strange that air space should be included in sections 7 and 8 and not in section 13. The Order under the Act was to have the effect of an Act of Parliament. What was the effect of that? The case cited about the Institute of Patent Agents showed that, in such a case, the Order and statute should be read together. Following that principle, there was no inconsistency in interpreting section 13 of the Privy Council Order as giving power to the local authority to make regulations in respect of "ventilation and air space."

MR. JUSTICE KENNEDY concurred. This was a case of a conviction for breach of the regulations as to cowsheds. The regulation was said to be *ultra vires*. It seemed to the learned Judge that there was nothing wrong in a Privy Council Order under the Act dealing with air space. In fact, they had provided for air space as well as ventilation for all dairies and cowsheds, both old and new, though it was difficult to see why in sections 7 and 8 ventilation and air space were included and not in section 13. The decision of the magistrates was right.

(Solicitors—Arthur S. Mather, for the respondent; J. Davies Williams, for the appellant.)

Q.B. Div. (Lindley, M.R., }
Chitty, L.J.) }

1897.
Nov. 2.

MURPHY v. ARROW.*

Gaming—Betting Houses Acts, 1853.

Persons arrested at a betting house are liable

to be treated as if they had been arrested in a common gaming house, and a magistrate has jurisdiction to order them to enter into recognizances under sec. 14 of 33 Hen. VIII., c. 9, "no more to play, haunt, or exercise . . . in any of the said places."

This was an appeal, by case stated, against an order made by a metropolitan police magistrate ordering the appellant, who was brought before him under a warrant of arrest made in pursuance of 16 and 17 Vict., c. 119, to be bound in his own recognizances in £20, "no more to play, haunt, or exercise from thenceforth" at any gaming house pursuant to section 14 of 33 Hen. VIII., c. 9.

Mr. E. D. Purcell appeared for the appellant; and Mr. Danckwerts for the respondent.

At 3 30 p.m. on May 4, 1897, the appellant, together with 88 other persons, was arrested by the police upon premises known as the Frascati Club, at 32, Gerard-street, Soho, under a warrant issued in pursuance of the Betting Houses Act, 16 and 17 Vict., c. 119, section 11. The premises were kept and used for the purpose of betting with persons resorting thereto, and betting was, in fact, going on just prior to the entry of the police. Four of the persons arrested were charged with having kept and used the premises for the purpose of betting with persons resorting thereto, three of whom were convicted of the offence, the remaining person being discharged. With regard to the appellant and 84 of the persons arrested it was ordered that they should be bound over in pursuance of 33 Hen. VIII., c. 9, section 14. That section provided that it should be lawful for justices to enter any houses suspected to be used for unlawful gaming and to arrest the keepers of the same, and the persons "there haunting, resorting, and playing," and to keep them in prison "unto such time as the keepers and maintainers of the said plays and games have found sureties to the King's use, to be bound by recognizance or otherwise no longer to use, keep, or occupy any such house, play, game, alley, or place, and also that the persons there so found be in like case bound by themselves, or else with sureties, by the directions of the justices, &c., no more to play, haunt, or exercise from thenceforth, in, at, or to any of the said places, or at any of the said games." The Gaming Act, 1845 (8 and 9 Vict., c. 109, section 3), provides that the justices may exercise their power of entry into suspected houses by means of their warrant issued to the police. The form of warrant given in the schedule to the Act directs the police to arrest as well the keepers of the house as also the "persons there haunting, resorting, and playing." The Betting Houses Act, section 1 (16 and 17 Vict., c. 119), provides that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof . . . betting with persons resorting thereto," and section 2 enacts that "Every house, office, room, or other place opened, kept, or used for the purposes aforesaid or any of them shall be taken and deemed to be a common gaming house within the meaning of 8 and 9 Vict., c. 109." Section 11 gives the justices power to issue their warrant to the police to enter suspected houses, the warrant to be in the form provided in the schedule to 8 and 9 Vict., c. 109. It was contended on behalf of the appellant that he ought to have been discharged and that the magistrate had no power to make the order he had made, because there was no evidence to show that the appellant "haunted, resorted, or played" in the premises, there being no evidence of the time he was there or whether he had been there on former

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

occasions so as to constitute "resorting," and also because betting on horse-races was not a game or an unlawful game so as to make it "playing" within 33 Hen. VIII., c. 9, and because that statute only affected players of unlawful games and not persons betting in a betting house declared to be a gaming house by 16 and 17 Vict., c. 119.

On behalf of the respondent the judgment of Mr. Justice Hawkins in "*Jenks v. Turpin*" (13 Q.B.D., 526) was cited.

The MASTER of the ROLLS, in dismissing the appeal, said that the question was whether the magistrate had power to do that which he did do—that was to say, to require the appellant to enter into recognizances, or whether he ought simply to have let him go. That depended upon the construction of certain sections of the Acts 33 Hen. VIII., c. 9, 8 and 9 Vict., c. 103, and 16 and 17 Vict., c. 119. The object of the Legislature in enacting section 2 of the last-mentioned Act—that is, in saying that a betting house was to be deemed to be a gaming house—was to put those who went to betting houses in the same position as those who frequented gaming houses. Section 11 gives power to arrest persons found in betting houses. The form of warrant in the schedule to 8 and 9 Vict., c. 103, referred to in that section as the one to be made use of, directs the police to arrest persons "haunting, resorting, and playing" in the premises. Then 33 Hen. VIII., c. 9, section 14, enacted that persons found in a gaming house were to be bound over in the manner provided. From this concatenation of sections it appeared that a betting house was to be treated as a common gaming house, and that when persons were arrested thereon they were to be treated as if they had been arrested in a common gaming house. That being so, the magistrate had power to order the appellant to enter into the recognizances.

LORD JUSTICE CHITTY delivered judgment to the same effect.

Q.B. Div. (Wright and Kennedy, JJ.)

1897.
Nov. 2.

REG. V. MEAD, METROPOLITAN POLICE MAGISTRATE.*

Metropolis—Building—London Building Act, 1894, secs. 107 and 183—Legal proceedings—Service of summons.

A summons under sec. 107 of the London Building Act, 1894, addressed to the owner is not properly served by affixing it to the premises unless reasonable attempts have been made to ascertain who the owner is.

This was the argument of a rule for a *mandamus* calling on Mr. Mead, the metropolitan magistrate, to show cause why he should not hear and determine a summons under the London Building Act (57 and 58 Vict., cap. cxxiii.) in respect of a dangerous structure. The question raised was whether a summons under section 107 of that Act could be served by being affixed to the premises only.

Mr. H. Sutton appeared to show cause on behalf of the magistrate; Mr. Avory appeared for the London County Council.

The affidavit of the magistrate stated that on September 22 the London County Council applied for a summons under section 107 of the London Building Act,

1894. The summons was returnable before Mr. Mead on October 1. It was addressed "To the Owner" (of the premises) merely. The owner was called upon to appear, but there was no response. The complainant proposed to proceed in his absence on proof that a copy of the summons had been affixed to the premises. It was stated by the complainant that the owner was unknown, but no evidence was given that any steps had been taken to discover him. There was no evidence that the valuation list or rate had been examined, or the rate collector interrogated, or other obvious means taken to discover who the owner was. The complainant contended that the service was sufficient under section 188 (1) of the Act of 1894. The magistrate, however, thought that the service of any summons, even if anonymously addressed—*i.e.*, "To the Owner"—was a "notice" the service of which is provided for by the Summary Jurisdiction Acts, and must therefore be served, under section 1 of the 11 and 12 Vict., c. 43, personally or at the last known place of abode. He also thought that, even if a summons addressed "To the Owner" in a case where the owner could not be found was not "provided for by the Summary Jurisdiction Acts," there should be evidence before him that reasonable diligence had been exercised by the complainant to discover the owner of the property. He therefore refused to hold that there had been valid service of the summons. Section 188 of the Act is as follows:—"Any notice, order, or other document required or authorized to be served under this Act, the service of which is not provided for by the Summary Jurisdiction Acts, the Lands Clauses Acts, or the Companies Clauses Consolidation Act, 1845, may be served by delivering a copy thereof at, or by sending a copy thereof by post to, the usual or last known residence in the United Kingdom of the person to whom it is addressed, or by delivering the same to some person on the premises . . . or if no person be found on the premises, then by fixing a copy thereof on some conspicuous part of the building."

Mr. SUTTON contended that the case of "*Reg. v. Mead*" (1894, 2 Q.B., 124), which was relied on when the rule was moved for, was an authority on another statute of 1891 relating to public health, and did not affect this case. The London County Council ought to have taken trouble to ascertain the owner before they sought to act under section 188. There was no sufficient proof that they had done so.

Mr. AVORY said the County Council did not pretend that when the owner was known this form of service of summons could be followed. The notice as to the dangerous nature of the structure admittedly could be served in this way. The summons could also be so served.

The COURT held that the application against the magistrate failed.

MR. JUSTICE WRIGHT said the first ground was that there was no evidence before the magistrate that the premises were empty at the time the summons was affixed, but that was a small point. The second ground, which was wider, was that in this case there had been no such sufficient inquiry as to who the owner was to entitle the County Council to act under the section. He was of opinion that if after reasonable inquiry the County Council could not ascertain who the owner was, then the procedure under section 188 was applicable, but in this case they had not done enough. They must first prove the inquiry, then the failure to ascertain who was the owner, and, lastly, that the premises were empty.

MR. JUSTICE KENNEDY concurred.

[Solicitors—Blaxland, for the London County Council; The Solicitor for the Treasury.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Q.B. Div. (Wright and)
Kennedy, JJ.)

1897.
Nov. 2.

LEWIS V. POOLE.*

Local Government—Parish documents—Custody
of—Tithe map and apportionment—Local
Government Act, 1894, sec. 17 (8).

This was a case stated by the justices of the Droxford Division of Hampshire raising a question as to the custody of the tithe map in a parish.

Lord Coleridge, Q.C., and Mr. Cancellor appeared for Mr. Lewis, the appellant; Mr. Macmorran, Q.C., and Mr. Gollan for the respondent.

An application was made by Hernan Le Roy Lewis under section 28 of 23 and 24 Vic., c. 93, that the justices of the Droxford Petty Sessional Division should make an order to remove the tithe apportionment and map of the parish of West Meon from the custody of the respondent, the Rev. Canon Poole, rector of the parish, and direct that the same be deposited in the custody of the parish council of West Meon. The justices refused to make the order, on the ground that they had no power to make it under the section. The facts were these. The appellant was interested in the lands delineated in the tithe apportionment and map. He was chairman of the parish council, but made the application in order to enforce an order of the county council dated February 22, 1897, and not as chairman of the parish council authorized to appear, nor by reason of being inconvenienced by the present place of the said documents. When the Local Government Act, 1894 (56 and 57 Vic., c. 73), came into operation the documents were in the custody of Mr. Arnold, a farmer in the parish, and were kept by him in his residence. On March 29, 1895, the parish meeting passed a resolution that the documents should remain in the custody of Mr. Arnold. He died on May 21, 1895, and the documents remained in the possession of his family till August 1, when the rector obtained them. On October 15, 1895, the parish council passed a resolution that the documents should be placed in the custody of the parish council. The rector, however, refused to give them up. On April 13, 1896, the parish council applied to the county council under section 17 (8) of the Local Government Act, 1894, to determine the difference. On August 10 the county council ordered that the said documents should be deposited in such custody as the parish council might direct. This order was formally drawn up and sealed in February, 1897. The rector refused to obey the said order, and retained the documents. The parish council have no room of their own in which to keep the said documents. The appellants contended that the parish council was entitled to the custody of the documents, and that the respondent was a "person other than the person legally entitled to the possession" of the said documents within the meaning of 23 and 24 Vic., c. 93, section 28, and that therefore the justices had power and ought to make the order. It was contended for the respondent that he was a person legally entitled to the possession of the documents; also that the documents did not come within section 17 (8) of the Local Government Act, 1894. He further contended that the parish council's resolution and the county council's order could not be enforced under 23 and 24 Vic., c. 93, section 28.

THE COURT allowed the appeal.

MR. JUSTICE WRIGHT said there were two questions—one as to the power of the parish council, and the next as to the procedure followed. The Local Government Act, 1894, by section 17, subsec. (8), provided that

"documents directed by law to be kept with the public books, writings, and papers of the parish should either remain in their existing custody or be deposited in such custody as the parish council might direct." This tithe map was such a document, and the parish council had directed how it should be dealt with. That disposed of the first question, although Mr. Macmorran had contended, on the construction of the various Tithe Acts, that the section did not apply to these documents. Then as to the procedure followed. The Tithe Act of 1846 (9 and 10 Vic., c. 73), section 17, provided that in certain cases the quarter sessions might appoint a place for the tithe documents to be kept. The quarter sessions, however, had not made any order here. By the 28th section of 23 and 24 Vic., c. 93, the justices had jurisdiction if the tithe documents were in the possession of any person not legally entitled to them to order them to be deposited in such custody as they thought fit. That was a jurisdiction intended to be exercised judicially. This, it was true, raised a difficulty if the justices were to act only ministerially in carrying out the order of the county council, but the objection was not conclusive. In the opinion of the learned Judge, the Local Government Act of 1894 had changed the jurisdiction of the justices, and they ought to hesitate long before overriding the resolution of the parish council, upheld by the order of the county council. The third question, whether the rector was a person not legally entitled to the possession of these documents, was determined by the answer to the former question. If the parish council had power to make directions as to the custody of the tithe map, that changed the right of the incumbent, and it was the person designated by the parish council who became the person legally entitled to the custody thereof.

MR. JUSTICE KENNEDY concurred. The case must go back to the magistrates with an intimation that they had power to make the order sought for.

[Solicitors—Attree, Johnson, and Ward, for Shield and Mackarness; E. W. I. Peterson, for the respondent.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov. 3.

WILSON V. LONDON AND GLOBE FINANCE CORPORATION
(LIMITED).*

Damages—Contract—Measure of damages—
Breach of contract to allot shares.

This was an appeal by the defendants from the judgment of Mr. Justice Wills at the trial of the action without a jury. The action was brought to recover damages for breach of a contract dated May 4, 1896. It appeared that the defendants were promoting an English company to take over the property and business of the Lake View and Boulder East Gold Mining Company in Western Australia, and the plaintiff was opposing the sale. The defendants' agent in Western Australia thereupon made an agreement, dated May 4, 1896, with the plaintiff that, in consideration of the withdrawal by the plaintiff of his opposition to the proposed sale to the proposed new company and of his assisting in the promotion and flotation of the new company, the defendants undertook and guaranteed to the plaintiff the allotment to him or his nominees of 7,500 shares at par in the new company, such shares to be issued concurrently with the first issue of shares and to be paid for by the plaintiff. The capital of the new company was to be £250,000 in £1 shares, of which

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

160,000 shares were to be allotted to the shareholders in the old company, 30,000 shares to be subscribed for in cash (which were allotted to the defendants and paid for by them), and 60,000 fully-paid shares to be allotted to the defendants. The plaintiff thereupon withdrew his opposition, and the new company was duly formed, and on June 2, 1896, the shares in the company were allotted. The 7,500 shares were not allotted to the plaintiff, and he brought this action on November 11, 1896, to recover damages for the breach of the agreement. The defendants admitted the breach, and contended that the damages should be assessed as on June 2, 1896, the date of the breach, when the shares were worth, as they alleged, £4 each, making the damages £22,500. The plaintiff contended that the damages should be assessed as on October 30, 1896, when the shares were worth £7 10s. each, making the damages £48,750. The plaintiff's contention arose upon the correspondence between the parties, the true construction of which was in dispute, but which showed, in effect, that the plaintiff had, at the request of the defendants and upon their writing that they hoped to deliver the shares, abstained from taking proceedings in respect of the breach, the plaintiff's solicitors writing on August 12 that they would hold the defendants responsible for any loss the plaintiff might incur through a fall in the market; but on October 30 the defendants definitely refused to deliver the shares, and "Ogle v. Earl Vane" (L.R., 3 Q.B., 272) was cited in support of this contention. Mr. Justice Wills held that October 30 was the date upon which the damages should be assessed, and assessed the damages accordingly at £48,750. The defendants appealed, and contended that the damages should be assessed at £22,500; and the plaintiff contended, in addition to what he contended in the Court below, that he did not know, as the defendants did not tell him, of the breach of contract until August 11, at which date the shares were higher in the market than on October 30, and that the subsequent delay could not affect the damages as on August 11.

Mr. Jelf, Q.C., and Mr. J. E. Bankes appeared for the defendants; Mr. J. Lawson Walton, Q.C., Mr. F. W. Hollams, and Mr. Frank Phillips appeared for the plaintiff.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was, What was the amount of damages to which the plaintiff was entitled? That was the sole question, as the contract and the breach were both admitted. The contract was to allot the shares to the plaintiff "concurrently with the first issue of shares." The first issue of shares took place on June 2. What was the plaintiff's position on that day? If he had known of the breach of contract on that day he could have gone into the market and bought the shares at the market price as against the defendants, or brought an action against them, when the damages would have been the market value, less the amount he would have had to pay if the shares had been allotted to him. If nothing else had happened in this case the plaintiff would have been bound to assess his damages in that way. But after that a long correspondence took place. His Lordship had no doubt that the plaintiff wanted the shares, and the defendants through their secretary undoubtedly kept him in the dark as to the issue of the shares, and it was not until August 11 that the plaintiff became aware that the shares had been issued. The correspondence showed that the plaintiff wanted the shares, and the letter of the plaintiff's solicitors of August 12, in his opinion, meant that the plaintiff would hold the defendants liable for any loss arising from the price of the shares falling in value as from that date. That was how he read the correspondence. The correspondence

showed that the plaintiff was pressing for the shares, while the defendants were requesting the plaintiff to forbear from pressing for the shares, and this went on until October 30, when the defendants definitely refused to hand over the shares. Any jury would find that the plaintiff was entitled to go into the market upon that day and buy the shares against the defendants, and the measure of damages would be the difference between the price on that day and the £1 which the plaintiff would have had to pay for the shares if they had been allotted to him. That was the ground upon which Mr. Justice Wills gave his judgment, and that was the principle laid down in "Ogle v. Earl Vane" (L.R., 3 Q.B., 272). Upon that ground he agreed with the judgment of Mr. Justice Wills. There was also another ground upon which the judgment could be supported, but which was not taken in the Court below. It was contended that it was not until August 11 that the plaintiff could have gone into the market and bought the shares against the defendants, because he was until then kept in the dark by the defendants. It was clear to his Lordship that until August 11 the plaintiff did not know of the issue of the shares, and consequently of the breach of contract, at which time the value of the shares was certainly as high as, if not higher than, on October 30. Upon either ground the amount of damages was right.

LORD JUSTICE RIGBY agreed in the result, saying that he rested his judgment entirely upon the second ground stated by Lord Justice A. L. Smith. Up to August 11 the plaintiff was led to suppose—his Lordship did not say intentionally—that the issue of shares would take place. Upon that date the plaintiff discovered the breach of contract, at which time the shares stood higher in the market than on October 30. As regards the other ground, in his view the correspondence did not bring the case within the decision in "Ogle v. Earl Vane."

LORD JUSTICE COLLINS concurred with the judgment of Lord Justice A. L. Smith.

[Solicitors—Hollams, Sons, Coward, and Hawksley, for the plaintiff; Williams and Neville, for the defendants.]

Court of Appeal (Lindley, }
M.R., Chitty, L.J.) }

1897.
Nov. 3.

POLLOCK V. GARLE.*

Evidence—Banker's books—Inspection of—
Bankers' Books Evidence Act, 1879.

In an action for damages against a director for misrepresentation as to the financial position of a company, and, in particular, as to its balance at the bank on December 2, 1895, the plaintiff applied for an order giving him leave to inspect the company's balances in the bank's books on that day.

Application refused.

This appeal against a decision of Mr. Justice Kekewich's raised a question of great and general importance under the Bankers' Books Evidence Act, 1879. The defendant was formerly a director of a company called The Gresham Gold Exploring Syndicate (Limited). The plaintiff alleges that in December, 1895, he was induced, by means of misrepresentations made to him as to the financial position of the company by the defendant, who was then a director, to purchase from him 150 shares in the company, and by this action he

claims rescission of the contract for purchase and repayment of the purchase money. One of the representations alleged was that the company had on December 2, 1895, standing to their credit at their bankers' the sum of £87,000 in cash undivided. The plaintiff alleges that this representation was untrue. The defendant denies that he made any misrepresentation. The pleadings having been closed, but the action not having been set down for trial, Mr. Justice Kekewich on the 9th August last, on the application of the plaintiff, made an order that the plaintiff should be at liberty upon three clear days' notice in writing to Messrs. Smith, Payne, and Smith, bankers, to inspect and take copies of or extracts from any accounts in the books of the bankers in the name of the Gresham Company pursuant to the provisions of the Act of 1879, "but such inspection is to be limited to showing the balances of the said company in the books of the said bankers on the 2nd December, 1895." Against this order the defendant appealed, and his appeal was supported by the Gresham Company. The Act of 1879 provides by section 3:—"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded." Section 4.—"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits." Section 5.—"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits." Section 6.—"A banker or officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's books the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge made for special cause." Section 7.—"On the application of any party to a legal proceeding a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

Mr. Mark Romer was for the defendant; Mr. A. J. Walter was for the Gresham Company; Mr. Ernest Pollock was for the plaintiff.

The COURT allowed the appeal.

The MASTER of the ROLLS said that a question of enormous importance to the public and to commercial men was raised under this apparently harmless summons. Two persons quarrelled. The plaintiff said to the defendant, "I bought some shares in a company from you, and I was induced to do so by your misrepresentations." One of the representations alleged was that the company had a certain balance to their credit at their bankers' on a specified day. The plaintiff applied for and obtained an order compelling the bankers before the trial of the action to disclose

to him the balance standing to the credit of the company in their books on the day specified, the company not being parties to the action and having nothing to do with the quarrel. The order appeared to his Lordship to be absolutely contrary to every principle of law relating to discovery and to the settled practice of the Court. It was said that the Court had power to make the order under section 7 of the Act of 1879. That Act was passed to remove a great hardship upon bankers. Under the old practice before the Act, a subpoena was served on bankers for the production of their books, and then a clerk attended at the trial of the action with the books. This was a great inconvenience to bankers, whose books were required for daily use. Sections 3 to 6 of the Act were for the protection of bankers, and they were fully protected. Section 7 had nothing to do with the protection of bankers; it related to litigants. If the section were read literally it would mean that the Court could, on the application of any party to any action, give him liberty to inspect the banking account of any one else and to take copies of any entries in it for the purposes of the action. Could that be the meaning? Could it be meant that, because two people had quarrelled, they were to be at liberty to inspect the banking account of any other person whatsoever? Such an interpretation of section 7 would be monstrous, and his Lordship would not be a party to giving it. The section must mean entries in the account of a person who was a party to the litigation. There might, of course, be a case in which a litigant was an undisclosed principal, a banker's account which was really his being kept in another name. But when the Court was satisfied that the person whose account it was sought to disclose was not a party to or had no interest in the litigation, the Court ought not in general to make such an order. His Lordship did not say that the Court had not power to make it, but the Court ought to be very careful not to make use of the section oppressively, and should consider the effect of what it was doing. His Lordship did not say that the Court could not make such an order at the trial of the action. But the present case was very different. The plaintiff wanted to see the bankers' books before the trial in order that he might make up his mind whether he would go on to trial. The order as it stood would disclose to the plaintiff not only the balance standing to the credit of the company, but all the particulars of their account. The plaintiff would have a roving inspection of the account, and the Court ought to protect a third party from that. The order must be discharged. It would be far too mischievous and oppressive.

LORD JUSTICE CHITTY, in giving judgment to the same effect, said that the account was neither in form nor in substance that of the defendant. It was the account of a third party, who objected to have his account inspected before the trial. The plaintiff was attempting to obtain discovery from a third party before trial by means of section 7. That section did not say that the entries must be in the account of a person who was a party to the action, but if the Court ever did make such an order in relation to the account of a third party it should use the greatest caution. The custom of bankers being to strike a balance of their customers' accounts half-yearly, this order would give the plaintiff a right to see the company's account from June 30 down to December 2; he would be entitled to see, not merely the figures, but the names and all the details—in fact, to ransack the company's account for five months. In his Lordship's opinion section 7 was not intended to be used for such a purpose, and it would be inflicting a great injustice on a third party if section 7 were so applied.

[Solicitors—Cheston and Sons; Wilson, Bristow, and Carpmael: H. F. Pollock.]

Q.B. Div. (Wright and Kennedy, JJ.)

1897.
Nov. 3.

WILLIAMS V. LLANDUDNO DISTRICT COUNCIL.*

Waterworks—Waterworks Clauses Act, 1863, sec. 19—Penalties—Affixing stop-tap without permission.

This was a case stated by justices for the county of Carnarvon upon the hearing of an information against the appellant, Clara Paine Williams, under section 19 of the Waterworks Clauses Act, 1863, for that she had affixed a certain stop-tap to a certain water-pipe, being a service pipe belonging to her use, for the conveyance of water to a house in Church Walks, Llandudno, without the consent of the Urban District Council.

The justices convicted the appellant and fined her one shilling.

The appellant, who was in the habit of leaving her house empty and locked up during the winter months, had found on two occasions during her absence that the service pipe had burst in her house, and damaged her carpets and walls. With the object of preventing the recurrence of such bursts, she affixed a stop-tap in a place which enabled her when she thought fit to prevent water from flowing through the said service pipe—thus stopping the water supply to the cottage, but not enabling her to draw water there. On the part of the appellant it was contended that the stop-tap was not an "apparatus" or an "alteration" within section 19 of the Act of 1863; also that that section was intended to apply only to cases of wilful waste of water. The Waterworks Clauses Act, 26 and 27 Vic., c. 93, s. 19, provides—"It shall not be lawful for the owner or occupier of any premises . . . to affix or cause or permit to be affixed any pipe or apparatus to a pipe belonging to the undertakers or to a communication or service pipe . . . or to make any alteration in any such communication or service pipe . . . without the consent in every such case of the undertakers; and if any person acts in any respect in contravention of the provisions of the present section, he shall for every offence be liable to a penalty . . . without prejudice to the right of the undertakers to recover damages from him in respect of any injury done to their property and without prejudice to their right to recover from him the value of any water wasted." The above section is one of a group headed "protection of water" which are introduced in the Act with these words:—"And with respect to the waste and misuse of the water supplied by or belonging to the undertakers, be it enacted."

Mr. ENGLISH HARRISON, who appeared for the appellant, contended that no waste or misuse of water could ensue from a stop-tap, and that the sections were governed by the introductory words and by words of section 57 of the Public Health Act, 1878, under which the council provided the water. A stop-tap was not "an apparatus"; an apparatus was a collection of instruments applied to a common purpose. The pipe was the lady's own property.

The COURT, without calling on Mr. Temple Franks, who appeared for the respondents, dismissed the appeal.

Mr. JUSTICE WRIGHT said he was sorry for the lady, but the words of the Act were too clear. She had her remedy, however, under the Act, and it was right that the water authority should have some means of knowing and controlling what was done to the pipes through which their water flowed.

[Solicitors—Bell, Brodriek, and Gray, for W. D. Henderson; James Porter, for the justices.]

Court of Appeal (Lindley, M.R., Chitty and Vaughan Williams, L.J.J.) 1897.
Nov. 4.

THE MAYOR OF WEST HARTLEPOOL V. ROBINSON.*

Local Government—Paving and sewerage expenses—West Hartlepool Extension Act, 1870—Liability of owner of one side of road to contribute to paving and sewerage of whole—Memorial by aggrieved owner to Secretary of State.

The owner of one side of a road in West Hartlepool, after notice to make up half the road, made up his half of the road.

Held, that he was liable to contribute to the making up of the other half, under the provisions of the West Hartlepool Extension Act, 1870.

Decision of Stirling, J. (13 *The Times* L.R., p. 182), affirmed.

This was an appeal from a decision of Mr. Justice Stirling, reported 13 *The Times* L.R., 182. The case depended on the construction of clauses in a local Act of Parliament (the Hartlepool Improvement Act, 1870) relating to the making up and payment of expenses of making up new roads, which clauses are very similar in their terms to the corresponding clauses in the Public Health Act, 1875. The case was peculiar in the result. Owing to the sequence of events and the conduct of the owner of one side in himself making up his side of two streets he had to submit to the apparent hardship of his having to pay, in addition to the whole of the expense of making up half the streets, half the expense of making up the other half of the streets. The matter was brought before the Court on an application by the Corporation of West Hartlepool to establish and enforce against certain lands belonging to the defendant and abutting on two streets, known as Murray-street and Sandringham-road, two charges for sums of £27 16s. 6d. and £328 3s. 4d. in respect of paving and sewerage of the two streets. The charges were claimed under the provisions of the West Hartlepool Extension Act, 1870. In 1878 the defendant was the owner of the land in question, forming part of an estate called the Lynfield estate, which was then and down to quite recently occupied by him for residential purposes. The owners of the immediately adjoining land on the south of Sandringham-road and east of Murray-street were Messrs. Calender, Pape, and Wright, who in 1878 were desirous of developing their property for building purposes, and applied to the West Hartlepool Improvement Commissioners (the predecessors in title of the plaintiffs) to sanction a scheme for that purpose. A plan was submitted by them showing proposed roads 36ft. wide, half on the land of the applicants and half on that of the defendant. The commissioners, on April 16 in that year, sanctioned the proposed scheme, and the roads were made, but in the first instance only 18ft. wide, an agreement having been come to between the defendant and the commissioners that he would thereafter contribute a sufficient quantity of land to give streets 36ft. wide. In January, 1892, the corporation made an order for the paving and sewerage of the roads in question, being 18ft. wide, notice of which was served on the defendant and the other owners. None of the owners executed any part of the works, and the corporation proceeded to do them themselves. The cost of the works was apportioned by the borough surveyor, the above-mentioned amounts being charged against the defendant, and, on his refusing to pay, the present sum-

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

mons was taken out. It appeared that the defendant had at some time after service of notice to make up half the road thrown the agreed portion of his land into the road, making it 36ft. wide, and that he had done the necessary work of paving, &c., that portion of the road, the claim now made against him being for the apportioned cost of making the 18ft. of road which was not upon his land at all. Mr. Justice Stirling made an order declaring and enforcing a charge, and Mr. Robinson appealed. The principal points taken by the counsel for the appellant were—that the 18ft. that had been made up by the corporation was not a street or streets within the meaning of the sections of the Hartlepool Improvement Act, 1870, relating to making up roads; that the notice to make up the roads was bad because it called upon Mr. Robinson to do work on roads which, as he contended, he could only do by committing trespass; and, thirdly, that going before an arbitrator to apportion the expenses was a condition precedent to enforcing a charge. It was stated that before the appeal was brought Mr. Robinson had made an abortive application to a Secretary of State under section 349 of the Act (a section somewhat similar to section 268 of the Public Health Act, 1875) for the purpose of obtaining compensation from the corporation for his grievance.

Mr. Graham Hastings, Q.C., Mr. Strachan, Q.C., and Mr. Ryde argued in support of the appeal; Mr. Buckley, Q.C., Mr. Macmorran, Q.C., and Mr. S. B. L. Druce for the corporation.

The COURT stopped the respondents' counsel and unanimously affirmed the order of the Court below. They held that half of each road was a street within the meaning of the Act, so as to bring it within the power of the corporation to make it up compulsorily at the expense of the adjoining owners in case of their not complying with a proper notice to do so; that the notice was properly made and served on Mr. Robinson, the adjoining owner on one side of the roads; and that as Mr. Robinson did not rest his defence on a wrong apportionment, there was no question within the jurisdiction of an arbitrator to decide and his decision was unnecessary.

The MASTER of the ROLLS, on certain remarks that had been made as to the hardship on Mr. Robinson in having to bear so great a part of the expense of making up the roads as a whole, observed that it was owing to the course of conduct he had himself taken, and pointed out that by section 349 of the Act in question a remedy had been provided in the case of persons who deemed themselves aggrieved by a charge for new street or other expenses by means of a memorial to a Secretary of State.

[Solicitors—Bell, Brodrick, and Gray, for Robinson; Baker, Lees, and Postlethwaite, for the Corporation.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.JJ.) } Nov. 4.

THE HON. JOHN BARING V. THE COMMISSIONERS OF
INLAND REVENUE.*

Revenue—Stamp duty—Bond, whether issued in
United Kingdom—Stamp Act, 1891, sec. 82 (1)
(b) (i.)

The bonds of an American railway were not to become valid unless authenticated by the trustee's certificate thereon endorsed. They were so authenticated in England.

Held, that this constituted an issue in the United Kingdom, and that the bonds were liable

to be stamped under sec. 82 (1) (b) (i.) of the Stamp Act, 1891.

Decision of Divisional Court (Wright and Ridley, JJ.) (13 *The Times* L.R., p. 436) affirmed.

This was an appeal from the judgment of a Divisional Court (Mr. Justice Wright and Mr. Justice Ridley) on a special case stated by the Commissioners of Inland Revenue, reported in 13 *The Times* Law Reports, p. 436. An instrument dated December 12, 1895, was presented to them on behalf of the Hon. J. Baring, the appellant, for the opinion of the Commissioners as to the stamp duty with which it was chargeable. The instrument was a bond unregistered, whereby the Atchison, Topeka, and Santa Fé Railway Company, a corporation organized under the laws of Kansas, hereinafter called the new company, promised to pay to bearer, or, if the bond should be registered as thereafter provided, to the registered holder thereof, the sum of \$1,000. It was recited that the bond was one of a series issued in pursuance of and secured by a mortgage or deed of trust, dated December 12, 1895, executed by the new company to the Union Trust Company of New York as trustee. An older company, called the Atchison, Topeka, and Santa Fé Railroad Company, had been incorporated in 1859. In 1895 this old company was in arrears in payment of the interest on its bonds. A scheme of reorganization was set on foot. This provided for the creation of the new company and a substitution of securities in the new company for those in the old. Pending the acquisition by the new company of the mortgaged property stockholders who assented to the agreement were to deposit their securities with certain firms, called depositaries. Messrs. Baring Brothers and Co. were named as the depositaries of bonds for London, and agreed to act as such. Shortly after April, 1896, the new company, in accordance with agreement, executed bonds in the United States and delivered them to a trust company in New York. One of the terms of the bonds was that they should not be valid for any purpose unless authenticated by the trustee's certificate thereon endorsed. These certificates were unsigned when the bonds were delivered to the trust company. The trust company forwarded to each of the depositaries in Europe a sufficient number of bonds to enable them to make the exchange against the certificates of deposit issued by them. The trust company were to countersign the bonds before forwarding them, but it was found that the premium to be paid for the insurance of the bonds on their transmission to London would be so heavy that it was arranged that the vice-president of the trust company should proceed to London and countersign them there; and this was accordingly done in the case of all the bonds sent to Baring Brothers and Co., the vice-president signing each bond by adding the words "Union Trust Company of New York, trustee, by E. H. Merritt, vice-president." Messrs. Baring and Co. received the bonds for the purpose of exchanging them against certificates of deposit issued by them. Among these was the bond in question. It was subsequently delivered by them to the appellant in London in exchange for a certificate of deposit issued by them, of which he was then the holder. The Commissioners assessed duty on the bond in question at the rate applicable to marketable securities transferable by delivery—viz., 1s. for every £10. The appellant was dissatisfied and obtained a case. The main questions were—(1) Whether the bond was made or issued in the United Kingdom; (2) if not, whether it was offered for subscription and given or delivered to a subscriber in the United Kingdom within the meaning of section 82 (1) b (i.) and (ii.) of the Stamp Act,

*Reported by F. G. BAKER, Esq., Barrister-at-Law.

1891; (3) whether, if so issued or offered for subscription and given or delivered in the United Kingdom, it was chargeable with the duty of 1s. for every £10, or 6d. for every £20, as being a substituted security. The case for the appellant was that when the bond was handed to the Union Trust Company in New York it was a complete and valid obligation of the new company, and such delivery was an issue in New York; secondly, that the subsequent delivery to Messrs. Baring was not an issue in the United Kingdom; further, that the bond was never issued for subscription within the United Kingdom. The case for the Crown was (1) that the bond was a marketable security made or issued by or on behalf of a foreign corporation bearing date after June 3, 1862, and made or issued in the United Kingdom; (2) that it was a foreign security which after August 6, 1885, was offered for subscription and delivered to a subscriber in the United Kingdom; (3) the security was not valid till authenticated by the certificate thereon endorsed of the Union Trust Company of New York, and was therefore not a completed security until after the signature of the authentication by Mr. Merritt in London. The Divisional Court were of opinion that the bond was issued in the United Kingdom and dismissed the appeal. The appellant appealed to the Court of Appeal.

Mr. Cohen, Q.C., and Mr. R. M. B. Gray appeared for the appellant; Sir R. B. Finlay, Q.C. (the Solicitor-General), and Mr. Danckwerts for the Crown.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said they were dealing with a bond which contained this express stipulation:—"This bond shall not be valid for any purpose unless authenticated by the certificate hereon endorsed of the trustee under the said mortgage or deed of trust." The bond, therefore, on the face of it, was not a bond at all until the certificate endorsed on it had been signed by Mr. Merritt. The piece of paper was sent as an inchoate instrument from New York to be converted into a valid bond in this country, and it was so converted into a valid bond when the certificate received Mr. Merritt's signature in London. It was clear that the bond was not issued in New York, but was first issued when it became a valid document in London. In his opinion, when the certificate was signed the bond became a marketable security, and it was issued in the United Kingdom. The judgment of the Divisional Court must therefore be affirmed.

LORD JUSTICE RIGBY was of the same opinion. An instrument was not issued until it came into the hands of a person who could make use of it. During the transit of this bond from America, and until it was authenticated in London, no one could have sued on it. In his opinion, when it was endorsed with the trustee's signature and handed over to Mr. Baring it was issued, and not till then. It was further said that, even if it was issued in London it was not so issued on behalf of the company. He would not decide whether it was right to construe the Act as meaning that the bond must necessarily be issued on behalf of the company, but he was of opinion, on the facts of the case, that this bond was issued in London on behalf of the company.

LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Bompas, Bischoff, Dodgson, Coxe, and Bompas, for the appellant; The Solicitor of Inland Revenue, for the Crown.]

Q.B. Div. (Wright and Kennedy, JJ.) 1897.
Nov. 5.

RE H. A. FARMAN—EX PARTE TRUMAN.*
Solicitor—Contempt of Court—Writ of attach-

ment against solicitor—Who may apply for—Jurisdiction of Court over solicitor.

In this case Mr. ISRAEL DAVIS moved for a writ of attachment to issue against Mr. Harold A. Farman, a solicitor, for non-payment of a sum of £53 Os. 9d. and one guinea for costs under an order of Court of June 25, 1897. The sum in question was the balance of money paid out of Court to him as solicitor in a successful action in the Bloomsbury County Court. This he had not paid over either to the lay client or to the country solicitor from whom he received his written instructions. Dr. Truman, the country solicitor, obtained at Chambers an order on June 25, 1897, for the payment to him of the amount recovered after deduction for the costs, which had been duly taxed. This order had not been obeyed, and the Court was now asked to issue a writ of attachment in the exercise of the Court's jurisdiction over their officer to enforce obedience thereto. Mr. Israel Davis cited "*Re Freston*" (11 Q.B.D., 545), and argued that he was entitled to the grant of the writ whether or not Dr. Truman was technically the client of Mr. Farman, inasmuch as anybody could inform the Court that one of its officers had disobeyed the order of the Court to pay money.

Mr. W. H. STEVENSON appeared on behalf of Mr. Farman and referred to "*Litchfield v. Jones*" (36 Ch. D., 530) (in which case, however, an action had been brought), and took the point that Dr. Truman, the country solicitor, was not the person who was entitled to make the application, which ought to have been made by the lay client himself.

The COURT, however, gave leave for the writ to issue, directing that it should lie in the office for a month in order to give Mr. Farman time to pay the money.

[Solicitors—Atkinson and Dresser, for the appellant; Harold A. Farman, for the respondent.]

Q.B. Div. (Commercial Court) } 1897.
(Mathew, J.) } Nov. 6.

SEA INSURANCE COMPANY V. BLOGG.*

Insurance—Marine—Policy on goods in vessels "sailing" on and after a certain date—"Sailing," what constitutes—Intention of master.

There cannot be a "sailing" within the meaning of a policy of marine insurance without a clear intention on the part of the master to proceed directly on the voyage.

The claim of the plaintiffs, the Sea Insurance Company, was made in respect of a loss on cargo per steamship *Massasoit* under a policy of reinsurance subscribed by the defendant. The policy was effected on goods at and from ports in the United States to ports in Europe in vessels "sailing on or after March 1, 1896." The question in dispute was whether the *Massasoit* sailed on February 29 or March 1. The facts were as follows. On February 29, 1896, the *Massasoit* was loading alongside a wharf at Newport News, on the St. James river, Virginia. She completed loading between nine and ten in the evening of that day. By a regulation of the port vessels were not allowed to go out to sea after dark. In order to leave the wharf clear and to prevent the crew from leaving the vessel the ship's husband ordered the master of the *Massasoit*, as soon as she had completed her

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

loading, to move out a short distance into the stream, but not to start on her voyage till daybreak on March 1. The vessel had cleared at the Custom-house before the loading was finished, but a Custom-house officer was on board when she left the wharf. On March 1, about 8 a.m., the Custom-house officer went on shore, and the *Massasoit* started on her voyage.

Mr. JOSEPH WALTON, Q.C., and Mr. CARVER, for the plaintiff company, contended that the vessel did not sail within the meaning of the policy till the morning of March 1. If the master had left the wharf on the previous evening with the intention of then going to sea it would have made no difference if the vessel had afterwards been stopped. But in this case there was not, and could not have been, any such intention. The master only intended to lie in the stream during the night, that being a more convenient position. The general principle of law as to what constitutes a sailing was to be found in "Phillips on Insurance," section 772, "Arnould on Marine Insurance" (6th ed., 610). Counsel cited "Lang v. Anderton" (3 B. and C., 495), "Wood v. Smith—the City of Cambridge" (L.R., 5 P.C., 451) was distinguishable, for that was a case of compulsory pilotage, and a different principle applied.

SIR WALTER PHILLIMORE (with him Mr. Scrutton), for the defendant.—The question was not whether the *Massasoit* could or could not have got out to sea on the evening of February 29, but whether she had begun her voyage. She left the wharf in order to be in a better position for starting in the morning, and she was ready to go to sea. It was held in "Cockrane v. Fisher" (2 C. and M., 581, and 1 C. M. and R., 809) that that was sufficient to show an intention of sailing. If leaving the wharf on February 29 was a "sailing" it was immaterial that the master knew that he could not get very far that evening. He also referred to "Arnould on Marine Insurance" (6th ed., pp. 616-617), "Moir v. Royal Exchange Assurance Company" (3 M. and S., 461), "Pittgrew v. Pringle" (3 B. and Ad., 514), and "The Cachapool" (L.R., 7 P.D., 217).

Mr. JUSTICE MATHEW, after stating the facts, said that when the vessel was moved out from the wharf into the stream the master had no intention of commencing the voyage. His object was to get away from the wharf so as to leave room for other vessels, and also to keep his crew together and prevent their going ashore. Some slight advantage might have been obtained for the ship in starting from the river instead of from the wharf, but there was no reason to suppose that that consideration entered into the master's calculations. It was contended for the plaintiffs that the vessel had "sailed" within the meaning of the policy on March 1. For the defendant it was urged that the vessel had made a start when fully prepared for the voyage on February 29, and that the risk, therefore, was not covered by the policy. The law was thus stated in "Phillips on Insurance," section 772:—"A vessel has 'sailed' the moment she is unmoored and got under way, in complete preparation for the voyage, with the purpose of proceeding to sea without further delay at the port of departure." Then he quoted Lord Mansfield as follows:—"To constitute a sailing . . . the vessel at the time of sailing must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were possible." For the plaintiffs reliance was placed on the case of "Lang v. Anderton;" which was contrasted with "Wood v. Smith" and "The Cachapool." It was said that without an intention to proceed to sea on a direct course there was no sailing within the meaning of the policy. On the other hand the defendant's counsel mainly relied on "Cockrane v. Fisher." The vessel. it

was said, when fully prepared for sea was placed by the master in a better position for prosecuting her voyage, and had, therefore, sailed upon the earlier day. But, as was pointed out in that case, the question whether the warranty was complied with depended upon the intention of the master when the vessel left her moorings, and upon the findings of the jury that the master meant from the first to prosecute the voyage it was held that the warranty was complied with, although in the then state of the weather the vessel could not get to sea. There was no authority for the proposition that there could be a "sailing," as required by the policy, without a clear intention on the part of the master to proceed directly on his voyage. Any obstacle which was foreseen and which would cause delay in getting the vessel to sea would postpone the time of sailing until the obstacle was removed. What the *Massasoit* did on February 29 was, not to sail, but to shift her berth with a view to sailing on March 1. There would therefore be judgment for the plaintiff company for the amount which had been agreed upon.

[Solicitors—Rowellifes, Rawle, and Co., for Hill, Dickinson, Dickinson, and Hill, Liverpool, for the plaintiffs; Waltons, Johnson, Bubb, and Whatton, for the defendant.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov. 6.

ROBERTS V. HILL'S PLYMOUTH COMPANY, LIMITED.*

Master and Servant—Dismissal—Agreement to refer questions to arbitration—Construction.

Decision of Lord Russell of Killowen, C.J. (13 *The Times* L.R., 448), affirmed.

This was an appeal by the plaintiff from the judgment of the Lord Chief Justice at the trial of the action without a jury, reported in 13 *The Times* Law Reports, 448. The action was brought against colliery owners to recover damages for the wrongful dismissal of the plaintiff from his employment in the Plymouth works, Merthyr Tydvil Colliery. It appeared that on January 1, 1892, a sliding scale agreement (which was a renewal of a previous agreement) was made between certain persons on behalf of the members of the Monmouthshire and South Wales Coal Owners' Association (of which association the defendants were members) and certain other persons on behalf of the workmen employed at the collieries of the members of the association. By clause 1 of the agreement the parties thereto were styled the joint committee. By clause 6, the wages of the men were to be regulated by a sliding scale. By clause 9, "the standard of wages upon which future advances and reductions are to be made shall be the several rates actually paid at the respective collieries for the month of December, 1879." By clause 9 (a), "both the employers and the workmen shall be bound to observe and fulfil all customs, provisions, and conditions existing in December, 1879, at the associated collieries, and no variation shall be made therein either by employers or workmen, except by mutual agreement." By clause 17, "both parties to this agreement pledge their respective constituents to make every possible effort to avoid claims or disputes at the collieries, and that in case of any unavoidable differences the owners and their officers together with their workmen shall endeavour to settle all matters at the collieries, and only in case of a failing to effect a settlement shall an appeal be made to the joint committee. It is also hereby agreed that in such cases no notice to terminate contracts shall be given by either

employers or their workmen before the particular question in dispute shall have been considered by the joint committee, and they shall have failed to arrive at an agreement." By clause 23, "all notices to terminate contracts . . . shall be given only on the first day of any calendar month and to terminate upon the last day of the same month." It had been the practice in the district where the defendants' collieries were situated to make certain allowances per ton, in addition to the stipulated rate of wages on cutting coal, to the men working in certain seams where from the character of the seam the coal was difficult to get. The amount of the allowances varied from time to time according as the difficulty increased or decreased. The practice of giving allowances existed before 1879. By an agreement dated March 26, 1891, the rates for allowances as from March 1, 1891, were fixed at certain figures, "the new rates to be subject to the sliding scale, advances and reductions." In November, 1895, an allowance of 3d. per ton was made to those who worked on the 9ft. seam. In that or the following month the defendants' manager, in consequence of the collieries being worked at a loss, desired to discontinue the allowances, stating that he could not go on without. The men refused to consent, and a mass meeting was held, and deputations were sent to the manager to discuss the matter. The men contended that the matter should be referred to the joint committee, to which the manager replied that the matter did not come within their jurisdiction. On January 1, 1896, the manager gave the men a month's notice of dismissal. Further discussions took place, and on January 28 the manager offered to refer the matter to the joint committee, on condition that their decision took effect from February 1. This proposal was rejected by the men, and on February 1 the collieries were closed. The present action was commenced on February 13, 1896, but subsequently an arbitrator was appointed by consent, who fixed the allowance at 1½d. per ton. An agreement was come to in accordance with the award, and the men resumed work on March 26. The action was continued to recover damages for the wrongful dismissal, the plaintiff claiming wages from February 1 to March 26. The Lord Chief Justice gave judgment for the defendants. The plaintiff appealed.

Mr. Asquith, Q.C., and Mr. S. T. Evans appeared for the plaintiff; Mr. Joseph Walton, Q.C., Mr. Abel Thomas, Q.C., Mr. F. W. Hollams, and Mr. Trevor Lewis appeared for the defendants.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether by clause 17 of the sliding scale agreement it was made a condition precedent under the circumstances which existed in this case that the matter should have been considered by the joint committee before the notice was given. The Lord Chief Justice held that it was not. It was not denied that when the notice of January 1, 1896, was given the defendants had paid to the plaintiff every farthing which was due to him under the agreement, whether for wages or allowances, or for any other claim which the plaintiff might have thereunder; and, indeed, as regards such matters there never was any claim or dispute whatever. The circumstances which existed when the notice was given the Lord Chief Justice found to be as follows, and there was ample evidence to support the finding. In October, 1895, the state of things at the colliery was this. For some years the colliery had been worked at a very considerable loss, and it had been under consideration by the owners to close the pits; but they were willing to advance further funds to continue to work the colliery if the men on their part were willing to forgo or make certain reductions in the allowances

they then claimed and were receiving. That was the finding. That the defendants acted *bona fide* was not disputed. The agreement of 1892 was headed "Sliding Scale, 1892." It was admitted that a month's notice on either side was the proper length of notice to be given, and the question was whether clause 17 applied to the case. If it did, the notice to leave the service could not be given until after the joint committee had been applied to, and in this case this was not done. All the clauses in the agreement, except clause 9a, related to the way in which the sliding scale was to be worked out. Clause 9a had reference to the customs and what he would call the allowances which were to be preserved and carried out, all the obligations of which had been duly performed by the defendants. What did the words "claims or disputes at the collieries," "unavoidable differences," in clause 17 embrace and refer to? Did they embrace and refer to claims or disputes which might arise in relation to the working out of the existing sliding scale of wages and the existing allowances and customs in clause 9a; or did they also embrace and refer to such a matter as to whether the master should or should not be bound to continue his workings at the existing rate of wages and allowances? That they referred to the first class of cases could not be doubted, and he could understand the setting up of a joint committee as a tribunal of conciliation in such cases, so as to prevent, when claims or disputes arose thereon, notices to leave being given by either side in hot blood; but what a joint committee had to do with the latter case, in which the master was the sole judge when he found, as in this case, that he could only carry on his works at the existing wages and allowances at an enormous loss, his Lordship did not apprehend. Every master was at liberty to do as he pleased as to continuing to carry on his works, unless he had contracted otherwise. It could not be found in this agreement that the master had contracted that, before he could shut up his works, he must call in the joint committee; and it would require clear words to show that he had so contracted. Clause 17 was a clause ancillary to the carrying out of the sliding scale agreement and the compact about allowances and customs, and to nothing more. For these reasons, in his opinion, the words of clause 17 would not bear the construction which the plaintiff was attempting to put upon them, and they did not apply to this case. It did not appear to him to be necessary to consider the true construction of the latter part of this ill-drawn clause. In his opinion, the Lord Chief Justice was right in the construction he placed upon the clause, and the appeal must be dismissed with costs.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Wrentmore and Son, for the plaintiff; Hollams, Sons, Coward, and Hawksley, for the defendants.]

Q.B. Div. (Wright and }
Kennedy, JJ.)

1897.

Nov. 6.

LONDON COUNTY COUNCIL V. LONDON HYDRAULIC COMPANY.*

Metropolis—Subways—London County Council (Subways) Act, 1893—Charges for using subways —"Water company," what is—Company for supplying hydraulic power.

This was a special case stated by consent, under Order XXXIV., r. 1, in an action by the London County Council against the London Hydraulic Company.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

in which they sought to recover £185 6s. for remuneration or rates payable by the defendants in respect of their use of certain subways under Queen Victoria-street, Victoria-embankment, Northumberland-avenue, Shaftesbury-avenue, Charing Cross-road, Southwark-street, and Rosebery-avenue. The question raised by the case was whether the London Hydraulic Company was a water company, for, if it was, the charge for use of the subways would only be £32. The defendants were constituted under the Wharves and Warehouses Steam Power and Hydraulic Pressure Company's Act, 1871, §1 and 35 Vic., c. 121, for applying motive power by hydraulic pressure to waterside and land cranes used for working lock gates and other machinery. Under the Act they were authorized to take water for this purpose from the Thames to an amount of one million gallons a day. Section 2 of the Act incorporated therein certain general Acts, including the Companies Clauses Act, 1845, and the provisions of the Waterworks Clauses Act, 1847, with respect to the breaking up of streets for the purpose of laying pipes. Section 30 provided that the company should construct all proper works, apparatus, and conveniences necessary to secure the return to the River Thames of all waters taken therefrom and used by them immediately after the use of the same for the purposes of the said Act. Section 31 provided that the said company should not at any time supply water to be used for any purpose other than as a motive force, and that if they should supply water at any place contrary to the said enactment they should for every such offence forfeit to every company then incorporated by Act of Parliament for the supply of water within the district the sum of £20. By Section 38 the company was authorized to supply within their district motive power by hydraulic pressure to any persons or company. The London Hydraulic Power Act, 1884 (47 and 48 Vic., c. 72), by Section 9 imposed a penalty on any person who being supplied by the said company with pressure water under the powers of the said Act should use the water so supplied for any other purpose than as a motive force. By the London County Council (Subways) Act, 1893 (56 and 57 Vic., c. 202), it was enacted that it should be lawful for the London County Council to require a company to lay in or remove into a subway of the Council any pipes belonging to the said company where the council had a subway in the same street. By Section 5 it was provided that it should be lawful for the Council to make on the company using any subway a charge for the use of the subway according to a scale to be determined. And it was provided that, in the case of any water or gas company having statutory powers to break up streets, regard should be had only to such saving (if any) as might result to such company by reason of the pipe laid and accessible in a subway instead of being laid or remaining under a street, and to any other saving resulting to such company by reason of the subway. By section 10 of the Acts power was given to the Council to make and enforce bye-laws, and to fix the scale of fees and charges to be paid by any company or person using any subway. A scale of charges was accordingly drawn up. One table consisted of the charges to be made on water and gas companies having power to break up streets, and the other of the charges for companies, bodies, and persons other than water or gas companies having power to break up streets. The latter was on a higher scale. The pipes of the company have been laid in the subways under the streets named. A question arose between the Council and the defendant company as to the scale of charges applicable. The question for the Court was on which scale the charges were to be made.

Mr. DICKENS, Q.C. (Mr. English Harrison with him), for the County Council, said the defendant company

was other than a water company, and should therefore be charged on the higher scale. In the Waterworks Act persons authorized to construct waterworks were called the undertakers. This company did not construct waterworks.

Mr. CRIPPS, Q.C. (Mr. Loehnis with him), said the company was a water company, at any rate for the purpose of breaking up streets. The clause of the Waterworks Clauses Act, 1847, with regard to the breaking up of streets was incorporated by section 2 of their Act. It was true the company could not compete with other water companies by supplying water to customers. In the Act of 1847 there was no definition of a water company.

Mr. DICKENS replied that it could not be said that this company supplied water for domestic use.

The COURT upheld the view of the London County Council.

Mr. JUSTICE WRIGHT said the defendant company was a company constituted for the purpose of supplying hydraulic power. The purpose of a water company was to take water for the purpose of supplying it for domestic use. The defendant company had no power to sell water; their duty was to return all water to the River Thames. Water was only the means of working the machinery. They were not a water company within the exemption; the higher scale of charge was therefore applicable.

Mr. JUSTICE KENNEDY concurred, but not with so much confidence as Mr. Justice Wright. The defendant company in a sense supplied water. Supply was a word common to both purposes, but, on the whole, he thought that the more just view was that the term water company should be kept for those companies which supplied water for consumption in the ordinary way.

[Solicitors—W. A. Blaxland, for the London County Council, plaintiffs; Beale and Co., for the defendants.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov 8.

TAYLOR V. THE MAYOR AND CORPORATION OF WINDSOR
AND ANOTHER.*

Tolls — Bridge — Prescriptive toll — Statutory rights.

Held, reversing the decision of Lord Russell of Killowen, C.J. (13 *The Times* L.R., 402), that the Corporation of Windsor had possessed a prescriptive right to take tolls in respect of Windsor-bridge, but that the effect of certain legislation was to extinguish that right and substitute in its place new statutory rights, on the expiration of which the corporation could not revert to the old prescriptive toll.

This was an appeal from the judgment of the Lord Chief Justice at the trial of the action without a jury (reported in 13 *The Times* Law Reports, 402). The action was brought by a member of the Eton Urban District Council for the purpose of having it determined whether the corporation of Windsor have the right to levy tolls from the public in respect of vehicles passing over Windsor-bridge. This bridge, which connects Eton and Windsor, was constructed in 1819 under a private Act of Parliament (59 Geo. III., c. 126) by means of funds raised from the public and from certain tolls authorized by that Act. Before that time there

had been an ancient wooden bridge on the same site, in respect of which the mayor, bailiffs, and burgesses of Windsor had always levied tolls. By an Act of Parliament passed in 1734—viz., 9 Geo. II., c. 15—the tolls which had been thus levied in accordance with custom were confirmed, subject to certain variations as to the persons liable to pay them, as mentioned in the judgment of Lord Justice A. L. Smith, and certain new means of enforcing the payment of them were conferred on the corporation. The present bridge was made of stone, and was larger than the old bridge. The Act of Geo. III., which was a temporary Act, referred to the Act of Geo. II., and in section 6 spoke of the ceasing of the tolls which the mayor, bailiffs, and burgesses were then entitled to take and receive by virtue of the thereinbefore recited Act. It conferred on the mayor, bailiffs, and burgesses special powers to take higher tolls for the purposes of the new bridge. The Act also contained a saving clause (section 54), which provided that nothing in the Act should prejudice the rights or tend or be construed to defeat or abridge the mayor, bailiffs, and burgesses of the powers granted to them by their charters, but that the said corporation should continue to hold and enjoy such rights, privileges, benefits, and advantages as were granted to them in or by their said charters, or to which they were entitled by prescription or otherwise, in as full, ample, and beneficial a manner as they did before the passing of the Act, or could or might have done in case the Act had not been passed, anything in the Act contained to the contrary notwithstanding. Section 55 provided that the said bridge should not be deemed or taken to be a county bridge, and the inhabitants of Berks and Bucks should not be liable to repair it. The continuance of the Act of Geo. III. was extended by another Act—5 Vict., c. 8—for 31 years from April 22, 1842, and from thence to the end of the then next Session of Parliament. On January 30, 1896, the plaintiff was proceeding from Windsor to Eton in a hired cab, and at the bridge a toll of 2d. was demanded of him, and on his refusal to pay the gates were closed against him. He then paid the toll under protest, and afterwards brought this action, asking for a declaration that the defendants were not entitled to levy tolls for the passage of the bridge, and for an injunction to restrain them from preventing the plaintiff from crossing the bridge and from levying tolls for the passage of the bridge. He contended that the right to levy tolls in pursuance of the above Acts had for a long time ceased to exist. The defendants contended that their right to take tolls in respect of the bridge was not affected by the expiration of the Act of George III. They and their predecessors had been from time immemorial owners of the bridge and had been liable to repair it, and had enjoyed the customary right to levy certain tolls in respect of loads, animals, and vehicles passing over the bridge, and, *inter alia*, a toll of 2d. for every hackney coach so passing over it, and, as incidental to their rights, the right to close the passage of the bridge to any person refusing to pay. These rights, they maintained, had never been extinguished, and existed in respect of the present bridge in the same manner as they had existed in respect of previous bridges which had from time to time existed before the present one was built. Alternatively to the claim by custom the defendants claimed to be entitled to the tolls and the rights incidental thereto—(1) by prescription at common law; (2) by prescription under the statute 2 and 3 William IV., c. 71; and (3) by lost grant. The defendants counterclaimed a declaration that they were entitled to levy tolls for the passage of Windsor-bridge and to close the bridge to any person refusing to pay. At the trial the Lord Chief Justice held that the effect of the Acts of George II. and

George III. was merely to suspend temporarily the prescriptive rights of the corporation to levy tolls, and that on the expiration of those Acts the prescriptive rights survived and remained. He accordingly gave judgment for the defendants. The plaintiff appealed.

Mr. WITT, Q.C., and Mr. DANCKWERTS, for the plaintiff, argued that the effect of the statute of 9 Geo. II. was to extinguish the customary right to take tolls which the corporation had possessed. Although the tolls taken under that Act were substantially the same as the customary tolls which had been levied previously, the Act conferred on the corporation a fresh and a different title to the tolls. The right, which had been a prescriptive one, was confirmed by the statute, and thenceforth the corporation took the tolls under the statutory right. It was settled law that where a prescriptive title was confirmed by a Parliamentary title the prescriptive title was thereby extinguished and the Parliamentary title alone remained—"Corporation of Manchester v. Peverley" (22 Ch.D., 294, note); "Abergavenny Improvement Commissioners v. Straker" (42 Ch.D., 83); Maxwell on the Interpretation of Statutes, 3rd ed., p. 419; Com. Dig., Prescription, G. The old prescriptive right was therefore destroyed in 1734 and could not by any means have been subsequently revived. Secondly, even if the prescriptive tolls survived the Act of George II., they were only tolls in respect of the old wooden bridge, and could not continue to be leviable when that bridge was pulled down and superseded by the new bridge in 1819. In that year the corporation made a contract with Parliament, to which effect was given by the Act of 59 Geo. III. The corporation were liable to repair the old bridge and rebuild it if necessary. In consideration of their giving up their rights to the old tolls Parliament relieved them from that liability; and in consideration of their substituting a new and larger bridge Parliament gave them new powers to levy a new set of tolls. The old prescriptive tolls were never leviable in respect of the new bridge.

Mr. CRACKANTHORPE, Q.C., and Mr. COURTHOPE MURDOCH, for the defendant corporation, contended that where prescriptive rights were confirmed by Parliament they were not thereby destroyed and converted into merely statutory rights, and cited Co. Litt. 115, A., and Com. Dig., Prescription, F. The Act of 9 Geo. II. enlarged the remedy, but did not extinguish the right, which continued to exist by virtue of the custom confirmed by statute. Neither was the old prescriptive right destroyed when the new bridge was built, which was for this purpose the same bridge as the old bridge. Section 6 of the Act of Geo. III. merely referred to the temporary suspension of the old tolls during the time while the new tolls were being taken. The saving clause in that Act was most material, and showed clearly that the old tolls were not extinguished.

Mr. J. R. Atkin appeared for the other defendant, through whom the corporation levied the tolls.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE A. L. SMITH read a judgment, in the course of which he said that the Lord Chief Justice of England found—and this finding was not impeached—that prior to the passing of the Act of 9 Geo. II., c. xv., in the year 1734, the corporation had, by virtue of prescription founded upon the theory of a lost grant, a right to take the toll in question, and he also held, though with some doubt, that the legislation which had taken place since that date in relation to the tolls had not extinguished this right, and that it had remained suspended and in abeyance for the 140 years intervening between the passing of 9 Geo. II., c. xv., and the termination by effluxion of time of the last Act

upon the subject—viz., 5 Vict., c. viii. The real point for determination was what was the effect which the statutes passed in 1734, 1819, and 1842, in relation to these tolls, had upon the old franchise founded upon prescription? There was, in the judgment of Lord Justice Bowen, in the case of "Mayor, &c., of Manchester v. Lyons" (22 Ch.D., at p. 310), a passage which so clearly defined what were the questions to be decided in this case that he (the Lord Justice) would at once cite it before going to the statutes. Lord Justice Bowen said:—"When there is a franchise created by charter, and the Legislature afterwards operates upon it, it is obvious that the Legislature can do exactly what it pleases. It can either leave the old franchise standing and place a new Parliamentary right beside it; or it may leave the old franchise standing and incorporate certain statutory incidents into the old franchise, provided it makes its intention clear; or it may extinguish the old franchise, either expressly or by implication, and substitute in its place, not a franchise properly so called, but Parliamentary rights and obligations as distinct from a franchise." Now, into which of these three classes did the legislation as to the tolls during the last century and a half bring the present case? This brought him to the year 1734, when the first Act was passed. At that time the Corporation of Windsor were under liability *ratione tenuræ* to repair and maintain the bridge, and by prescription were entitled to receive tolls for passage over and under the bridge. In 1734 the corporation obtained the first Act (9 Geo. II., c. xv.). Did that Act leave the old franchise founded upon prescription standing, or did it bring into existence a Parliamentary right as distinct from a franchise? By the old right founded upon prescription the corporation were empowered to levy upon every coach, animal, article, and barge passing down stream, passing over or under the bridge, the respective enumerated tolls, excepting the one toll of 2d. upon every hackney carriage which was not to be levied upon a freeman's hackney carriage. By this statute not one of these tolls was to be levied upon a freeman. How could these two conflicting rights stand together? If the old franchise founded upon prescription was left standing, a freeman after the passing of the Act of 1734 was liable to all the tolls except the one, whereas by the Act he was exempt from all. It could not be said that this Act left the old franchise standing and placed a new Parliamentary right beside it. Nor did the Act leave the old franchise standing and merely incorporate certain statutory incidents therein, for it did much more, it changed the area over which the toll was to range. In his opinion this Act of 1734 granted a substantive right to tolls to be levied upon persons different from those whom the old franchise made liable to toll, and this Act consequently superseded and extinguished the old franchise founded upon a lost grant, and substituted in its place a new statutory right. This was made clear by the Act of 1819 (59 Geo. III., c. cxxvi.), which the corporation then obtained, and wherein they recited (s. 6) the loss they would sustain by the ceasing "of the several tolls which at present they are entitled to take and receive by virtue of the Act of 9 Geo. II., c. xv." This alone was sufficient to decide the case against the corporation. He now came to the Act of 59 Geo. III., c. cxxvi., passed in the year 1819. The tolls granted to the corporation by this Act were in amount greatly in excess of the tolls authorized by the Act of 1734, and it also authorized tolls upon some different subject-matters, and the freemen were not exempted from toll as they had been by the Act of 1734. How could the old franchise, which was totally different, stand together with this Act, even assuming that the Act of 1734 had never been passed? Surely the fresh

substantive Parliamentary powers contained in the Act of 1819 were such that they could not exist alongside the old franchise and leave it standing; and, if so, it followed that the old franchise must give way. How could two different sets of tolls, differing in amount, persons to be charged, and subject-matters to be charged, stand at one and the same time? It appeared to him impossible, and therefore the Act of 1819 must be held to have extinguished the old franchise, had it existed in 1819, which, in his judgment, for the reasons given above it did not. It was said, in answer to this, that this Act of 1819 was only a temporary Act for 21 years, and that the Legislature could not have intended to have left the corporation without a toll at the end of that period. But the Legislature expressly prolonged the existence of the Act from the end of the 21 years to the end of the next Session of Parliament, which seemed to have been given in order that the corporation might again go to Parliament, if necessary, for extended rights to the tolls, and which in fact they did when they obtained the Act of 1842. No doubt section 54 of the Act of 1819 reserved the rights of the corporation whether under charter or prescription, but it only reserved such rights as existed when the Act was passed. By the Act of 1842 the provisions of the Act of 1819 were extended for 31 years, and from thence to the end of the then next Session of Parliament. Here, again, time was expressly given to the corporation to apply to Parliament at the expiration of the 31 years, but when the Act expired in 1874 the corporation sought no further powers. For these reasons, in his opinion the old prescriptive toll was extinguished, and the corporation after the year 1874 could not lawfully revert to such tolls and take the toll which was the subject-matter of the action. The appeal must be allowed, with costs here and below.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS read judgments to the same effect.

Chan. Div.
(Byrne, J.) }

1897.
Nov. 8.

IN RE PEVERIL GOLD MINES (LIMITED).*

Company—Winding up—Petition—Who may present—Companies Act, 1862, sec. 82.

Articles of association provided that no petition to wind up the company should be presented except upon certain conditions therein set forth.

Held, notwithstanding the articles of association, that a holder of 5,000 fully-paid shares who had not complied with any of the conditions was entitled to present a petition to wind up the company.

This case involved an important and novel point of company law. A petition had been presented by a shareholder, holding 5,000 fully-paid shares, to wind up the company, and a motion was made on behalf of two shareholders, one holding 20 shares on which 16s. 6d. per share had been paid, and the other holding 13,000 fully-paid shares, to stay proceedings upon the petition. All the shares were of the nominal value of £1 each. It was conceded for the purposes of the motion that the petitioner was a contributory who would be entitled to petition but for the existence of clause 164 of the articles of association, which was as follows:—

*Reported by F. EVANS, Esq., Barrister-at-Law.

"No petition shall be presented or proceeded with by a member to wind up the company except and unless (a) by consent in writing of not less than two of the then board, or (b) in pursuance or by permission of a resolution passed by a majority at a general meeting of the company, or (c) the petitioner or petitioners shall hold or together hold not less than one-fifth of the then issued capital of the company, upon which all calls shall have been paid." It was admitted that the petitioner had not complied with any one of the conditions mentioned in the article.

Mr. C. E. E. Jenkins, Q.C., and Mr. W. H. Cozens-Hardy were heard in support of the motion; and Mr. Eve, Q.C., and Mr. Eustace Smith for the petitioner.

MR. JUSTICE BYRNE delivered judgment to the effect following:—The applicants say that the article in question disentitles the petitioner to proceed with his petition. Their argument may be shortly summarized thus:—The articles of association constitute an agreement between the members of the company, and article 164 is part of that agreement; there is nothing illegal either at common law or by statute to render such an agreement invalid, and, consequently, they are entitled to insist on its being observed. For the petitioner (the respondent on this motion) it is contended that the article is invalid as being in conflict with the provisions of the Companies Act, 1862, as being against the policy of the Act and against public policy. The memorandum and the articles of association embody the contract between the different members of the company, but those documents must not conflict with the provisions of the Acts regulating the incorporation of joint stock companies. The Act of 1862 confers certain rights upon shareholders, and, amongst others, it provides, by section 82, that any application for winding up shall be by petition, that "it may be presented by the company or by any one or more creditor or creditors, contributory or contributories, of the company, or by all or any of the above parties, together or separately." A qualification upon the right to petition so conferred is to be found in the Act of 1867, section 40. The 82nd section of the Companies Act, 1862, undoubtedly confers a right upon any single contributory—and the petitioner in the present case is a contributory within the meaning of the section—to present a petition, and the question really is whether or not the petitioner has by becoming a shareholder entered into a contract, enforceable either by the company or by other individual shareholders, not to exercise the right which section 82 *prima facie* in terms confers upon him. I am of opinion that, although section 82 only says that a contributory "may" present a petition, it confers a right upon every shareholder just as much as if the terms of the section had been that every contributory should have "the right to present a petition." Apart from the question of public policy, I consider that the terms of the section are intended to confer a right of which a contributory cannot be deprived, either entirely or in a modified way, by the terms of the articles of association, unless upon the footing that by becoming a shareholder the petitioner has done what is equivalent to validly releasing an individual legal right, and I am of opinion that he has not done so. I am confirmed in my view of the true intent and meaning of the section, not only by section 40 of the Act of 1867, to which I have referred—which had the meaning been otherwise would have been unnecessary—but by the fact that the Act of 1862, when it provides for a discretionary alteration or limitation of the statutory terms of articles of association, so provides in terms, as in the case of section 52, in relation to voting and summoning meetings, where it is enacted that, in default of any regulations as to voting, every member shall have one vote, and in default of any regulations as to summoning general meetings, a

meeting shall be held to be duly summoned if summoned as in the section mentioned. There are no corresponding words in section 82. In fact, I think that the right to petition to wind up by every single shareholder is a condition of incorporation under the Companies Acts, whatever independent contracts may be separately made between the company and an individual who happens to be or to intend to become a shareholder, or between individuals who happen to be the shareholders. I am not left without guidance in the matter. It appears to me that I have the authority of the House of Lords in the case of "Welton v. Saffery" (1897, A.C., p. 299) for the principle which ought to be applied in this case. It is true that in the present case the article in question is not at variance with the memorandum of association in the same way as it was in the case I have referred to, but if it can be shown that the article is at variance with the Act of Parliament directly, the reasoning applies, if not with greater force, at least in a more direct manner. "If one were to suppose," says the Lord Chancellor at p. 305, "that the whole 6,000 original shareholders, or persons who agreed to become shareholders, or persons who became shareholders by purchase in the market, were to have agreed that these shares should only be regarded as having 10s. due upon them, each might perhaps against himself establish some contract by which the persons agreeing with him in his individual capacity might have rights, but it would not be in his capacity as shareholder, it would be in his capacity as individual." And Lord Davey says at p. 331:—"Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations or an *exceptio personarum* against themselves only and would not become a regulation of the company or be binding on the transferees of the parties to it or upon new or non-assenting shareholders. There is no suggestion here of any such private agreement outside the machinery of the Companies Acts." I think that the passages I have quoted apply to the present case. The article which I have to deal with is really an attempt to fix upon the holders of every share an obligation, so to speak, running with the share, in contravention of the provisions of the Act of Parliament. So far as regards the company who are moving parties the case is to my mind quite clear, and, in reply, counsel for the motion hardly insisted upon the right of the company to the relief asked for. If the articles are to be regarded as part of the terms of the contract between the company and the person applying for shares, I am of opinion that the company had no right, having regard to the Act of Parliament, to enter into such contract as a condition and part of the general contract binding upon all shareholders, whatever separate or distinct bargain they might have the power to make with an individual who happened to be or to desire to become a shareholder. This article appears to be one more attempt to remove a statutory safeguard of the inexperienced intending shareholder. Not one per cent. of intending shareholders reads the articles before applying for or accepting a transfer of shares, and a shareholder does not expect to find that he has entered into a special contract waiving his statutory rights. I know nothing about the merits of the particular case presented by the petition sought to be restrained, but I am glad to be able to think that the law is as I hold it to be. Having regard to the views I have expressed, it is unnecessary for me to decide the points raised which were founded upon the article being against the policy of the Act or against public policy; but I desire to add that I am far from saying that such points may not be made good. I dismiss the motion with costs.

The petition was, however, ordered to stand over pending an appeal.

[Solicitors—White and De Buriatte; Robinson and Stannard.]

Q.B. Div. }
(Bigham, J.) }

1897.
Nov. 8.

CLARKE V. M'TURK.*

Penalty—Liquidated damages—Breach of contract.

This was an action against Mr. William M'Turk, who until 1896 carried on business at Angelo's Fencing School in St. James's-street. The plaintiff, Mr. Henry Clarke, was in the employ of the defendant as fencing instructor, and he brought this action to recover arrears of salary. The claim was admitted as to part, but the defendant denied that he was liable for one month's salary in lieu of notice, as the plaintiff had agreed to forgo it. Since leaving the defendant's employment the plaintiff had started a fencing school of his own at 47, Pall-mall, and the defendant contended that this was a breach of an agreement entered into by the plaintiff when he went into the defendant's employment. That agreement contained a clause that the plaintiff would not teach or instruct any person in London or within 70 miles thereof in the event of his leaving Mr. M'Turk's employ or that of his successors, and for the performance of that clause and all the other provisions of the agreement on the part of the plaintiff the plaintiff bound himself in the sum of £1,000, to be recoverable as liquidated and ascertained damages and not as a penalty. The defendant counter-claimed for £1,000.

Mr. Loehnis appeared for the plaintiff; and Mr. Bonsey for the defendant.

Mr. LOEHNIS contended that the £1,000 was not liquidated damages but a penalty, and that therefore the defendant could not recover against the plaintiff on the counter-claim. He cited "*Wilson v. Love*" (L.R., 1896, 1 Q.B., 626).

His LORDSHIP upheld this contention, and gave judgment for the plaintiff on the claim for £15 10s. 6d. (being the amount claimed less the month's salary claimed in lieu of notice), and on the counter-claim.

[Solicitors—Frère and Cholmeley, for the plaintiff; Letts, Brothers, for the defendants.]

Probate, Divorce, and Adm. Div. }
(Gorell Barnes, J.) }

1897.
Nov. 8.

THE CHIOGGIA.†

Ship—Bottomry—Necessaries—Prior charges—Marshalling assets.

Certain necessities men held not entitled to have the assets marshalled in their favour.

This was a motion by bottomry bondholders for payment out of Court to them of the net proceeds of the Italian ship *Chioggia* and her freight, and that they might be at liberty thereout to reimburse themselves the sum of £106 8s. 8d. paid by them to the crew for wages, and pay the master £101 and the Italian Consul £10 1s. 8d., and apply the residue in part satisfaction of the judgment recovered by them in respect of their bond.

Mr. Butler Aspinall appeared on behalf of the necessities men, and Mr. Balloch on behalf of the cargo owners.

MR. JUSTICE GORELL BARNES said,—The motion is supported by the owners of the cargo, but is opposed by the Goole Roping and Ship Chandling Company (Limited) and others who have supplied necessities to the said vessel and obtained judgment against the ship and freight in respect thereof. The bond was given on ship, freight, and cargo whilst the vessel was on a voyage from Demerara to Liverpool, on April 9, 1897. After the vessel arrived at Liverpool, an action was instituted by the bondholders against ship, freight, and cargo, in which an order was made that the plaintiffs should be at liberty to pay the wages and other amounts legally due to the crew (other than the master) and to take their rights, and in pursuance of this order the plaintiffs have paid crew's wages amounting to £106 8s. 8d. Judgment was obtained on July 12 last in this action for £1,897 19s. 6d., against the ship and freight and the owners of the cargo who had given an undertaking in respect of the cargo, but all questions of priorities were reserved. The necessities above mentioned were supplied at Goole, in January and April, 1896, before the vessel sailed for Demerara, and judgment was obtained on October 26 last against the proceeds of the ship and freight for the sum of £245 17s. 7d., subject to questions as to priority. The ship has been sold by the marshal, and the net proceeds of the ship and freight in court after deducting the marshal's expenses are £376 16s. 10d. The cargo was of the value of £2,052 10s. 9d. The suppliers of the necessities had no lien on the ship or freight, but having recovered judgment against these interests they contend that they have a right to have the assets marshalled in their favour as they have only the ship and freight to look to, while the bondholders have the security of ship, freight, and cargo. The value of the ship, freight, and cargo appears to be enough to meet all the claims and costs. The cargo owners, in whose interest the case was argued by Mr. Balloch, however contend that the bondholders have a prior right to the proceeds of the ship and freight as against the necessities men, and must exhaust these proceeds before coming on the cargo, and that if the assets are marshalled the effect will be to compel the cargo owners to pay the claim of the necessities men, with which they have no concern. It was not disputed that the claim of the bondholders has priority over that of the necessities men, nor that the cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted, but the contention of the necessities men, as above indicated, was that, the bondholders having two funds upon which they can claim—namely, the proceeds of the ship and freight on the one hand, and the cargo on the other, while the necessities men can only claim against the proceeds of the ship and freight, the latter ought, according to the doctrine of marshalling, to be paid first out of the last mentioned proceeds. But marshalling should not be permitted to the prejudice of third persons. According to equitable doctrines, in order to marshal not only should there be two creditors of the same person, but one of them should have two funds belonging to the same person to which he can resort; see "*Aldrich v. Cooper*" (2 Tudor's Leading Cases, 4 ed., p. 78) and "*Douglas v. Cooksey*" (2 Ir.R., Eq., 311). In the present case the two funds belong to different persons, i.e., the shipowners and cargo owners respectively, and in my opinion the necessities men have no right of marshalling. They have no equity to have the claims adjusted so as to compel the cargo owners in effect to provide the means of discharging the claim for neces-

* Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

† Reported by H. STUART MOORE, Esq., Barrister-at-Law.

sarios. The case of the "Edward Oliver" (L. R., 1 A. and E., 379), which was principally relied on by the counsel for the necessaries men, does not apply. Although the effect of that decision was to compel the cargo owners to pay a balance which was greater by the exact sum paid to the master out of the proceeds of ship and freight, the master had a lien on these proceeds for the amount of his claim, and it was merely decided that the rule that a master who has bound himself, as well as the ship and freight, for the payment of a bottomry bond, is not entitled to payment of his own claims in priority to those of the bondholders cannot be invoked by the cargo owners, and will not be acted on where the bondholder will not be prejudiced by the master being paid before him. The net proceeds in Court, £576 16s. 10d., must therefore be paid out to the bondholders, and thereout they must be directed to repay themselves the said sum of £106 Rs. 8d. and pay to the master the said sum of £101 and to the Italian Consul the said sum of £10 1s. 8d., on proof to the satisfaction of the Registrar that these sums are due, and to apply the balance in discharge *pro tanto* of the amount due under their judgment.

[Solicitors—T. Cooper and Co.; Waltons, Johnson, Bubb, and Whatton.]

Court of Appeal (Lindley, M.R., } 1897.
Chitty, L.J.) } Nov. 9.

IN THE MATTER OF AN ARBITRATION BETWEEN
THOMAS PALMER AND CO. AND HOSKEN, TREVITHICK,
POLKINGHORN, AND CO. (LIMITED).*

Arbitration—Question of law—Remitting award
for re-consideration—Special case—Jurisdiction
of Court over arbitrators—Arbitration Act,
1889, secs. 10, 11, and 19.

This was an appeal, by leave, of Hosken and Co. (Limited) from an order of Mr. Justice Day's, at Chambers, on July 23 last which raised a question of considerable importance to the commercial world bearing on the Arbitration Act, 1889. His Lordship ordered that an award of the directors of the Liverpool Corn Trade Association (Limited), dated June 16, 1897, and made in the above-mentioned arbitration and the matters referred to in the arbitration forming the subject matter of the award, should be remitted to the reconsideration of the directors. The learned Judge also ordered that the directors should state in the form of a special case for the opinion of the Court the following question of law arising in the course of the reference—namely, whether Palmer and Co. were entitled to be refunded by Hosken and Co. (Limited) in respect of the actual deficiency in a cargo of wheat below the bill of lading quantity, notwithstanding that the cargo was shipped in the hold and rebagged and weighed at even weights of less than 250 per draft, contrary to the terms of the contract. The dispute, which had been referred to arbitration in accordance with the rules of the Liverpool Corn Trade Association (Limited), arose between Palmer and Co., last buyers, and Hosken and Co. (Limited), sellers, and G. W. M'Near, of San Francisco, first seller, under a contract dated February 3, 1897, for a cargo of Californian wheat, shipped per the Port Douglas. The contract contained a provision that any deficiency on bill of lading weight was to be refunded by the sellers, and any excess over bill of lading weight to be paid for by the buyers. Palmer and Co. alleged that they received, ex ship, a number of bags short, equivalent to about £442 in value, and thus accordingly claimed to be compensated. The arbitrators awarded

that the buyers had no claim upon the sellers for deficiency in invoice quantity. The matter was brought before the directors of the Liverpool Corn Trade Association (Limited) by way of appeal against the decision of the arbitrators, and they confirmed the award. The matter was very fully discussed before the directors, and in the course of the proceedings a formal application was made to them on behalf of Palmer and Co. to state a special case for the opinion of the Court, under the 19th section of the Arbitration Act, 1889, on the point of law above mentioned. In the event of their refusing to state a case they were asked to adjourn the further consideration of the matter, in order that Palmer and Co. might apply to the Court for an order for the point of law raised to be settled. The directors were, however, of opinion that they were competent to deal with the case, and that there were no grounds or necessity for seeking the assistance of the Court. The matter was then brought before Mr. Justice Day, sitting in Chambers, when his Lordship made the order now appealed against.

Mr. E. Bray (with him Mr. R. M. Bray) was for the appellants; Mr. Carver was for the respondents.

At the conclusion of the arguments on the 26th ult., their Lordships reserved judgment, which was delivered this morning, dismissing the appeal.

The MASTER of the ROLLS, after stating the facts of the case, said,—Having stated these facts, the question arises as to the jurisdiction of the Court to make the order. That turns upon three sections of the Arbitration Act, 1889—namely, sections 10, 11, and 19. (His Lordship read them and continued).—Those are the sections which are material. The Arbitration Act, 1889, section 19, gives the Court very extensive powers over arbitrators beyond any which the Court previously possessed. It impliedly confers on the parties to an arbitration the right to apply to the Court for an order directing the arbitrator to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. The right thus conferred must be respected by the arbitrator; and if a party to an arbitration acting *bona fide* requests an arbitrator either to state a special case raising a question of law arising in the course of the reference and material for consideration, or to delay his award until the party can apply to the Court for an order directing a special case, and the arbitrator refuses to comply with either of such requests, the arbitrator is *prima facie* at all events guilty of a breach of duty towards such party. Such a breach of duty is *prima facie* misconduct on the arbitrator within the meaning of section 11 of the statute, and justifies the Court in setting aside the award under that section, or in remitting it for further consideration under section 10. Even in such a case as that supposed there may possibly be some grounds for justifying the refusal of the arbitrator, although it is not easy to imagine any. But it is obvious that, if an application for a special case is frivolous and is made merely for delay, an arbitrator will be perfectly right to refuse it, and will be upheld by the Court in so doing. This view of the law is quite consistent with "Dinn v. Blake" (Law Rep., 10 C.P., 388) and "Re Keighley and Co." (1893, 1 Q.B., 405). Section 19 has imposed new duties on arbitrators, and has consequently made a breach of such duties by them misconduct on their part; although before such duties existed their conduct could not be so regarded. In the present case the question of law raised by the buyer is material if there is a deficiency and is raised *bona fide* and not at all for delay. On the evidence before us a considerable deficiency seems established; but the parties are not agreed about the matter, and the Court does not know what the arbitrators' decision on this question really is. If they find there is no deficiency no question of law arises; but if

* Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

there is a deficiency the question of law raised by the buyer becomes all important. Under these circumstances the order appealed from should be slightly varied in its terms so as to direct the arbitrators to reconsider their award and to state whether there is a deficiency or not, and if there is then to state the special case. In substance, however, the order is right, and the appeal must be dismissed.

LORD JUSTICE CHITTY said,—The order under appeal cannot be supported under section 19 of the Arbitration Act, 1889, standing alone. The proceedings were closed by the award. Section 19 empowers the arbitrator to state a case "at any stage of the proceedings," but not after the award has been completed, and the power of the Court or a Judge to compel him to state a case, under that section standing alone, is on the construction of the section limited in like manner. This was the opinion of the Lords by whom the "Tabernacle" case ([1892] A.C., 298) was decided. The case, then, turns on section 10, read in connexion with the other sections of the Act, including particularly sections 11 and 19. Upon the principle of construction adopted in "Keighley's" case ([1893] 1 Q.B., 405) the Court or a Judge has power to remit an award to the arbitrator for reconsideration where there has been misconduct on the part of the arbitrator. Now, on the facts of this case I think that it was the duty of the directors to adjourn in order to give Palmer and Co. an opportunity to apply to the Court or a Judge for an order directing a special case to be stated for the purpose of raising the question of law. The application was made in good faith and on reasonable grounds; it was not made for the purpose of delay. According to the affidavits, a strong case was made out in the evidence adduced before the directors by Palmer and Co., the ultimate buyers, showing that on the discharge of the cargo from the ship there was a deficiency in the quantity stated in the provisional invoice, which was founded on the bill of lading; and if there was, in fact, a deficiency the contract between the ultimate sellers and buyers gave a right to the buyers to have the deficiency refunded; and the right to have the deficiency refunded was irrespective of any question of the liability of the ship. I am not stating these propositions for the purpose of deciding any point of law between the parties; but merely for the purpose of showing the nature of the case presented on Palmer and Co.'s behalf to the directors. The points of law, if they arise on the facts, will have to be considered and decided hereafter. Now, the appellants do not contest that the evidence as to deficiency on the discharge was such as is stated in Palmer's affidavit; wholly passing this evidence by, they state that there was evidence before the arbitrators of a due shipment of the full quantity of cargo referred to in the bill of lading, and they suggest that the arbitrators were not satisfied in fact that any deficiency in the outturn was proved. The chairman of the directors has made an affidavit; but it is silent on this point of fact. We are unable to say whether the directors were prepared to find as a fact that there was no deficiency. The order which we propose to make varying the order in Chambers will leave that matter open for the decision of the directors. If they find as a fact that there was no deficiency, the point of law sought to be raised will not arise. Our decision is quite consistent in principle with that of Lord Esher and the other members of the Court in "Re Keighley" ([1893] 1 Q.B., 405). There in dealing with the tenth section of the Arbitration Act, 1889, the Court referred to the corresponding eighth section of the Common Law Procedure Act, 1854, and the previous decisions on that section. But they had not to take into their consideration the new enactment of the 19th section of the

Arbitration Act, 1889, and the general effect of that enactment on arbitrations, and on the application of the tenth section to circumstances such as those before us. It seems to me that the Legislature intended to confer on the Court or a Judge a discretionary power to be exercised according to the circumstances of the case over arbitrators in reference to questions of law at least to this extent—namely, that when a request for a case is made in good faith, and on reasonable grounds, and the request is made for an adjournment for the purpose of applying to the Court or a Judge, the arbitrator by summarily making his award ought not to preclude, or attempt to preclude, the party from applying to the Court. In this case I think that the adjournment ought to have been allowed; that there was a duty cast on the directors which they failed to perform; and that in this sense there was misconduct on their part which justifies us in remitting the case to them in the manner already stated by the Master of the Rolls. In the "East and West India Docks" case (12 App. Ca., 738), decided before the Arbitration Act, 1889, was passed, it was held by the House of Lords that the Court had jurisdiction to give leave to revoke the submission if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction. The leave would have been given in the circumstances of that case if the parties had not come to terms that the arbitrator should state a special case for the decision of the Court. This jurisdiction, as was held in "James v. James" (23 Q.B., 12), is discretionary, and to be exercised according to the circumstances of the case. In the "East and West India Docks" case the discretion was exercised while the arbitration was still pending, and consequently the decision does not directly bear on the present case. Granting leave to revoke the submission is a strong measure and a drastic remedy. As the law then stood, it was considered the right mode of controlling the arbitrator in matters of law; and the case shows the importance attached by the House of Lords to keeping the arbitrator right in point of law; and in this respect it has an indirect bearing on the present case.

[Solicitors—Tilleards, for the appellants; Simpson and Cullingford, for the respondents.]

Q.B.Div. } 1897.
(Bigham, J.) } Nov. 9.

COOPERS AND OTHERS V. THE UNITED CONTRACT CORPORATION (LIMITED) AND DANZIGER.*

Contract—Agreement—Syndicate—Validity of Agreement.

The defendants entered into an agreement with a syndicate, consisting of eight persons, but the agreement was executed by seven only of them.

Held, it was not binding on the defendants.

The plaintiffs in this action were seven gentlemen, who, together with the defendant Danziger, constituted a syndicate called the Athelstane Syndicate. The action was brought to recover £700 under an agreement alleged to have been entered into by the members of the syndicate with the defendant corporation, by which the syndicate agreed to transfer to the corporation certain leases of mining properties in Western Australia. The agreement contained a proviso that if the corporation made default in paying the sum of £700 on account of the purchase money the syndicate should be entitled to recover £700 as liquidated

damages. The plaintiffs alleged that default had been made, and brought this action to recover £700. Danziger had refused to join in the action as one of the plaintiffs, and had therefore been joined as a defendant. The corporation raised several defences, but the only one calling for a report was that the agreement was not binding on the corporation because it had not been executed by Danziger as one of the syndicate.

Mr. H. D. Greene, Q.C., and Mr. Holmes Poulter appeared for the plaintiffs; Mr. Jelf, Q.C., and Mr. Ritter for the corporation; Mr. Mitchell Innes for Danziger.

MR. JUSTICE BIGHAM said that he was of opinion that the action could not be maintained. The question in the case was, Who was it that intended to contract with the defendant corporation? It was the Athelstane Syndicate. Who were the members of the syndicate? Danziger was one of them. The contract was signed by all the members except Danziger. His Lordship was of opinion that the defendant corporation did not intend to contract with some only, but with all the members of the syndicate, and an examination of the contract made that fairly clear. The object of the contract was to transfer to the corporation certain leases of property in Western Australia. The agreement recited that "Whereas the syndicate is possessed of or entitled to transfers of certain mining leases," and "whereas the syndicate has agreed with the corporation for the sale to it of the mining leases." It was obvious that the corporation throughout intended to contract with the persons who had control of the leases. The seven plaintiffs were not by themselves possessed of or entitled to the transfers of the leases. Then the contract went on to provide that the syndicate would sell and the corporation would buy. How could it be said that a contract signed by seven only of the eight vendors was a contract at all? Clause 3 made the matter still plainer, for it provided that the corporation should form a company for the purpose of acquiring the properties. Was it ever contemplated that the defendants should form a company to take over and work 92½ per cent. of these leases, for that would be the effect of excluding Danziger's interest from the contract? Finally, the contract provided that the liquidated damages should be paid to the syndicate. How, then, could these plaintiffs recover the damages, for they were not the syndicate? It was argued that Danziger was bound because he had given a power of attorney to two of the members to deal with the properties on his behalf, but the contract did not purport to be signed by them as attorneys for Danziger, and his Lordship was sure that these two members, when they signed, had no intention of dealing with more than their own individual rights. His Lordship added that he did not know where the morality of the case lay, but if the matter were probed to the bottom it was probable that the morality would be found to be nowhere. As, however, the case had to be decided according to the law there must be judgment for the defendants.

[Solicitors—Finch and Turner, for the plaintiffs; Alex. Ross, for the defendant Corporation; William Sparkes, for the defendant Danziger.]

Court of Appeal (Lindley, M.R.,) 1897.
Chitty and Vaughan Williams, L.JJ.) Nov. 10.

DAWSON V. THE AFRICAN CONSOLIDATED LAND AND TRADING COMPANY.*

Company—Directors—Appointment—Validity—Trivial Irregularities.

This was an appeal against an order made by Mr. Justice Ridley (acting as Vacation Judge) restraining the defendant company, and the three other defendants, Thomas Thompson, A. B. Nielsen, and E. G. Sanders, until judgment in the action or further order, from forfeiting, or declaring forfeited, all or any portion of the shares held by the plaintiff and the other shareholders in the company, and from selling, or allotting, or otherwise disposing of, such shares, or any of them, and from taking or continuing proceedings to recover the amount of an alleged call of 3s. on each share which had been made, or alleged to have been made, by the defendants Thompson, Nielsen, and Sanders, and from parting with any proceeds of the call money in their hands, or to be received under the call. It was alleged that the resolution making the call, which purported to be a resolution of the directors, was invalid, because the defendant Nielsen, who had been a director, had ceased to be such by reason of his having for a short period lost his qualification. There were only three directors—viz., the defendants Thompson, Nielsen, and Sanders. Nielsen had originally held the number of shares required by the articles as the qualification of a director, but for a short period—from the 17th to the 23rd June, 1897—he had ceased to hold any shares, and had been off the register of shareholders, and he had never been formally re-elected after he had regained his qualification. An objection was also raised to the defendant Thompson, on the ground that he was an undischarged bankrupt at the time of his appointment, and it was said that he, therefore, vacated his directorship immediately on his appointment. The articles of association contained the following clauses:—By clause 41, shares might, for non-payment of calls after notice, "be forfeited by a resolution of the directors to that effect." Clause 90.—"The number of the directors shall not be less than three, nor more than seven." Clause 93.—"No person, other than the first directors, shall be qualified to be a director who is not the holder of shares of the company of the nominal value of £200." Clause 96.—"The office of a director shall be vacated (*inter alia*) if he become bankrupt, or suspend payment, or compound with his creditors . . . or if he cease to hold the required amount of shares to qualify him for office." Clause 105.—"Until otherwise determined two directors shall be a quorum." Clause 114.—"All acts done at any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they, or any of them, were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

Mr. Alexander, Q.C., and Mr. W. Higgins were for the defendants, the appellants; Mr. Bramwell Davis, Q.C., and Mr. Stewart Smith were for the plaintiffs.

THE COURT allowed the appeal.

THE MASTER of the ROLLS said that the ground of the application to the Court was that there were several irregularities in the appointment of the directors who made the call. The suggestion was of nothing more nor less than some small irregularities; there was no radical defect in the appointment. Take one instance. Thompson was appointed to fill a casual vacancy, which the directors had power under the articles to fill up. At a subsequent meeting of the shareholders Thompson retired and was re-elected. It was said that the shareholders did not know that he was an undischarged bankrupt. But his Lordship thought it was perfectly competent to the shareholders to elect him, notwithstanding that fact. Then, as to

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

the defendant Nielsen ; for five days he had no shares in the company. He then re-acquired the necessary number of shares, and on June 24 he was present at a meeting of the directors, and acted as a director. There was a casual vacancy which the directors had power to fill up. They did not pass a formal resolution reappointing Nielsen, but they accepted him as a director. The objections were very trivial, and without a shadow of substance in them. It would be reducing clause 114 to a nullity to say that it did not apply to such trivial irregularities and trumpery defects as this. It was said that the case of "The Howbeach Coal Company v. Teague" (5 H. and N., 151) showed that such a protecting clause applied only in favour of strangers, and not as between the company and its shareholders. Nothing of that kind was to be found in the judgments in that case. There the Court held that the validating clause did not cure a radical defect in the appointment of directors. That was the foundation of the judgment, and the case was no authority for the proposition that clause 114 did not apply as between the company and the shareholders. His Lordship could see no reason for thus cutting down the meaning of the clause. Another point taken by the plaintiffs, which might be a serious matter, was that the call on the shares was made for an improper purpose—not for the benefit of the company, but with the object of repaying persons who had paid off the promoters. There was no evidence to support such a case ; it was a mere suggestion as to which the Court had nothing to rely upon. The appeal must be allowed, with costs in both Courts.

LORD JUSTICE CHITTY agreed. He would say one word about clause 114. That clause was not so framed as to render valid (as had been suggested in argument) any resolution passed by any persons whatever who were assuming to act as directors of the company—e.g., three strangers—who came into the board-room and said, we are the directors. The clause was addressed, as the language showed, to defects in the appointment of directors. And there was no evidence to show that the two other directors knew that Nielsen had parted with all his shares. There could be no question that if the defect had been pointed out they would have reappointed him a director. There was no defect in his original appointment, but he had become disqualified. There had been a loss of his qualification subsequently to his appointment. This was just one of the irregularities or defects at which clause 114 was aimed. And there was no distinction, as suggested, between the case of outsiders and the case of the company as against the shareholders. In "The Howbeach Coal Company v. Teague" it was quite clear that the persons who were professing to act as directors had not been well appointed, and it was quite open to say that their appointment was so radically bad that it was not within the protection of the validating clause. As to the point that the call was made for a fraudulent or improper purpose, the simple answer was that the evidence did not prove in any material degree the case which was shadowed out. His Lordship would reserve for future consideration the point (which did not really arise now) whether on such materials shareholders could sue for the rescission of the company's contract.

LORD JUSTICE VAUGHAN WILLIAMS entirely agreed. He only wished to add that it was not necessary to decide what was the true meaning of the words "shall be afterwards discovered" in clause 114, for there was no evidence that at the time of the passing of the resolution the directors knew of the irregularity.

[Solicitors—Burgoyne Watts and Co. ; Wyatt Digby and Co.]

Court of Appeal (Lindley, M.R.,) 1897.
Chitty and Vaughan Williams, L.J.J.) Nov. 11.

COOK V. WILLIAMS.*

Contract—Offer and acceptance—Withdrawal—Specific performance refused.

Decision of Kekewich, J. (13 *The Times* L.R., 481), affirmed.

This was an appeal from a decision of Mr. Justice Kekewich's, reported 13 *The Times* L.R., 481. The action was brought by Mr. John Mason Cook, the well-known tourists' agent, claiming specific performance of a contract, alleged to have been constituted by letters and telegrams, for the sale to him of the mansion and estate called Mount Felix, at Walton-on-Thames. The principal defendants to the action were the five daughters of the late Lady Watkin (the wife of Sir Edward Watkin) by her first husband, the late Mr. Herbert Ingram, formerly M.P. for Boston, and proprietor of the *Illustrated London News*. A sixth defendant was Mr. Osman Frederick Giddy, who carries on the business of estate agents in Pall-mall under the style of "Giddy and Giddy." The property in question belonged to the late Lady Watkin, and on her death, which occurred on May 26, 1896, the beneficial interest in it passed under her will or testamentary appointment to the defendants, her five daughters, for their separate use in equal shares. On May 31, 1896, shortly after Lady Watkin's death, the property was placed in the hands of Giddy and Giddy for sale on behalf of the intended executor, who had not yet been appointed, and on June 1 Giddy and Giddy wrote to the plaintiff, who was a client of theirs, informing him that the property was in the market. Subsequently telegrams and letters passed between the several parties containing negotiations for the purchase of the property by the plaintiff. In one of these letters, dated June 11, from Giddy and Giddy to the plaintiff, Giddy and Giddy said that, "although we can agree price now, we cannot make a formal contract until the executors are appointed and will proved." Ultimately, on June 23, Giddy and Giddy sent the plaintiff a telegram to the effect that they could "close for £21,250, subject to more formal contract," which would at once be prepared by the ladies' solicitors, and requesting him to send a cheque for the deposit. In reply to that telegram the plaintiff on the same day wrote to Giddy and Giddy that he was "willing to close at £21,250," and enclosed a cheque for the deposit. Giddy and Giddy thereupon informed the ladies by letter of the plaintiff's acceptance of the offer. A formal agreement was then prepared, but ultimately the ladies declined to execute it, and accordingly, on October 10, 1896, the plaintiff issued the writ in this action against the five ladies and Mr. Giddy as defendants. He claimed specific performance and damages against the first five defendants and, as against Mr. Giddy, the return of the deposit and damages for misrepresentation if it should appear that he had no authority to enter into the alleged contract. Mr. Justice Kekewich held that there was no contract in writing to satisfy the Statute of Frauds, and dismissed the action. The plaintiff appealed.

Mr. Cozens-Hardy, Q.C., and Mr. Jenkins, Q.C., appeared for the plaintiff ; Mr. Warrington, Q.C., and Mr. Beddall for two of the sisters ; Mr. Renshaw, Q.C., and Mr. Mark L. Romer for the other three sisters ; and Mr. Bramwell Davis, Q.C., and Mr. A. J. Allen for Mr. Giddy, the other defendant.

After having heard Mr. JENKINS, Q.C., at length for the appellant,

Their LORDSHIPS confirmed the judgment of the Court below without calling on counsel for the defendant.

The MASTER of the ROLLS said that there was no authority to make a complete contract, and Mr. Giddy had never represented that he had authority. In the very first letter he had himself stated that he had authority only to settle the price; the price had been settled; that was only one term of the contract, and the other terms had never been determined.

LORD JUSTICE CHITTY gave judgment to the same effect. He observed that the old fallacy that there could be an enforceable agreement to make an agreement seemed at the bottom of part of the argument.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Shaen, Roscoe, and Co.; Ince, Colt, and Ince; Allen and Son; Albert Myers.]

Chan. Div. }
(Kekewich, J.) }

1897.
Nov. 11.

LOCKE-KING V. THE URBAN DISTRICT COUNCIL OF WOKING.*

Highway—Extent of—Fences—*Prima facie* presumption.

Where a highway runs between fences, one on each side, the right of passage which the public have along it extends *prima facie*, and unless there be evidence to the contrary, over the whole space between the fences.

This was an action by a landowner in Woking, Surrey, raising the question whether certain strips of land adjoining his property and bordering a highway in Woking called Goldsworth-road belonged to him or to the defendants, the Urban District Council, as part of the highway. The road, or highway, including the strips, was bounded on each side by a hedge in the usual way, and it was proved that the public had habitually used and made tracks over the strips without interference. The plaintiff claimed a declaration that he was entitled to enclose the strips as being his property under a conveyance to his predecessor in title, whereas the defendants counter-claimed a declaration that the strips formed part of the highway. On Monday last his Lordship went down to view the *locus in quo* in the presence of the representatives of both parties.

Mr. Warrington, Q.C., and Mr. Gore Browne appeared for the plaintiff; and Mr. Warrington, Q.C., and Mr. E. M. Bray for the defendants.

MR. JUSTICE KEKEWICH, in the course of an exhaustive judgment, adverted to his having had the inestimable advantage of a view, which had put him in possession of the points in the plaintiff's case; and without presumption he might say he was then able to forecast within fair limits the answer proposed to be given by the defendants. He confessed he then formed a strong opinion which neither the evidence nor the arguments had been able to displace. It seemed to him as he looked at the roads, and the strips and hedges bounding them, that the case fell within the class of cases of which one that had been cited—"Reg. v. United Kingdom Electric Telegraph Company" (31 L.J., M.C., 186)—was as good an illustration as could be found. The answer through the eye of the mind was an obvious one. These strips were remarkably irregular; sometimes they were of considerable width, and sometimes they ran to a point; and the boundary hedges were themselves not very regular in shape. The conclusion he had arrived at he would take from the

judgment of Mr. Justice Crompton, in the case already referred to, which was heard before the Lord Chief Justice, Mr. Justice Crompton, and Mr. Justice Blackburn. The learned Judge said this:—"Taken altogether, I think it comes to this, that, *prima facie*, when you come to look at the highway running between fences, unless there is something to show the contrary, the public have a right to the whole, and are not confined to the metalled part of it." Was there anything "to show the contrary" in the present case? A great deal of the evidence appeared to him to be of no practical value at all; he believed there was no real question of fact in dispute between the parties, and there was no evidence that the case came within any of the exceptions mentioned by Mr. Justice Crompton in the case referred to. There was no rock or other obstruction which made any of the spaces impassable, or prevented them from being used by the public, nor anything to prevent the application of the presumption of law to which he had referred. It was said that the strips of land had been conveyed to the plaintiff's predecessor in title, but if they formed part of the highway, there could be no interference with the exercise by the defendants of their statutory power to maintain them as part of the highway for the benefit of the public. Then it was said that the strips formed part of the waste of the manor of Woking, and that the rule of law already cited would not apply to such a case. It might be assumed that if they were proved to be part of the waste the rule of law would not apply. But there was no sufficient evidence that they ever were part of the waste; the evidence on the point was extremely slight. Then descriptions in Acts of Parliament had been relied upon, but it could not be seriously argued that because an Act may have described the strips as part of the Manor of Woking, therefore that was so. If they were not in fact part of the waste, what was the value of the description in an Act? After referring to further points, including the circumstance that there were definite public tracks across the strips, his Lordship said he based his conclusion entirely upon the direct application of the rule as laid down by Mr. Justice Crompton. He would, therefore, make a declaration that the strips of land in question claimed by the plaintiff formed part of the highway known as Goldsworth-road, and the plaintiff must pay the costs of the action and counterclaim.

[Solicitors—Beaumont, Son, and Rigney, for Paine and Brettell, Chertsey; N. Mossop.]

Chan. Div. }
(Romer, J.) }

1897.
Nov. 11.

ATTORNEY-GENERAL V. TEDDINGTON URBAN DISTRICT COUNCIL.*

Local Government—Public Health Act, 1875, sec. 175—Power to purchase lands—Sale of "lands not required for the purpose for which they were acquired."

This was an action against the Teddington local authorities, at the relation of Mr. James Powell, a resident in the defendants' district, to compel the defendants to sell a piece of land which adjoined the plaintiff's property, on the ground that it was no longer needed for the purpose for which it had been bought—viz., the disposal of sewage. The land in question formed part of a piece of land consisting of some 26 acres, which had been acquired in the year 1887, with the sanction of the Local Government Board, under the

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

Public Health Act, 1875, for the purpose of permanent sewage works, and most of which had been used for the erection of tanks and machinery and for filtration beds for the purpose of the reception and disposal of sewage. About 2½ acres of the land had been sold as not being required for sewerage purposes—in accordance with section 175 of the Public Health Act—but another part had been utilized by the defendants as a place of deposit for refuse collected from dustbins, to receive which trenches had been dug to the gravel surface and drawn to the level of the sub-soil. A mound had also been raised. The plaintiff alleged that the defendants had also entertained a scheme for turning another part of the unused land into a public recreation ground, with a lake, bathing-place, and promenade, and had constructed a temporary footpath over the land. The plaintiff alleged that the pieces of unsold land were, in the words of section 175 of the Public Health Act, 1875, “not required for the purpose for which they were acquired”—viz., the reception and disposal of sewage, and submitted that they should be ordered to sell the same in accordance with the section. The defendants alleged that their mode of using this land was not permanent, but merely temporary, and not such as to prevent the land from being used hereafter for sewage purposes; and, moreover, that having regard to the rapid increase of Teddington in extent and in population, and to the necessity of having reserve land available for these purposes, the land was, in truth, still needed for the purpose for which it had been acquired. The plaintiff claimed a declaration that the land in question, in all some eight acres, was not required for the purpose for which it had been acquired under the Act of 1875, an order directing its sale under section 175, and an injunction restraining the defendants from appropriating or using any portion as a site for a public promenade or recreation ground, or for ornamental water, or for a footpath, or for the purpose of the deposit of house refuse, or for any purpose other than that of the reception and disposal of sewage.

Mr. Neville, Q.C., and Mr. F. R. Y. Radcliffe appeared for the plaintiff; Mr. Macmorran, Q.C., and Mr. E. Lewis Thomas for the defendants.

MR. JUSTICE ROMER said that the first question which he had to consider was whether any part of the land acquired by the defendants for the sewage purposes was no longer required for those purposes. Bearing in mind the rapid growth of the defendants' district and its rapidly increasing population, he found that all the land should be kept and would be ultimately required for sewage purposes only; or, in other words, that section 175 of the Public Health Act, 1875, did not apply to any portion of the land. No doubt at the time when the land was purchased with the sanction of the Local Government Board it was contemplated as shown by the plan, that part of the land purchased would not be required for sewage purposes. But circumstances had changed, and if he were to hold that the portions contemplated at the date of the purchase as not being then required to be retained for sewage purposes were on that account never to be so used at all he failed to see what right the local authority had to acquire the land at all. In his view the local authority did acquire the whole of the land for sewage purposes, and they were not conclusively bound to sell the land marked on the plan as not required if circumstances changed and it was found that they did require it. Apparently they had now changed their minds, and, in his opinion, they had come to a wise conclusion, and the land was required for sewage purposes. No doubt the council, until very recently, had thought that the whole of the land would not be required, and if they had committed themselves irrevocably to the position that part was not required perhaps section 175 would

have applied. He had considerable doubt on the point, but he should give the council the benefit of the doubt; but he thought they were not precluded from saying that the whole land was required, and they were entitled to retain it. Undoubtedly what they had done had misled the plaintiff; and his Lordship would remember that when he came to deal with the question of costs. The next question which arose was whether the defendants had dealt with any part of the land so that it could not be used for sewage purposes. The only parts which that referred to were those on which the trench and mound had been made. Although he thought these works were improper, yet, at the same time, they did not make the land on which they were wholly unfit for sewage purposes. The plaintiff was not, therefore, entitled to any declaration that any portion of the land should be sold. A further question arose. The plaintiff or relator said that the defendants had dealt with parts of the land improperly, and ought to be restrained. With the exception of the mound and trench, nothing had been done of a permanent character. They had made a footpath and put a few benches, and contemplated using parts of the land as a temporary park, and these things only referred to parts not immediately required for sewage purposes. The plaintiff, however, argued that even such temporary use was not permissible, and claimed an injunction. He thought it right to state shortly his views with reference to the interim user of the land not required for sewage purposes. He agreed that the defendants could not apply the land to or use it for any purpose inconsistent with the purposes for which it was acquired. But those purposes did not require the immediate user of every part of the land for sewage purposes. Some part only was required for immediate sewage works, and the remaining part had to be retained because needed hereafter for such works. Pending the actual application of this remaining part for such purposes the defendants could retain it, and one of the purposes for which it was required might be said to be such retainer. But, of course, while so retaining it, they could not use it or deal with it in such a way as to prevent user for sewage purposes or substantially interfere with its immediate user whenever it was needed for these purposes. But, subject to such exception, while retaining the land, his Lordship did not see how it was inconsistent with the purpose for which they had acquired it to use it in any lawful manner in which in its then condition it could be used, provided that such user did not substantially interfere with the main purpose of drainage for which the land was ultimately wanted, and he knew of nothing which made it unlawful for a council such as these defendants from permitting vacant land in their possession, and not at the time required for the ultimate purpose for which they had acquired it, to be temporarily used as a recreation-ground, provided care was taken to prevent any rights from being acquired over it by the public or otherwise which would prevent or interfere with the council's using the land for its ultimate purpose whenever required. The case of “Attorney-General v. Corporation of Southampton” ([1853] 1 Giff., 363) did not interfere with that view. There the land had to be held by certain trustees substantially for purposes of recreation, and it was held that these trustees could not use it even temporarily for purposes of a fair or for the sale of cattle, because the land could not be used for the purposes of the trust except for recreation, and it was just as much a breach of trust to use it temporarily as permanently. Nor was the judgment of Lord Justice Cotton in “Bayley v. Great Western Railway Company” ([1884] L.R. 26, Ch.D., 450) inconsistent. It might also be added that he had nothing to do in the present case with the misapplication of ratepayers' money. He was only concerned

with the lawful user of the land. With regard to the works proposed by the defendants to be put on the land—namely, campshedding, making up the frontage, making a lake and, above all, a bathing-place—when the correspondence was looked at, and all the facts, his Lordship thought that the defendants had contemplated using parts of the land not for sewage purposes, nor for justifiable interim purposes. The defendants now asserted that they had no intention of doing anything which would prevent them from properly using the land for its ultimate purposes. He accepted that statement. The mound and trench were, however, most injurious to the proper user of the land for sewage purposes, and were inconsistent with such user. As he understood that the defendants would give an undertaking not to use the land for such inconsistent purposes, he made no order except that, on the defendants' undertaking not to use the land for dustbin refuse, the defendants should pay the costs of the action.

[Solicitors—Powell and Rogers; G. C. Sherrard.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) } 1897.
Nov. 12.

COONEY V. EDEVEAIN.*

Defamation—Libel—Fair comment, what is—
Question for jury.

This was an application for judgment or a new trial in an action brought by Mrs. Charlotte Cooney, professionally known as Miss Lottie Collins, against the proprietor of a weekly periodical called *Society* to recover damages for an alleged libel published in the issue of his paper of December 5, 1896. The trial was reported in *The Times* of July 17. The defence was that the words complained of were fair comment on a matter of public interest. At the time of the publication of the alleged libel the plaintiff was engaged at the Palace Theatre, where she sang two songs called "The Little Widow" and "The girl on the Ran-dan-dan." On December 5, 1896, the alleged libel appeared as a paragraph in *Society*, and ran as follows:—"At the Palace Theatre, Morton Console, there is quite the best variety entertainment in London, the sort of show, I mean, to which a man can with impunity take his maiden aunt. There is nothing coarse about it anywhere, and the only touch of vulgarity is supplied by Miss Lottie Collins, who successfully reproduces in two of her songs, at least, the methods, far from pleasing, of the age which to its eternal sorrow used to applaud such monstrosities as the 'Lion Comique,' now happily very nearly dead. One of her songs, 'The Little Widow'—no connexion, I am happy to say, of our very own sweet lady—is written in gross bad taste, which is not redeemed even by the singer's surprising agility and rose red petticoats. To my mind, Miss Collins has never done anything so well since 'Ta-ra-ra-boom-de-ay.' " The action was tried before Mr. Justice Hawkins and a special jury, when the jury found a verdict for the plaintiff, damages £25. The defendant applied for judgment or a new trial.

Mr. JELF, Q.C. (Mr. E. U. Bullen with him), appeared for the defendant, and, after reading the above paragraph, said that the plaintiff at the trial admitted that the hit of the song, "The Little Widow," was that a lady appeared in very deep mourning and bemoaned the loss of her first and second husbands, and then suddenly began dancing, when the sadness passed away and gave place to gaiety, and she showed a red petticoat beneath her black dress. Some people might

consider that vulgar. No jury could find that this was not fair comment, and the learned Judge ought to have withdrawn the case from the jury. Fair comment was no libel, and therefore it came within the rule that it was for the Judge to say whether the publication complained of was or was not capable of being a libel. The learned counsel then read the two songs, and said that half the people in the world might say that there was vulgarity in those songs, taken in connexion with all the circumstances, though probably the other half would say that there was no vulgarity. If this sort of criticism was not allowed then criticism might as well cease altogether. He referred to "*Merivale v. Carson*" (20 Q.B.D., 275).

Mr. E. U. BULLEN followed on the same side.

Mr. H. Kisch, for the plaintiff, was not called upon.

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said that, in his opinion, the application must be refused. This was an action for libel, and the question was whether the defendant had published a libel or not. The jury found for the plaintiff, damages £25. He would like, first of all, to state his opinion as to the law applicable to the case. A plaintiff went into Court and produced a document which he alleged to be libellous, and proved the publication by the defendant. If the document was incapable of being a libel the Judge should withdraw the case from the jury. In such a case the document could not in any view of it be a libel. But if the document was capable of being a libel no Judge in the kingdom could nonsuit the plaintiff. If the document was capable of being a libel, then the question whether it was or was not fair comment was, as a general rule, one for the jury. Was the document in this case capable of being a libel? In his opinion it was. The case was therefore properly left to the jury. Then, when the jury came to consider whether the document was or was not a libel, they might take into consideration whether it was fair comment. He could not say that the jury were wrong in this case.

LORD JUSTICE RIGBY concurred.

LORD JUSTICE COLLINS said that fair comment was no libel, and there might possibly be cases, though he did not wish to decide the point and expressed no opinion upon it, in which it might be the duty of a Judge to withdraw the case from the jury. But this was not one of those cases.

Q.B. Div. (Wright and }
Kennedy, J.J.) } 1897.
Nov. 12.

EX PARTE PAGE.*

Mandamus—Prerogative writ—Application refused on the ground that an action for a mandamus could be brought.

In this case the HON. ALFRED LYTTELTON moved, on behalf of Mr. Page and another, the trustees of the will of Mr. John Martin, for a rule nisi for a mandamus to Lord Bateman and the steward of the manor of Kingsland, in the county of Hereford, to compel them to admit the applicants to the holding in the manor formerly held by the late Mr. Martin. The late Mr. Martin carried on the business of farmer in partnership with his brother, and had only a partnership interest in the stock and chattels of the business. One of the incidents of the copyhold property was a heriot. In respect of them a question was raised by the lord of the manor, who refused to admit the applicants to a portion of the property except on the payment of 20

*Reported by W. F. HARRY, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

guineas in lieu of a heriot. The solicitor of the applicants wrote formally demanding admittance, and offering to hand over any article of the testator's wearing apparel which the lord of the manor might select. This was refused. Hence the present application. Mr. Lyttelton said it was an important question of law whether in the total absence of custom a lord of the manor could compel an applicant to pay money instead of a heriot. The only heriot possible in this case was clothing, because the stock and business chattels were not the sole property of the deceased, and he had no jewels.

MR. JUSTICE WRIGHT interposed, and suggested that this was not the proper case for a prerogative writ of *mandamus*, and referred to a case in which it was decided that, since an action for a *mandamus* could be brought, the prerogative writ should only be granted in cases of public concern. It was of great importance to keep the practice regular, and not to grant a writ unless there was a strong balance of convenience in its favour.

MR. LYTTLETON argued that this process was a much more convenient method than an action for a *mandamus*. The point was so short and the facts so simple that an action was not really necessary.

The COURT, however, refused the application.

[Solicitors—Whitehead, Marshall, and Co., for H. J. Southall, for the applicant.]

Q.B. Div. } 1897.
(Wills, J.) } Nov. 12.

MAYOR, &C., OF THETFORD V. NORFOLK COUNTY COUNCIL.*

Local Government—County Council—Expenses of Quarter Sessions—Local Government Act, 1888, sec. 84.

This was an action brought by the Corporation of Thetford against the Norfolk County Council for money paid by the corporation for the council.

Mr. Crump, Q.C., and Mr. Rufus Isaacs appeared for the plaintiffs: Mr. Channell, Q.C., and Mr. W. Wills were counsel for the defendants.

The question was whether the obligation to pay the costs and expenses of the quarter and petty sessions of the borough of Thetford, including the salary of the Recorder and the fees of the clerk of the peace and the salary of the clerk to the borough justices, together with the expenses incurred in the necessary attendance, warming, cleaning, and lighting of the Guildhall and retiring rooms when used for the purposes of the quarter and petty sessions, was transferred from the plaintiffs to the defendants by the Local Government Act, 1888. The action was tried on the 26th ult., when judgment was reserved.

MR. JUSTICE WILLS, in giving judgment, said that Thetford was a borough of less than 10,000 inhabitants. Section 38 of the Local Government Act, 1888, dealt with boroughs of less than 10,000 inhabitants. Up to the passing of that Act the salaries of the Recorder and of the clerk of the peace fell on the borough, and they must still be paid by the borough unless there was something in this Act transferring them to the county council. He could not find anything in the Act that either expressly or by implication effected such a transfer. It was said that this involved a hardship, but the borough could petition her Majesty to revoke the grant of quarter sessions on the ground that they were unnecessary. The only difficulty was

the case of " *Ex parte* the County Council of Kent and Council of Sandwich " ([1891] 1 Q.B. 390), but that case could not have been exhaustively argued, and was founded on the mistaken supposition that the clause in section 35, which expressly provided for the payment of the cost of quarter sessions in boroughs of over 10,000 inhabitants, was also to be found in section 38. It was suggested in that case that section 169 of the Municipal Corporations Act, 1882, was repealed, but the alteration really applied only to the larger boroughs. There remained the question of the salary of the clerk to the justices in petty sessions. This was dealt with by section 84 of the Act—a section which had been considered in " *In re* the County Council of Herefordshire and the Council of Leominster " ([1895] 1 Q.B. 43), where it had been decided that the salary of the clerk to the justices in petty sessions now fell on the county council. The judgment would be a declaration that, so far as regarded the salaries of the Recorder and the clerk of the peace, the borough of Thetford was liable, but as regarded the salary of the petty sessions clerk the county council was liable, and there would be judgment for the plaintiffs for such portion of the arrears of his salary as could be recovered consistently with section 68, sub-section 9, of the Act—namely, such a sum as was in arrear at the time the action was brought, limited to six months before that time. With respect to the claim for the salary of clerk to the visitors and magistrates as regarded lunacy matters, that was expressly cast upon the borough by sections 177 and 178 of the Lunacy Act, 1890. The other items of expenditure on quarter sessions were also payable by the borough. The costs of each of the issues would follow the event.

Court of Appeal (A. L. Smith,) 1897.
Rigby, and Collins, L.JJ.) } Nov. 13.

FIELDING AND CO. (LIMITED) V. COREY AND OTHERS.*

Bill of Exchange—Notice of dishonour—Time—Principal and agent—Bills of Exchange Act, 1882, sec. 49, subsec. 12 (b).

This was an application for judgment in an action tried before Mr. Justice Ridley and a jury or for a new trial. The action was brought by endorsees of a bill of exchange for £120. The defendants were the drawer, the acceptor, and an endorser. The defendant, who was sued as endorser, Mrs. Laura Emma Edwards, pleaded that she had not received due notice of dishonour. The bill was payable at the National Provincial Bank of England, and it was presented there for payment on Saturday, November 10, 1894, by the London and Westminster Bank, as agents for the County of Gloucester Bank. The plaintiffs kept their banking account at the Cardiff branch of the County of Gloucester Bank, from which branch the bill had been sent to the London and Westminster Bank. The bill having been dishonoured on presentation, the London and Westminster Bank on Monday, November 12, gave notice of its dishonour by returning it to the County of Gloucester Bank, but by inadvertence they addressed their letter to the Cirencester branch of that bank instead of the Cardiff branch. Early on the next morning, November 13, having discovered their mistake, they sent a telegram to the Cardiff branch of the County of Gloucester Bank giving notice of the dishonour of the bill. Subsequently notice of dishonour was given by the plaintiffs to the defendant, Mrs. Edwards, but her case was that the London and West-

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

minster Bank had not given notice to their principals in accordance with the requirements of the Bills of Exchange Act, 1882. By section 49, subsection 12, of that Act—"The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless . . . (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter." By subsection 13—"Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder." Mr. Justice Ridley at the trial gave judgment for the plaintiffs. The defendant appealed.

Mr. Woodfin appeared for the defendant; Mr. Ashton Cross and Mr. Edmondson for the plaintiffs.

The COURT (Lord Justice Collins dissenting) dismissed the appeal.

LORD JUSTICE A. L. SMITH said the defendant's contention was that there was a blot in the plaintiffs' case, in that the London and Westminster Bank had not given due notice of dishonour to their principals on November 12 as required by the statute. They did give notice on that day to the right persons, but they directed it to them at a wrong address. On the next morning they rectified this error by sending a telegram to the right address. He thought that he could not disjoin these two acts, but ought to treat them as one continuing act, and in his opinion the requirements of the statute had been satisfied. He therefore agreed with the judgment of Mr. Justice Ridley.

LORD JUSTICE RIGBY was of the same opinion. A notice of dishonour need not be in any particular form, and in his opinion the matter ought to be treated as one of substance. If the Act had said that the address was to be an essential part of the notice, different considerations would arise. But in his opinion the question was whether the notice came to the knowledge of the person to whom it was addressed in proper time. If the putting of a wrong address did not prevent the notice from arriving in proper time he could not say there had been a failure to comply with the Act. Here the notice was received in proper time.

LORD JUSTICE COLLINS said it was with great diffidence that he differed from his learned brethren. But the point on which he differed was this, whether different branches of a bank ought to be treated as one and the same person or as different persons for the purpose of receiving notices of dishonour of bills of exchange. He thought they ought to be treated as different persons. In his opinion the only principals of the London and Westminster Bank were the Cardiff branch of the County of Gloucester Bank, and when the London and Westminster Bank sent notice to the Cirencester branch they sent notice to persons who were not their principals. He therefore could not see that they had satisfied the obligation imposed on them by subsection 12 (b) of section 49. It was said that their error was cured by the telegram on the next day. But that telegram clearly was not a good notice in itself, in accordance with the statute, and in his judgment it could not be used to supplement the wrong notice.

[Solicitors—Windybank, Samuel, and Behrend, for the plaintiffs; G. J. Brocklesby, for the defendants.]

Chan. Div. }
(Romer, J.)

1897.
Nov. 13.

RALEIGH V. GOSCHEN.*

Trespass—Crown—Prerogative.

Action against Lords of the Admiralty as an official body held not maintainable.

In this case, recently reported in *The Times* (see *The Times* of November 5, 1897), judgment was delivered today. The action was brought (in the words of par. 1 of the statement of claim) for the purpose of establishing, as against the Lords Commissioners of the Admiralty and the Director-General of Naval Works, that they were not entitled to enter upon, or take possession of, or to acquire by way of compulsory purchase, certain land, the property of the plaintiffs, in the neighbourhood of Dartmouth, for the purpose of establishing there a training college for cadets. The plaintiffs allege (par. 12 of the statement of claim) that the defendants had entered upon a portion of the estate and had placed certain stakes thereon, with a view to the acquisition of the site for the training college, and (par. 17) that the defendants had, by their servants and agents, wrongfully entered upon the property, and surveyed and staked out the site, and threatened and intended to take possession, and they alleged that the defendants contended that they had statutory powers of compulsory acquisition, which they threatened and intended forthwith to exercise, and (par. 18) that they, the plaintiffs, were advised that the defendants had no right, either by statute or otherwise, to enter on the land, &c., or to acquire it by compulsory purchase. The defendants admitted that the site had been surveyed and marked out, but denied that they or any of them had done the acts complained of, and they alleged that what had been done had been duly performed by the officers of the Lords of the Admiralty acting by the direction of the Executive Government under the Crown. They submitted that the Lords of the Admiralty were entitled to exercise by statute compulsory powers. They, however, made a further and preliminary submission—namely, that the Court had no jurisdiction to entertain the action for tort against Ministers of the Crown sued in that capacity. The plaintiffs asked leave to amend, if necessary, by also suing the defendants individually, and by adding as parties two marines and a civil engineer who had staked out the site.

The ATTORNEY-GENERAL (Sir Richard Webster, Q.C.), Mr. A. T. LAWRENCE, Q.C., and Mr. INGLE JOYCE, for the defendants, submitted that the action was not maintainable, and that leave to amend should be refused.

Mr. Swinfen Eady, Q.C., and Mr. S. Dickinson appeared for the plaintiffs.

MR. JUSTICE ROMER said:—I have already stated some general principles of law which, in my opinion, are applicable to cases like the present. I will apply those principles and point out shortly what kind of action the plaintiffs might have maintained and what kind they were not entitled to bring against the present defendants in respect of the matters referred to in the statement of claim. The plaintiffs are complaining of an alleged trespass said to have been committed on their land, for which they claim damages, and they ask for an injunction to restrain further trespass on the land, which they say is threatened. Now, in the first place, inasmuch as the plaintiffs could not sue the Crown for a past or threatened trespass, they could not in respect of any trespass sue the defendants in the capacity of agents for or as representing the Crown. Again, the plaintiffs could not sue the defendants merely on the

footing that, as representing a branch of the Executive Government, the defendants were responsible for a trespass committed or threatened by some officials or persons in the employment or under the control of the Government or of the Admiralty as a department of the Government, even though those officials or persons purported to act on behalf of or as representing the Crown or the Government or the Admiralty. And further, even if some of the defendants, acting on behalf of the Crown or of the Government or of the Admiralty, had committed or threatened a trespass, that would not justify the plaintiffs in suing the other defendants, if they had taken no part in the transaction. On the other hand, the plaintiffs could sue any persons actually committing or threatening the trespass, even though those persons only acted on behalf or by the authority of the Government or of the defendants as representing the Admiralty. Moreover, I do not think the rights of the plaintiffs would of necessity be confined to an action against those actually committing the trespass, who might be some very humble persons. If a trespass was committed by those persons by the order or direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship unlawfully to have ordered some of his sailors to take possession of a house and they obeyed his order, he could be sued for the trespass, even though he himself remained on board his ship and did not personally go into the house. So if any of the defendants had themselves ordered or directed the alleged trespass now complained of by the plaintiffs, and it was in consequence of such order or direction that the alleged trespass took place, or if any of the defendants threatened to order or direct further trespass, then they could be sued. But in this case they could be sued not because but in despite of the fact that they occupied official positions or acted as officials. In other words, to sum up shortly the result of the above by the use of convenient phraseology, the plaintiffs in respect of the matters they are now complaining of could sue any of the defendants individually for trespasses committed or threatened by them, but they could not sue the defendants officially or as an official body. The question then before me narrows itself down to this, Is the present action one against the defendants as an official body, or is it an action against them as individuals? And in dealing with this question I ought also to consider the summons to amend issued on behalf of the plaintiffs, and the affidavits filed in support of that summons. Now, on the facts before me, and dealing fairly with the writ and statement of claim, the conclusion I come to is, that the present action was intended to be and is a claim against the defendants in their official capacity, and not as individuals. They are described and sued, except as regards the defendant Major Raban, as the Lords Commissioners of the Admiralty, and he is described and sued as the Director-General of Naval Works. Throughout the statement of claim no distinction is drawn between them, and no act, order, direction, or threat by any of them individually is alleged. Paragraph 1 of the statement of claim sets forth the general nature of the plaintiffs' case, and shows that what the plaintiffs wish to do is to have some general questions decided as between them and the defendants as representing the Admiralty. The correspondence referred to in the statement of claim is with the Admiralty, or with certain officials in an official capacity only. Then so far as regards trespasses alleged to have been actually committed or threatened, the only material paragraphs are those numbered 12 and 17. Paragraph 12 alleges that the defendants had entered upon some portion of the plain-

tiffs' estate and placed stakes there. Now it was admitted before me on behalf of the plaintiffs that it was not suggested or intended to be suggested that the defendants themselves had done this. The paragraph shows that, in this action, when an act of the defendants is referred to what is meant and intended to be alleged is the act of the defendants treated as an official body—that is to say, as a body representing the Crown or Government or as responsible for the acts of all officials or persons acting or purporting to act on behalf of the Crown or of the Government or of the Admiralty. Then all that is contained in paragraph 17 is a general allegation that the defendants by their servants and agents have trespassed and threatened to trespass again. That is to say again, as I understand it, acts alleged against them as an official body on the footing above mentioned. But any possible doubt as to what kind of action this is appears to me to be set at rest by the plaintiffs' summons to amend their writ and subsequent proceedings, and the affidavits filed in support of that summons. The affidavits state that the alleged trespass was committed by two marines acting under the directions of Mr. Shortridge, a civil engineer employed in her Majesty's dockyard at Devonport. Those affidavits do not allege any personal participation in the alleged trespass or any threat of future trespass by, or by the order or direction of, any of the defendants. Then the summons asks for leave to amend the action by suing the defendants in their individual as well as in their official capacity, and by adding the two marines and Mr. Shortridge as co-defendants. In other words, the summons proceeds on the footing that the present action is one against the present defendants in their official capacity only, and I think the plaintiffs' own view as to their action is the correct one. It follows that in my opinion the present action as it stands is misconceived and will not lie, and the only further question I have to consider is whether I ought to give the plaintiffs leave to amend as asked by them. On consideration, I think I ought not. For what the plaintiffs are seeking to do is to change one action into another of a substantially different character. Apart from the fact that the present action cannot be sustained, while the other might lie, an action against the defendants in their official capacity, supposing it to lie, would differ in most material respects from an action against them as individuals, as will be seen when consideration is paid to questions of discovery, and to the form of any interlocutory injunction or final judgment that could be obtained by the plaintiffs, and as to how and against whom such injunction or judgment could be enforced. Moreover, as pointed out above, the affidavits in support of the summons to amend do not venture to allege any claim against any of the defendants individually. For these reasons I think I ought not to allow leave to amend as asked. If the plaintiffs have in fact any claim against any of the present defendants individually, that claim will be more properly and conveniently enforced in a separate action. At the same time I will take care to provide by my order that the dismissal of the present action shall not prejudice any just claim the plaintiffs may have. I therefore order the present action to be dismissed with costs, without prejudice to any claim the plaintiffs may have against the two marines or Mr. Shortridge or against any of the defendants individually in respect of any trespass committed or threatened. The costs of the summons and of any pending interlocutory application will be costs in the action.

Leave to appeal was asked by the plaintiffs and given.

[Solicitors—Petch and Smurthwaite: The Solicitor to the Treasury.]

Q.B. Div. }
(Mathew, J.) }1897.
Nov. 13.

THOMAS V. LONDON SEWING MACHINE COMPANY.*

Penalty—Liquidated damages—Breach of contract—Wrongful dismissal.

This was an action tried before Mr. Justice Mathew and a special jury on November 11, 1897. A report appeared in *The Times* of November 12. The plaintiff claimed damages for wrongful dismissal, or in the alternative £1,000 under the terms of the agreement under which the plaintiff was employed by the defendants. The agreement, which was dated May 13, 1896, provided that "if at any time during the said term the company shall by notice determine the agreement and the engagement hereby created without assigning any reason the company shall thereupon pay to the said Thomas, by way of compensation and in full discharge of his rights and claims, the sum of £1,000." The jury found that the plaintiff was not properly dismissed either because he was unfaithful to his employers or because he was incompetent. The question of damages was not left to them. The defendants contended that the sum mentioned in the agreement was in the nature of a penalty and not recoverable at law. This question now came on for argument on further consideration.

Mr. S. Lynch and Mr. Bennett Calvert appeared for the plaintiff; and Mr. Kemp, Q.C., and Mr. S. O. Buckmaster for the defendants.

Mr. KEMP, Q.C., relied on the words "without assigning any reason." The defendants assigned a reason.

Mr. JUSTICE MATHEW, without calling on counsel for the plaintiff, said that the jury found the defendants' reason to be a bad one, which was equivalent to saying it was no reason. In any case he, the learned Judge, would have had great difficulty, in view of the terms of the agreement, in assessing the damages at any other sum than £1,000. The verdict must therefore stand and judgment be entered for the plaintiff for £1,000.

Q.B. Div. }
(Mathew, J.) }1897.
Nov. 13.THE MERSEY DOCKS AND HARBOUR BOARD V. R.
HUNTER CRAIG AND CO.*Shipping—Port dues on goods—Upper Mersey
Dues Act, 1860—Construction.

This was a claim by the plaintiffs for £1 5s., being town dues at the rate of 8d. per ton on 37½ tons of flour alleged to have been imported into the port of Liverpool by the defendants and landed at the Duke's Dock in the said port in the following circumstances:—The flour in question formed part of the cargo of the ship *Oliva*, which was a general ship carrying goods to Manchester, and was brought from Fiume, a place beyond seas, under a bill of lading in which the ship was described as "bound for Liverpool, via Manchester." The vessel proceeded to Liverpool by the Manchester Ship Canal, and the whole cargo, including the flour, was discharged and landed at Manchester. The flour was subsequently carried in lighters by the Manchester Ship Canal and across the River Mersey and into the Duke's Dock, and there landed in accordance with the terms of the bill of lading. In accordance with the usual practice of the Customs

authorities when the *Oliva* arrived at Manchester the flour was entered with the Customs there, and when it was carried to Liverpool no entry was there made or required by the Customs. The corporation of Liverpool from time immemorial levied certain "town dues" upon all goods imported into the port of Liverpool. The port of Liverpool is of very wide extent and includes the waters of the Mersey and Weaver as far up as the bridges at Frodsham and Warrington, and the corporation claimed that these dues were payable on all goods landed in any part of the port. No service was performed in return for these dues. As Widnes, Runcorn, and Garston, which were all within the port, grew in importance considerable difficulty arose with regard to the payment of the dues on goods landed at those places. In 1857 the Mersey Docks and Harbour Board was created by the Mersey Docks and Harbour Board Act, 1857, and all the powers, rights, and privileges of the corporation with respect to these town dues were by that Act transferred to the Mersey Board. The Upper Mersey Dues Act, 1860 (23 and 24 Vict., cap. CXXV.), section 17, provided that from and after January 1, 1861, "all powers, rights, and privileges of imposing or collecting all such of the rates or dues in the above-mentioned Mersey Docks and Harbour Act, 1857, called 'town dues' . . . as should be payable for or in respect of any goods which should be carried or conveyed upon, over, or along any part of the Upper Mersey" should be transferred to and vested in "the Upper Mersey Dues Trustees (by the said Act created)." For the purposes of that Act the port of Liverpool was divided by an imaginary line, drawn from Eastham Ferry to Garston Dock, into two parts, called the Upper Mersey and the Lower Mersey respectively. The Act of 1860 also provided that the Upper Mersey Trustees should, as a consideration for the transfer of the dues, pay to the Mersey Docks and Harbour Board the sum of £105,000, and that when that sum, together with certain other charges, had been paid the dues transferred should be abolished. The said sum was finally paid in 1875, and the dues were abolished. The entrance to the ship canal is about a quarter of a mile above Eastham Ferry, Duke's Dock is in the Lower Mersey, so that the flour was in fact carried over a portion of the waters of the Upper Mersey, both on its way to Manchester in the *Oliva* and on its way from Manchester to Duke's Dock in lighters. A separate issue was ordered to be tried to determine the question, apart from other questions in the action, whether, assuming that the plaintiffs would otherwise have been entitled to succeed on their claim, they were disentitled by reason of the provisions of the Mersey Dues Act, 1860. This issue came on to be tried on November 5, the question in effect being whether the town dues claimed were "payable for or in respect of any goods which had been carried or conveyed upon, over, or along any part of the Upper Mersey" within the meaning of that Act.

Mr. Joseph Walton, Q.C., and Mr. T. G. Carver appeared for the plaintiffs; Mr. Cripps, Q.C., and Mr. Dankwerts for the defendants.

The learned Judge reserved judgment.

Mr. JUSTICE MATHEW, in giving judgment, after stating the facts of the case and referring to the Upper Mersey Dues Act, 1860, and reading section 17 of that Act, said that the defendants' counsel insisted on a literal interpretation of that section; they said that these goods had been "carried or conveyed upon, over, or along any part of the Upper Mersey," and therefore no dues were payable in respect of them. Now, at the time the Act was passed no town dues were payable in respect of goods carried over the Upper Mersey unless these goods were imported into the Upper Mersey into such places as Runcorn,

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

Widnes, and Garston, which were all places within the port of Liverpool. It seemed clear from the language of the preamble of the Act of 1860 that the dues were levied only on goods "imported into or exported from the port of Liverpool," and it was intended by the Legislature that only such part of those dues should be transferred by the Act of 1860 as were payable in respect of goods imported into or exported from places in the Upper Mersey. It appeared from the language of the Act that the only goods in respect of which dues were payable to the Upper Mersey Trustees were goods inward bound or outward bound to or from a place in the Upper Mersey. These goods were inward bound to Liverpool, not to a place in the Upper Mersey. The effect of the literal interpretation contended for by the defendants would be to create new dues.

The learned JUDGE gave judgment for the plaintiffs on the issue with costs.

[Solicitors—Rowcliffes, Rawle, and Co., for A. T. Squarey, for the plaintiffs; Thos. Cooper and Co., for Hill, Dickinson, Dickinson, and Hill.]

Q.B. Div. } 1897.
(Kennedy, J.) } Nov. 13.

PASSINGHAM V. KING.*

Principal and Agent—Commission—Sale of publichouse—Finding a purchaser.

This was an action for commission on obtaining a contract for the sale of the Albert Edward publichouse, Albert-road, Kilburn.

Mr. C. A. Russell, Q.C., and Mr. Carrington appeared for the plaintiff; Mr. Jelf, Q.C., and Mr. Fred Low for the defendant.

In December, 1896, Mr. Bird, the plaintiff's managing clerk, had an interview with the defendant, who requested him to find a purchaser for the Albert Edward. The plaintiff on December 30, 1896, introduced to him a Mr. Vine, who paid a deposit of £250 on the purchase-money. Mr. Bird prepared the contract, which was duly executed both by defendant and by Mr. Vine, and by which completion was to be on February 11, and, on defendant's instructions, he also took the inventory at the Albert Edward. Subsequently the defendant extended the time for completion of the purchase till May 6, on receipt of a further deposit of £250 from Mr. Vine, a clause being added to the contract which gave the defendant absolute right to retain the deposit and sell elsewhere after that date. The defendant afterwards (on June 10) called at the plaintiff's office and was alleged to have said that he had cancelled Mr. Vine's contract, as he hoped that a brewery company would purchase. On January 1, 1897, the plaintiff had written to the defendant:—

"We beg to inform you that our regular commission to a vendor for licensed property is 1 per cent. upon the purchase-money, but as we hope to do future business with you over some of your other houses we are willing to reduce our commission *re* the Albert Edward to £100."

On behalf of the defendant, it was contended that this was an agreement to pay commission only on completion of the sale of the property if sold through the plaintiff's introduction, unless the sale went off by defendant's default. The plaintiff admitted that he had taken no trouble to ascertain whether Mr. Vine was a man capable of completing. As a matter of fact, the defendant was still in possession, no purchaser having

been found. He denied that he ever said that he had cancelled the contract. He simply said it was at an end, as the required time had elapsed. He was willing to accept Mr. Vine still.

Mr. Vine gave evidence that he contracted to buy the house simply as a speculation, and with no present means of paying for it. He did not complete, because he could not resell at a profit. It was urged that the plaintiff could not earn his commission by getting a man of straw to sign a contract. The clause added to the contract had not made time of its essence. Time always is of the essence of such a contract. (*Cowels v. Gale* (7 Ch.Apps., 12.) As to the meaning of the word "sale," counsel cited "*Bull v. Price*" (7 Bingham, 237). Moreover, if the action was right, it was premature, as the defendant had never cancelled the contract, but was willing to accept Mr. Vine now.

Mr. C. A. RUSSELL, on behalf of the plaintiff, cited "*Grogan v. Smith* (7 *The Times Law Reports*, 132). Defendant had accepted Vine as purchaser, and so prevented the plaintiff from looking elsewhere to find one, and he had subsequently entered into a fresh bargain with Vine behind the plaintiff's back.

His LORDSHIP said that, in his opinion, plaintiff was clearly entitled to succeed. The defendant chose to accept Vine as purchaser without inquiry. There was no evidence that commission was to be payable upon the completion of the sale. The evidence only was that Mr. Bird undertook "to sell" for him. Neither plaintiff nor Mr. Bird ever acquiesced in the new arrangement between defendant and Vine. By that arrangement he chose not to enforce a contract he had got.

Judgment for plaintiff for £100.

Mr. JELF stated that the defendant intended to appeal, and a stay of execution for ten days was granted.

Q.B. Div. } 1897.
(Darling, J.) } Nov. 13.

ROBEY V. ARNOLD.*

Contract—Agreement—Construction—Music-hall agency—Commission on "re-engagements."

This was an action brought by Mr. George Robey, a music-hall artist, against Mr. Henry Lewis Arnold, of 35, King-street, Covent-garden, and Mr. Walter Lumley, of 37, Conduit-street, W. (receivers of the late firm of Hugh J. Didcott and Co.), for damages for wrongfully and falsely and to the damage of the plaintiff asserting to the manager of the Royal Theatre at Birmingham (where the plaintiff was performing as a music-hall artist) that the plaintiff had made default in the payment of instalments which he agreed to pay to the defendants under or by virtue of an indenture dated October 4, 1895, and made between the defendants and the plaintiff, and for stopping, or endeavouring to stop, the payment of the plaintiff's salary at the said theatre in pretended exercise of the defendants' rights under the said indenture; and for an injunction to restrain the defendants from doing the acts and things complained of or the like acts and things at other theatres or music-halls; and for a declaration that all moneys secured under the said indenture had been paid by the plaintiff to the defendants, and that the said indenture was no longer a continuing security, and had ceased to be so before the said salary was earned by the plaintiff.

Mr. Cook, Q.C., and Mr. Montague Lush appeared

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

for the plaintiff; Mr. Joseph Walton, Q.C., and Mr. Rufus Isaacs for the defendants.

The material facts were shortly as follows:—The plaintiff some years ago employed Messrs. H. J. Didcott and Co. as his agents to procure him engagements at various music-halls, and in November, 1892, they obtained for him engagements at the Oxford, Pavilion, and Tivoli Music-halls. On November 15, 1892, the plaintiff made three contracts in writing with Didcott and Co., each being in the same form, and respectively relating to the engagements at the Oxford, Pavilion, and Tivoli Music-halls. The contract relating to the Oxford Music-hall engagement contained the following paragraph:—"I agree to pay to you or your heirs, executors, administrators, or assigns 10 per cent. commission on all moneys accruing from this engagement; and I hereby authorize Mr. Thomas to deduct and pay Hugh J. Didcott and Co. or order the same from my salary in any manner Hugh J. Didcott and Co. may deem expedient. I also agree to pay you, your heirs, executors, administrators, or assigns the same rate of commission on all my re-engagements at the above establishment or with E. Thomas, Esq." (Signed) GEORGE ROBEY." In 1893 H. J. Didcott became bankrupt, and the defendants were appointed receivers of Didcott and Co. On October 4, 1895, the plaintiff was indebted to H. J. Didcott and Co. in the sum of £48 15s. 7d., and upon that date he gave a mortgage to the defendants, as receivers, to secure that debt and other claims for commission which had accrued and were accruing. The engagements under the contracts of November 15, 1892, terminated on December 1, 1895, and it was admitted that at the time the present action was brought the debt of £48 15s. 7d. and all commissions up to December, 1895, had been paid by the plaintiff. Between April and December, 1896, the plaintiff himself obtained his own engagements without the intervention of Didcott and Co. at the Pavilion, Tivoli, and Oxford, and it was admitted by the defendants that at that time Didcott and Co. were not ready and willing to act as the plaintiff's agents. In January, 1897, the defendants wrote to the manager of the Royal Theatre, Birmingham, requesting him to pay half the plaintiff's salary to them. The ground upon which the defendants based their claim to stop the plaintiff's salary was as follows:—They contended that under the contracts of November 15, 1892, Didcott and Co. were entitled to commission on all future engagements the plaintiff might at any time during his life obtain at the Pavilion, Tivoli, or Oxford, and whether obtained through Didcott and Co. or not. They said that the words "on all my re-engagements at the above establishment" included all fresh engagements, however obtained. As the plaintiff had in fact obtained engagements at the Oxford, Tivoli, and Pavilion in 1896, they contended that Didcott and Co. were entitled to 10 per cent. commission upon the salary he received for those engagements, although Didcott and Co. had nothing whatever to do with procuring such re-engagements. The defendants further contended that by the mortgage the plaintiff had assigned to them Didcott and Co.'s rights, and that, therefore, they were entitled to claim such commission from the plaintiff.

Mr. Harry Lundy, manager of the Oxford Music-hall, examined by Mr. LUSH, said that in the music-hall profession the word "re-engagement" meant a re-engagement through the particular agent. There was a uniform and well-recognized practice in the music-hall profession that the agent should obtain the times of the performer.

Cross-examined by Mr. WALTON, Q.C.—If a performer employed one agent one year, and the agreement contained a clause saying that the agent was entitled to commission on re-engagements, and the next

year the performer obtained an engagement through another agent, the performer would only pay commission to the second agent for the second year, and not the first agent, because the first did not obtain the second engagement.

Mr. Glenister, manager of the London Pavilion, and Mr. Vernon Dowsett, manager of the Tivoli, said that they were not aware of any specific meaning in the profession given to the word "re-engagement."

MR. JUSTICE DARLING ruled that there was no evidence to go to the jury that the word "re-engagement" had any specific meaning.

In giving judgment, his LORDSHIP said that it was with great regret that he felt compelled to hold that the contention on behalf of the defendants as to the meaning of the word "re-engagements" in the contracts of November 15, 1892, must prevail. The sentence which contained the word "re-engagements" meant that commission was to be paid to Didcott and Co. whether they effected such re-engagement or not. If that were not so, there would have been no necessity to put the clause in at all. As to the mortgage deed, however, the plaintiff had only assigned to the defendants the rights of Didcott and Co. under contracts they themselves had arranged, and, as nothing was due from Robey to Didcott and Co. in respect of such contracts, the defendants had no right to make the claims for commission they had made. There would, therefore, be judgment for the plaintiff upon the claim for the injunction and declaration asked for, with costs. Judgment for defendants upon their counter-claim for an account with costs, and for payment of the amount found due. There would be a general stay of execution if notice of appeal given within 14 days, and then to the hearing of the appeal.

[Solicitors—Stanley, Woodhouse, and Hedderwick, for the plaintiff; Hicks, Arnold, and Mozley, for the defendant.]

Court of Appeal (A. L. Smith, 1897.
Rigby, and Collins, L.J.J.) } Nov 15.
TRUFFAULT CYCLE AND TUBE MANUFACTURING
COMPANY (LIMITED) V. SAUNDERS.*

Practice—Judgment (Order 14)—Leave to defend
—Unconditional leave—Calls on shares resisted on the ground of deception in prospectus.

This was an appeal from an order made by Mr. Justice Day at Chambers. The action was brought by the plaintiff company to recover from the defendant calls in respect of shares which had been allotted to him. The defendant had applied for these shares on receiving from the company a prospectus, in which they were called the Dunlop Truffault Cycle and Tube Manufacturing Company (Limited). An injunction having been obtained in the Chancery Division by the Dunlop Pneumatic Tyre Company restraining the plaintiff company from using the word "Dunlop" as part of their name, the defendant complained that he had been deceived by the use of that word in the prospectus, and he refused to keep the shares, and demanded repayment of the application money. The plaintiffs thereupon commenced this action, and took out a summons at Chambers for summary judgment, and Mr. Justice Day made an order giving them leave to sign final judgment for the amount claimed. The defendant appealed, and asked the Court of Appeal to give him unconditional leave to defend. It was pointed out on the part of the plaintiffs that there was on the

face of the prospectus a statement printed in red ink to the effect that the company was self-contained, and was not in any way connected with the Dunlop Pneumatic Tyre Company.

Mr. W. D. Benson appeared for the defendant; Mr. J. W. McCarthy for the plaintiffs.

LORD JUSTICE A. L. SMITH said that in his opinion the appeal ought to be allowed. The defendant resisted a claim for calls on shares in the plaintiff company on the ground that he had been deceived by the use of the catchword "Dunlop" appearing on a prospectus as part of the company's name. He thought that there was a question proper to be submitted to a jury, and that Mr. Justice Day had been wrong in allowing the plaintiffs to sign judgment. There would, therefore, be unconditional leave to defend.

LORDS JUSTICES RIGBY and COLLINS concurred.

House of Lords (Lord Halsbury, L.C.,
Lords Watson, Herschell, Macnaghten,
Morris, and Shand) 1897.
Nov. 16.

THE CALEDONIAN RAILWAY COMPANY V. MULHOLLAND.*

Railway Company—Liability to passenger—
Wagons lent gratuitously to another company
—Personal injuries.

Appellants had lent wagons gratuitously to another company.

Held, that they owed no duty to persons travelling in such wagons to see that they were in proper condition. Decision of Court of Session reversed.

This was an appeal from a decision of the Second Division of the Court of Session in Scotland.

Mr. Cyril Dodd, Q.C., Mr. C. E. Allan, Mr. M. Campbell, and Mr. Johnston appeared for the appellants; and the Lord Advocate and Mr. E. B. Nicolson for the respondent.

The action was brought by the respondent, the widow of a carter in the employment of the Glasgow and South-Western Railway Company, against that company and the Caledonian Railway Company to recover damages for the death of her husband, who was killed on October 22, 1895, by reason of the alleged negligence of both or either of the companies. The deceased was killed through the defects in the brakes of certain wagons of the Caledonian Railway Company which were being used on the Glasgow and South-Western Railway Company's line. The Caledonian Railway Company sought to be dismissed from the action on the ground that they having lent their wagons gratuitously to the other railway company owed no duty to the deceased, and were therefore not liable. The Court below held that in the circumstances the Caledonian Company were liable to the action. The Caledonian Company appealed.

At the conclusion of the arguments,

LORD HERSCHELL, in delivering judgment, said that it was clear that the appellants owed no duty to the deceased to see that their wagons were in proper condition. The decision of the Court below must therefore be reversed, with costs. The noble and learned Lord said that the Lord Chancellor, who was unavoidably absent, concurred in his judgment.

The other noble and learned Lords having concurred,

The appeal was allowed, and the judgment of the Court of Session was reversed, with costs.

[Solicitors—Grahames, Currey, and Spens, for the appellants; Street, Poynder, and Whatley, for the respondents.]

House of Lords (Lord Halsbury, L.C.,
Lords Herschell, Macnaghten, and
Morris.) 1897.
Nov. 16.

JONES V. SPENCER.*

Practice—New trial—Verdict of jury set aside—
New trial ordered.

Decision of Court of Appeal (13 *The Times*
L.R., 174) reversed.

This was an appeal from an order of the Court of Appeal, refusing by a majority to set aside the verdict of the jury in the action.

Mr. Amplett, Q.C., and Mr. E. A. Owen, appeared for the appellant; and Mr. Witt, Q.C., and Mr. Sidney Clarke for the respondent.

The action was brought by the respondent, a horse-dealer in London, against the appellant, a farmer at Bromsgrove, in Worcestershire, to recover the sum of £70 for breach of a warranty of a cart horse which the respondent had purchased from the appellant on a warranty that the horse was at the time of the purchase "a good worker." The case of the respondent was that on the arrival of the horse by train in London it was immediately found to be "a shiverer" and as such unable to back, and consequently not a good worker. In support of his case the respondent called several veterinary surgeons who had examined the animal shortly after its arrival in London, and who pronounced it to be a very bad shiverer and suffering from a disease which must have been in existence at the time of its purchase by the respondent. On the other hand the appellant called a number of witnesses who had used the animal continually, and who swore that up to the time of the sale the animal was perfectly sound and had shown no symptom of shivering. The jury found for the respondent for the amount claimed. The appellant thereupon applied to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence. The Court of Appeal, consisting of the late Master of the Rolls, Lord Justice Lopes, and Lord Justice Chitty, by a majority, Lord Justice Lopes dissenting, dismissed the appellant's application and upheld the verdict of the jury. In the course of his judgment Lord Esher remarked that, short of perverseness on the part of a jury, it was nearly if not quite impossible that a new trial could be obtained on the ground that a verdict was against the weight of evidence when there was conflicting evidence in the case. Lord Justice Lopes, on the other hand, suggested that the Court of Appeal had gone rather too far in refusing new trials in such cases, and that it was clear from the judgment delivered in the House of Lords in the case of the "Metropolitan Railway Company v. Wright" (11 App. Cas., 152) that a new trial ought to be granted if it were necessary to prevent a miscarriage of justice. The appellant now sought to have the decision of the Court of Appeal reversed.

At the conclusion of the arguments yesterday,

The LORD CHANCELLOR, in giving judgment reversing the decision of the Court of Appeal, and directing a new trial, said that he did not propose to enter into the evidence, because, according to the long-established rule when the verdict of a jury was set aside, no observations as to the effect of the evidence should be made lest they might prejudice the new trial. It was sufficient to say that he did not think that the jury in this case had thoroughly appreciated the question before them. The learned Judges in the Court of Appeal did not appear to have directed their minds to the question because the late Master of the Rolls appeared to think that a judgment which he (the Lord Chancellor) had delivered in the case of the "Metropolitan Railway

Company v. Wright" made it necessary to refuse a new trial in a case of this sort. He was not aware that he had laid down any new rule in that case, and he had found in a case more than a century old very much the same language as he had himself made use of in the "Metropolitan Railway Company v. Wright." The appeal must be allowed with costs.

The other noble and learned lords having concurred, The appeal was allowed and a new trial ordered, the respondent to pay the costs in that House and in the Court of Appeal, and the costs of the former trial and of the new trial to be dependent upon the result of the latter.

[Solicitors—Thomas White and Sons, for the appellant; Frederick Jones, for the respondent.]

Chan. Div. }
(North, J.) }

1897.
Nor. 16.

MEABY AND CO. (LIMITED) v. TRITICINE (LIMITED)—
IN RE MEABY AND CO.'S TRADE-MARK (No. 52,389).
Trade Name—Colourable imitation of—Evidence
of confusion—Trade-mark—When descrip-
tive—Registration of—Patents, Designs, and
Trade Marks Act, 1883.

In the above action the plaintiffs claimed an injunction to restrain the defendants, a company called Triticine (Limited) and two gentlemen named Goodall, who are directors of that company, from infringing the plaintiffs' registered trade-mark "Triticumina" (No. 52,389 of 1886), and also to restrain the defendants from selling, disposing of, offering or advertising for sale any food-stuff or preparation from wheat (not being an article prepared or manufactured by the plaintiffs) under the name of "Triticine" or "Triticumina," or under any other name of which "Triticine" or "Triticumina" formed part, or which constituted a colourable imitation of the plaintiffs' trade name "Triticumina," or in such a manner as to be calculated to lead the public or purchasers to believe that the article sold, disposed of, or offered or advertised for sale was in fact prepared or manufactured by the plaintiffs; and to restrain the defendants from trading or carrying on business under the style of "Triticine (Limited)," or under any other style of which the name "Triticine" or "Triticumina" formed part, or under any other name which constituted a colourable imitation of the plaintiffs' trade name, or which might be calculated to lead the public or persons having dealings with them to believe that the trade or business carried on by them respectively was the trade or business of the plaintiffs, or in any way connected therewith. The plaintiffs also claimed the delivery up of all labels, wrappers, &c., in the possession or under the control of the defendants, or any of them, containing the word "Triticine," or any such other word as aforesaid, or otherwise so contrived or expressed as to be calculated to lead the public or purchasers to any such belief as aforesaid. The plaintiffs further claimed damages or an account of profits. As is usual in cases of this kind, the defendants met the action with a motion to rectify the register of trade-marks by removing the plaintiffs' trade-mark therefrom, on the ground that its registration was wrongful and improper. The business of millers, &c., now carried on by the plaintiff company was during 1886 and 1887 carried on by Messrs. Albert Meaby and A. B. Lester at Reading, and from October, 1887, to October 13, 1891, in conjunction with Mr. S. A. M. Farnworth. In March, 1886, Meaby and Lester obtained the registra-

tion of the trade-mark in their names in Class 42 in respect of leaven and wheatmeal biscuits, bread, cakes, and other preparations from wheat. On September 15, 1886, Meaby and Lester obtained the grant of a patent for improvements in preparing malted wheaten meal and for preparing malted wheat. On October 7, 1891, Lester assigned his interest in the trade-mark to Meaby and Farnworth. The plaintiff company was incorporated on October 13, 1891, under the title "Meaby's Triticumina Company (Limited)," and the whole of the business of millers and manufacturers carried on by Meaby and Farnworth, and the goodwill and the assets thereof, including the benefit of the patent and the trade-mark, were assigned to the plaintiff company. In 1893 the company acquired the business of the Reading Biscuit Company (Limited), and the name of the plaintiff company was, as from August 31, 1893, changed to their present name. By their statement of claim the plaintiffs said that they had always maintained the high reputation in the trade and with the public which had been obtained by the firm of Meaby in connexion with malted wheaten meal, and flour and articles manufactured therefrom, and had spent large sums in advertising, with the result that their business had enormously increased. The trade-mark had ever since 1886 been used by the plaintiffs and their predecessors in title in connexion with the various articles manufactured by them, and in particular with flour, meal, bread, porridge, biscuits, and a food for infants, children, and invalids. Ever since its registration as a trade-mark the name "Triticumina" had been associated with the name of Meaby, and had for many years denoted, and still denoted, both to the trade and the public, that the article to which it was attached was the manufacture of the plaintiff company. The "Triticumina" food, which is a particular preparation of malted wheatmeal, in the production of which the patent process is used, had been largely advertised and had acquired an extensive and favourable reputation as a food for infants and invalids. It was sold in tins bearing the name "Triticumina" thereon. The defendant company was registered in November, 1896, and they acquired the business of millers formerly carried on by Messrs. Harry Goodall and Sons at Castleford, in Yorkshire, defendant directors being then members of that firm. The defendant company sell under the name "Triticine" a food which the plaintiffs allege to be really what is commonly known as "Semolina." The plaintiffs alleged that the name of the defendant company so closely resembles the plaintiffs' registered trade-mark that confusion must arise and the public would be led to believe that the business of the defendant company was that of the plaintiffs, or that the defendant company was in some way connected with the plaintiffs, and that the defendant company would, by reason of its name, appropriate part of the legitimate business of the plaintiffs and their trade would be seriously interfered with. The defendants asserted that the word "Triticumina" had been applied by the plaintiffs themselves as the name of the article made under their patent, and that for this reason, and also because the word was descriptive of the article, and not a "fancy" word, it could not be properly registered as a trade-mark. The defendants also said that they, or their predecessors, had used the word "Triticine" for many years, beginning as early as 1885. The defendants also denied that their acts would deceive the public or lead to any confusion.

In the opening of the plaintiffs' case their claim to an injunction was limited to the food for infants and invalids which they sell under the name "Triticumina." On the question of the legality of registering the name of a patented article it was contended, on

the part of the plaintiffs, that, though they had patents under which they manufactured "Triticumina" flour and food, the name did not describe the patents, and the articles could be made without the help of the patents.

Mr. Bousfield, Q.C., and Mr. A. J. Chitty were for the plaintiffs; Mr. Swinfen Eady, Q.C., Mr. Thomas Terrell, Q.C., and Mr. Sebastian were for the defendants.

MR. JUSTICE NORTH dismissed the action. The action, he said, was for the purpose of restraining the defendant company from using the name "Triticine" in a way likely to lead the public to think the substance it described was the article "Triticumina" made by the plaintiff company. The burden of proof lay on the plaintiffs; and his Lordship was of opinion that they had not established a case. The defendants had clearly shown that they had their word printed on labels before they could have heard of the plaintiffs' name. He commented on the fact that no evidence of confusion of names had occurred—a fact not absolutely fatal to the granting of an injunction, at the same time an important matter. He also commented on the absence of important witnesses on both sides; and, on the ground that the defendants had not given the Court the assistance it was entitled to, he dismissed the action without costs. Upon the motion to expunge the registration of the trade-mark, his Lordship said there were two grounds on which the application was based. In the first place, it was said that the name "Triticumina" was not one capable of being properly registered as a trade-mark within the provisions of the statute applicable to the case. In the second place, it was contended that, by reason of its being a patented substance, or a substance professed to be patented as an article called by the name "Triticumina," there was a well-settled principle of law preventing the name from being registered as a trade-mark, because, if the name of a patented article could be registered as a trade-mark, after the expiration of the patent the patentee would have an unfair advantage in the exclusive use of the name, the advantage to a large extent of a monopoly, after the legal period of the monopoly had come to an end: his Lordship was not, however, going to deal with the motion on this ground; at the same time he observed that it was well settled that a man could not by registering the name of a patented article acquire practically a prolongation of his patent. He did not see that even if a man had not a patent for an article he sold under a particular name, and he held out that he had a patent for the article, he ought to be in any different position as to the registration of the name of the article than if he actually had a patent for the manufacture of the article. He considered that the trade-mark ought to be removed from the register on the other ground—namely, that the word was not such a word as could be registered under the Patents, Designs, and Trade Marks Act of 1883, the Act applicable to this trade-mark. On this part of the case he thought it only necessary to refer to the definitions given by Lord Justice Cotton, the present Master of the Rolls, and Lord Ludlow, in the case of "Van Duzer's Trade Mark" (34 Ch. D., 623; 3 *The Times Law Reports*, 322), of a "fancy word not in common use." He read the definitions given by their lordships, and said that a fancy word to be used as a trade-mark must be one not descriptive of the article to which it was to be applied. He said the word "triticum" was a well-known Latin word meaning wheat, and the articles to which it was applied by the plaintiff company were made from wheat, therefore the word "triticum" with a termination was clearly descriptive. On this ground he allowed the motion with costs.

[Solicitors—Dale, Newman, and Hood, for the plaintiffs; Plunkett and Leader for the defendants.]

Chan. Div. }
(Kekewich, J.) }

1897.
Nov. 16.

MUDDOCK V. BLACKWOOD.*

Copyright — Book — Infringement — Remedies —
Copyright Act, 1842, secs. 15 and 23.

Plaintiff in an action for infringement of copyright may sue under both sec. 15 and sec. 23 of the Copyright Act, 1842, and may sue under sec. 23 in both trover and detinue.

This was a copyright case of some importance. Two copyright actions had been brought, one having been commenced in the Chancery Division and the other in the Queen's Bench Division, but they had since been consolidated by an order in the Chancery action. The writ in the Chancery action was issued on November 24, 1896, by the plaintiff, Mr. James Edward Muddock, the author of and the registered proprietor of the copyright in a work called "A Wingless Angel," against Mr. James Blackwood, a publisher, and a firm of publishers called J. Blackwood and Co., claiming an injunction, an account of profits, and delivery up of copies in respect of a work published by the defendants under the same title, and being, in fact, a reprint of the plaintiff's work. On December 10 the principal defendant, Mr. James Blackwood, wrote to the plaintiff offering to submit to an injunction, to pay £10 as damages, to deliver up all copies in his hands, and to pay the plaintiff's costs as between party and party. The plaintiff, however, refused the offer, and on December 18 made a demand in writing on the defendants under section 23 of the Copyright Act, 1842 (5 and 6 Vict., c. 45), for all copies of the book unlawfully printed or imported, and then, on December 23, 1896, issued the writ in the Queen's Bench action, claiming damages for wrongful conversion of copies of the book unlawfully printed without the consent of the plaintiff. Then he delivered a statement of claim in that action, and on February 1, 1897, obtained an order in Chambers in that action transferring it to the Chancery Division, but expressly reserving the costs of that action to be dealt with by the Chancery Judge at the trial. On February 8 Mr. Justice Kekewich, on the plaintiff's application, made an order that the two actions should be consolidated and proceed as one action, and in the consolidated action the plaintiff delivered a statement of claim, claiming an injunction, delivery up of all copies in the defendants' possession, an account of profits made by the defendants by the infringement, or, alternatively, damages in respect of the infringement, with an inquiry as to the amount thereof, £250 damages for conversion as in an action of trover, and costs. It appeared that the plaintiff had not published any copies of his work since 1875; that in 1886 the defendant Mr. James Blackwood bought the stereotyped plates of the work at an auction sale at Messrs. Puttick and Simpson's, of Leicestershire-square, and had used them without demur until last year. An account furnished by the defendant showed that in 1886 he sold 1,010 copies at a total price of £33 19s. 9½d. and at a profit of £8 10s. 4½d.; also that in 1896 he sold 29 copies at a profit of £1 4s. 2d., his total profits thus amounting to £9 14s. 6½d., also that, after taking into account the purchase of the plates and repairs, amounting altogether to £10, there had been a net loss on production and sale of the book of 5s. 5½d.

Mr. WARRINGTON, Q.C., and Mr. J. G. JOSEPH, for the plaintiff, relied on section 23 of the Copyright Act, 1842, 5 and 6 Vict., c. 45 (Scrutton on Copyright, p. 246), which provides that "all copies of any book

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover."

Mr. RENSHAW, Q.C., and Mr. J. W. BAINES, for the defendant Blackwood, referred to section 15, which enacts that "if any person shall, in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose for sale or hire, or cause to be sold, published, or exposed for sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any Court of record in that part of the British dominions in which the offence shall be committed." They submitted that the two sections were inconsistent, and that the plaintiff was wrong in claiming, as he had done, both in detinue and in trover, for under section 23 he must select the one mode of action or the other, not both. As to the alleged profits made by the defendant, when the price of the plates and the usual trade discount were taken into consideration, it was clear there could be no profits. The plaintiff had resorted to a "multiplicity" of actions, when he might have sought relief by one action. The action had been, in fact, continued without any necessity, the defendant having offered all the plaintiff could justly claim.

MR. JUSTICE KREKOWICH said it was somewhat strange that in the end of the year 1897 he should be called upon for the first time to say what was the meaning of section 23 of the Act 5 and 6 Vict., c. 45—whether the remedy given by that section was inconsistent with that given by section 15; but he supposed he was really called upon to do that because no counsel had suggested to him that there was any decision; and, moreover, the book on copyright which was in the hands of the profession, and to which reference was usually made on all questions of copyright, did not give any case on the subject. Two points had been raised. First, it was said on behalf of the defendant that section 15 gave the proprietor of copyright a remedy by special action on the case; that that meant that this was the remedy which he was intended to pursue, except so far as his remedies at common law were not interfered with; that the offender under section 23 was a different person to the offender under section 15; that under section 15 he was dealing with a person who had "unlawfully printed or imported" a book in which there was a subsisting copyright, and that the other section, 23, provided a remedy against the accidental possessor of the infringing book, so as to give a right of action against that accidental possessor independently of his being otherwise a wrong-doer. That might be the right view, but the language of the sections was not sufficiently clear to compel his Lordship to adopt it. No doubt there were words in

section 15 which were not to be found in section 23, and he was unable to suggest why the two sections should not have been put into one, and why they should have been separated as they were. But, on the other hand, he did not see why, because the proprietor of copyright had a remedy under section 15 against the wrong-doer, he could not sue that wrong-doer, if so advised, under section 23. Then the next point was this. The book being vested in the proprietor of the copyright, section 23 said he "shall, after demand in writing, be entitled to sue for and recover the same or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover." That provided an alternative remedy; and the argument on behalf of the defendant was that the plaintiff claiming to sue under that section must elect to sue either in detinue or in trover, and could not sue in both. That was an easier point than the other. There was an alternative remedy. It would, in his Lordship's opinion, be adopting an extremely narrow construction of the Act to say that the proprietor of the copyright in a book, knowing that a person had a certain number of copies in his hands and that he had sold other copies, could not sue that person in respect of the copies that he detained and also in respect of those that he had converted to his own use. It seemed tolerably plain upon the Act itself, and in accordance with what was the apparent intention of the Legislature, that the two actions might be reduced to one action distributed in the way he had suggested—that is to say, the plaintiff might sue in detinue in respect of the copies the defendant had detained, and might sue in trover in respect of the copies he had sold and converted to his own use. Having got so far, the plaintiff in the present case, who was the proprietor of the registered copyright in a book called "A Wingless Angel," was entitled to sue under section 23, and to sue the defendant notwithstanding that he might have brought what was called "a special action on the case" under section 15; and he might have exercised his privilege of bringing an action on the case by proceeding in the Chancery Division. What, then, was the plaintiff's remedy? In his Lordship's opinion he was entitled to the delivery-up on oath of all books in the possession of the defendant—that is to say, delivery-up, and also damages as in an action of trover for the books the defendant had sold. The defendant had sold twice. In 1886 he sold 1,010 copies and realized £38 19s. 9½d., or, say, £39, making a profit of £8 10s. 4½d.; and then he published the book again in 1896, and sold 29 copies, and made a profit of £1 4s. 2d., which on his own showing was rather more than one-eighth of what he had made in 1886. His Lordship declined to order an inquiry as to damages. It would be almost wicked to send the case to the Master or to an official referee to find damages for conversion; if necessary, he should have the inquiry before himself. Mr. Warrington had asked him to fix a sum, and if he added 40 guineas for the whole he thought he was giving the plaintiff as much as he was entitled to. The plaintiff was also entitled to an injunction as part of the order. Upon the question of costs, his Lordship said that the plaintiff might have obtained all the relief he sought by one action in the Chancery Division. He seemed, however, to have determined to multiply costs in every possible way, and his Lordship would do his best to mark his sense of that proceeding. He should therefore give him only the costs of the Chancery action; the costs of the other proceedings he must be ordered to pay.

[Solicitors—E. Salaman, Fort, and Co., for the plaintiff; Richardson and Gorin Thomas, for the defendant, J. Blackwood.]

Q.B. Div. (Commercial Court) } 1897.
(Bigham, J.) } Nov. 16.

WHITE V. TURNBULL, MARTIN, AND CO.*

Ship—Charterparty—Broker's commission—
—"Commission payable on all hire earned"
—Construction—Rescission of charterparty.

A charterparty for 12 months provided that plaintiff, the broker, should receive a commission on all hire earned. Hire was payable monthly in advance. In the third month the charterparty was rescinded by consent of both shipowner and charterer.

Held, plaintiff was only entitled to commission on such hire as was actually earned.

This was a claim for commission in respect of a time charterparty entered into through the agency of the plaintiff between the defendants, who were the owners of the steamship *Elderslie*, and certain charterers. The charter was for a period of 12 months, hire was payable monthly in advance, and the charter provided that a commission of 5 per cent. should be paid to the plaintiff "on all hire earned." The hire was at the rate of £1,050 per month. The first two months' hire was duly earned and commission was paid to the plaintiff. The third month's hire was paid in advance, but during the currency of that month the charterers rescinded the charter on the ground that certain warranties as to the condition of the ship contained in the charter had been broken by the defendants. In an action between the defendants and the charterers which was tried before Mr. Justice Mathew in July, 1897, judgment was entered by consent after a trial of several days by which the cancellation of the charter was upheld, and £700 of the £1,050 hire paid in advance was returned to the charterers. The plaintiff White claimed commission on the £1,050 paid in advance and on a like sum for each of the remaining nine months of the charter. The defendants paid into Court £17 10s., being commission on the £350 not returned, without a denial of liability; and a further £35, being commission on the £700 returned, with a denial of liability.

Mr. LAWSON WALTON, Q.C., and Mr. J. E. BANKES appeared for the plaintiff. They cited "Prickett v. Badger" (1 C.B., N.S., 296), "Green v. Lucas" (33, L.T., N.S., 584), "Inchbold v. Western Neigherry Tea and Coffee Co." (17 C.B., N.S., 733), "Fisher v. Drewitt" (48 L.J., C.L., 32), "Fuller v. Hames" (8 *The Times* L.R., 278), and "Roberts v. Barnard" (1 *Caabae* and Ellis, 336).

Mr. JOSEPH WALTON, Q.C., and Mr. D. C. LEOK appeared for the defendants. They referred to the cases cited for the plaintiff and cited the following cases:—"Hamlin v. Wood" ([1891] 2 Q.B., 488), "*In re* Railway and Electric Appliance Co." (38 Ch.D., 597), "Emanuel v. La Compagnie Fermiere" ([1889] W.N., 150), and "Peacock v. Freeman" (4 *The Times* L.R., 541).

MR. JUSTICE BIGHAM, in giving judgment, said the question in the case was whether the plaintiff was entitled to be paid any commission at all. The circumstances of the case were these:—The defendants were the owners of the steamship *Elderslie*, a vessel fitted with refrigerating machinery, and a company, called the Jamaica Fruit Importing Company, desired to find such a ship for the purpose of importing fresh fruit from Jamaica, and accordingly they chartered this vessel from the defendants, Messrs. Turnbull, Martin, and Co. The charter provided that the vessel should

be hired for 12 calendar months, and that the charterer should pay for the use and hire of the vessel at the rate of £1,050 per month in advance; it also provided that payment of the hire should be suspended or reduced in certain cases, as, for instance, "in the event of loss of time from deficiency of men or stores or breakdown of machinery," and "in the event of the steamer being delayed by certain repairs," and in the event of the loss of the vessel, in which case hire was to cease. The charter contained the usual excepted perils and negligence clause. It provided for the payment of a commission of 5 per cent. to the plaintiff on all hire earned. The first question to be determined was whether any hire had been earned, the second whether, assuming it had not been earned, and the non-earning could be attributed to some breach of the charter by the defendants, the plaintiff was entitled to be paid his commission. No hire was earned. Counsel for the plaintiff said it was not earned because of the defendants' breach of the charter. Was there such a breach as to entitle the plaintiff to claim commission? He thought there was not. The intention of the parties was that only commission should be paid upon the hire that actually was earned by the ship and that, with the possible exception of the defendants' own wilful default, all risks should be equally shared by both parties, and that the plaintiff was to take the risk of losing his commission if the charter was put an end to in such circumstances as the present. The words of the clause seemed to have been inserted for the very purpose of preventing such questions as the present from arising. The learned Judge then described the circumstances in which the charter was put an end to—the parties came together and determined that the best thing to be done was to put an end to it. It was doubtful, therefore, whether it came to an end by any default of the defendants.

Judgment was given for the defendants with costs; the plaintiff to have costs on the High Court scale up to the time of payment into Court.

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov. 17.
BRICKWOOD AND CO., APPELLANTS; REYNOLDS,
SURVEYOR OF TAXES, RESPONDENT.*

Revenue—Income-tax—Deductions—Annual profits or gains—Brewers' "tied houses"—Maintenance and repair.

In estimating the balance of profits and gains for the purposes of income-tax brewers are not entitled to deduct sums expended by them in repairing their tied houses.

Decision of Divisional Court (13 *The Times* L.R., 542) affirmed.

This was an appeal from the judgment (13 *The Times* L.R., 542) of a Divisional Court (Mr. Baron Pollock and Mr. Justice Ridley) on a special case stated by Commissioners of Income-tax. The case was to the following effect:—(1) At a meeting of the Commissioners for general purposes, held at Portsmouth, on December 1, 1896, Messrs. Brickwood and Co. (Limited), who are a company registered under the Companies Acts, 1862-1890, and carry on the business of brewers and maltsters at Portsmouth and elsewhere, appealed against an assessment of £20,973 made on them under 16 and 17 Vic., c. 34, section 2, Schedule D, in respect of the profits of their trade. (2) They claim to have the assessment reduced by the

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

sum of £1,492, being the balance of a sum of £2,496 expended by them in the repair of certain licensed houses of which they were the owners, and which they had let to tenants, after deducting from such sum £1,004, being one-sixth of the annual value of such houses, under 16 and 17 Vic., c. 34, section 2, Schedule A. (3) The appellants have from time to time, in order to increase their trade, bought licensed houses, which they have let to tenants under written agreements, one of the terms thereof being that such tenants should buy from the appellants all the ale, beer, and other articles to be sold in such houses which the appellants might from time to time manufacture or sell. (4) The profits of the appellants have been earned by manufacturing ale, beer, and other articles and selling them, in part to private individuals, in part to the owners of what are generally known as "free" licensed houses, and in part to the tenants of their "tied" licensed houses. The whole of the profits so made by the appellants are included in the assessment. Such profits have been materially increased by the increased sale of their goods due to the possession by them of their tied houses, and also by their having been able to obtain, and having in fact obtained, for the same class of goods, a higher price from the tenants of their tied houses than they have obtained or are able to obtain from their other customers. (5) In no case have the tenants of the tied houses as a fact spent any money on the repairs to the tied houses let to them. Such repairs as have from time to time become necessary to such houses have been executed by the appellants, and, after deducting that portion of the cost which has been in the nature of capital outlay or which has tended to the permanent improvement of the premises, the balance properly attributable to revenue is the sum of £2,496 above mentioned. (6) Part of the said sum of £2,496 has been spent by the appellants in order to enable them to comply with the requirements as to repairs of the licensing authorities. (7) The tied houses in question are in the possession of the tenants in part for the purposes of the trade of licensed victuallers and beer retailers, and in part as the private dwelling apartments of themselves and their families. The repairs in question have been executed indifferently to both parts of such houses. (8) In addition to their tied houses the appellants own other licensed houses, which they have during the year occupied by their managers or servants, and in respect of these and of the brewery and other premises admittedly occupied by the appellants for the purposes of their trade they have been allowed for repairs before the assessment was made the full sum to which they are entitled under 5 and 6 Vic., c. 35, section 100, First Case, Rule III. They have also received in respect of the whole of the licensed houses owned by them the deductions from the annual value under 16 and 17 Vic., c. 34, section 2, Schedule A, to which they are entitled under the Finance Act, 1894, section 35. Such deduction has, in the case of their licensed houses not let to tenants and of their brewery and other premises aforesaid, been made before ascertaining the allowance to be made to the appellants for repairs under 5 and 6 Vic., c. 35, section 100, First Case, Rule III. It was contended on behalf of the appellants (a) that the purchasing and letting of licensed houses was an essential part of their business of brewers and maltsters, and alternatively that it was a separate business; (b) that but for such purchasing and letting their profits, as assessed under Schedule D, would not and could not have been earned; (c) that the repairs in question were a necessary outlay, without which such profits could not have been earned, and form a legitimate deduction in arriving at the balance of profits in respect of which they are chargeable under Schedule D; and (d) that the tied houses in question

were "occupied" by them for the purpose of their trade, manufacture, adventure, or concern in the nature of trade within the meaning of 5 and 6 Vic., c. 35, section 100, First Case, Rule III., and that in this respect there is no distinction between such houses and those licensed houses which, being owned by the appellants, are not let to tenants, but are conducted on their behalf by their managers or servants. The surveyor, in opposition, contended (a) that the tied houses were not "occupied" by the appellants within the meaning of 5 and 6 Vic., c. 35, section 100, First Case, Rule III.; (b) that the appellants must be deemed to have executed the repairs in question not *qua* traders, but *qua* landlords, and that as such they had received the one-sixth deduction from the annual value under 16 and 17 Vic., c. 34, section 2, Schedule A, to which they were entitled under the Finance Act, 1894. The Commissioners determined that the tied houses in question were not "occupied" by the appellants within 5 and 6 Vic., c. 35, section 100, First Case, Rule III., and that the appellants were not entitled to the deduction claimed. The Divisional Court upheld the decision of the Commissioners, and gave judgment for the Crown. The appellants appealed to the Court of Appeal.

Mr. Lawson Walton, Q.C., and Mr. R. D. Muir appeared for the appellants; the Attorney-General (Sir Richard Webster, Q.C.) and Mr. Danckwerts for the Crown.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the Crown was entitled to succeed and the judgment of the Divisional Court must be affirmed. The appellants were a brewery company, and they had, like most brewers, what were called "tied" houses, and they also had untied houses. They found that in their tied houses they sold more beer and at a better price, and it was worth their while to spend considerable sums on the repairs of those tied houses. They now contended that in estimating the balance of their profits and gains, on which they were chargeable to income-tax under Schedule D, they were entitled to deduct the sums which they had expended on those repairs. Section 100 of the Income-tax Act, 1842, said that in estimating the balance of profits and gains of any trade no sum should be deducted on account of any sum expended for repairs of premises occupied for the purpose of such trade beyond the sum usually expended for such purpose according to an average of three years. He agreed that that amounted to a permission that such sum might be deducted. But did this case come within that permission? The permission applied to "any sum expended for repairs of premises occupied for the purpose of such trade." He thought that meant premises occupied by the person assessed for the purpose of his trade. It was necessary to distinguish between the trade of the brewer and the trade of the publican. In his opinion the case did not come within the permission, and therefore it remained within the prohibition. Then a further rule in the same section said that in estimating the balance of profits and gains no deduction should be made for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade. It was clear that the money spent on these repairs was not exclusively expended for the purpose of the appellants' trade. The appellants, therefore, were not entitled to the deduction which they asked for.

LORDS JUSTICES RIGBY and COLLINS concurred.

[Solicitors—Godden, Son, and Holme, for the appellants; the Solicitor of Inland Revenue, for the Crown.]

Chan. D.v. }
(Kekewich, J.) }

1897.
Nov. 17.

EDWARDS' MENU COMPANY (LIMITED) V. CHUDDEIGH.*

Contract — Agreement — Construction — Agreement by defendant to let refreshment bars at a theatre as long as it should "remain in his hands" — Injunction.

This was a motion by the plaintiff company for an injunction, until the trial or further order, to restrain the defendant, Mr. Arthur Chudleigh, who was or is the lessee of the Court Theatre, from excluding the plaintiffs from the bars, refreshment room, cloak-room, and wine cellar of the theatre, in breach of an agreement between the plaintiffs and the defendant. By the agreement in question, which was dated February 6, 1896, it was agreed that the defendant should, "so long as the Court Theatre should remain in his hands," let to the plaintiff company, at a weekly rent of £25, "the free and exclusive use" of the bars, &c., the agreement carrying with it the privilege of letting spaces for advertisements in the bars, &c., and selling programmes. The agreement was carried out until July 9, 1897, when the theatre was closed for the summer season. Upon its being re-opened in October, the defendant, as the plaintiffs alleged, refused to allow them the use of the bars, &c., and the plaintiffs then brought this action, and served the defendant with a notice of motion to the effect above stated. The defendant's case was that the agreement in question had been entered into by him on behalf of the Court Syndicate (Limited), who were the real tenants of the theatre, and that he was merely their manager; that the agreement came to an end on July 31 last; and that negotiations were in progress between the owner of the theatre and himself, acting on behalf of another syndicate called the Buckingham Syndicate (Limited), for a new tenancy of the theatre, but no lease had yet been executed. He admitted, however, that he had not yet given up possession of the theatre, but he contended that the theatre was no longer "in his hands" within the meaning of the agreement. It appeared that he had made an offer to relet the bars, &c., to the plaintiffs, but at an increased rent of £20 a week, in consequence, as he said, of his having improved and enlarged the bars.

Mr. Warrington, Q.C., and Mr. George Cave appeared for the plaintiffs; and Mr. A. A. B. Terrell for the defendant.

MR. JUSTICE KEKEWICH said the real question was, What was the meaning of the words "in his hands" in the agreement? The word "remain" he would deal with directly. The words could not mean literally that the Court Theatre was to be in the defendant's manual possession. It was a more or less figurative expression. The defendant was described in the agreement as "manager." At the date of the agreement he was not treated as tenant, and was not the lessee at that time. But the theatre was under his control, though he was not lessee. In his Lordship's opinion, "in his hands" must mean that the control of the theatre was in his hands sufficiently to enable him to do what he had to do as manager. Then, as to the word "remain," the theatre did not "remain in his hands," in one sense, if the tenancy changed, but in point of fact it was under the defendant's control. His term came to an end on July 31, and his Lordship gathered that he immediately, if not before, entered into negotiations for a renewal of the term. What was his position? He did not throw the place up at the end of his term. He might, his Lordship supposed,

have used it as a theatre if he so desired. At any rate, it was under his control, and remained under his control; therefore he could not get out of it by saying there had been a break in the occupation or tenancy. There must be an injunction in the terms of the notice of motion.

By consent his Lordship directed the injunction to be suspended pending an appeal, the defendant undertaking to apply to the Court of Appeal for a speedy hearing, and not to create any new tenancy of the bars, &c., in the meantime.

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) }

1897.
Nov. 18.

IN RE THE CROWN LEASE PROPRIETARY COMPANY
(LIMITED).*

Contract — Agreement — Construction — Underwriting agreement — Absolute contract.

This was an appeal from the refusal of Mr. Justice Vaughan Williams to order that the name of Mr. Edwin Bonner should be struck off the list of contributories of the Crown Lease Proprietary Company (Limited), which was in liquidation. It appeared that the company had been promoted by a Mr. Oakden for the purpose of acquiring a lease of a site at the corner of the Haymarket, and that Mr. Bonner, at the request of Mr. Oakden, signed an underwriting letter, by which he agreed to subscribe for 200 preference shares in the company and to pay for the same on the conditions named in a prospectus to be issued to the public, and further agreed that he would sign and lodge with the company the necessary application for the shares and pay the deposit thereon in accordance with the terms of the prospectus, and that if he failed to do so the underwriting agreement should be sufficient authority to Mr. Oakden to apply for the shares in his name. Subsequently Mr. Oakden acted on this authority, and 189 preference shares were allotted to Mr. Bonner. But before Mr. Oakden applied for the shares it had become clear that the affairs of the company could not prosper, and the contract which had been entered into for the purchase of the site in the Haymarket was rescinded. Mr. Bonner claimed that he was entitled to have his name removed from the list of contributories, on the ground that he had authorized Mr. Oakden as his agent to buy shares in a company formed for a particular purpose, and that when that purpose was relinquished the authority came to an end. The learned Judge on the hearing of the summons refused to make the order asked for, and Mr. Bonner appealed.

Mr. Farwell, Q.C., and Mr. Hay appeared for Mr. Bonner; Mr. Astbury, Q.C., and Mr. Barnard Lailey for the liquidator.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, the underwriting letter was an irrevocable contract on the part of the appellant to take 200 shares if they were allotted to him. The appellant contended that it was conditional on the performance of a particular contract. He could not read in any such condition, and he thought that the judgment of the learned Judge was correct.

LORD JUSTICE RIGBY was of the same opinion. He thought that the underwriting letter which they had to construe was an absolute undertaking by the signer to subscribe for 200 shares in the company in consideration of certain commission to be paid to him by the pro-

motor. Oakden clearly had authority to apply for the shares on behalf of Bonner, and the allotment to the latter was good.

LORD JUSTICE COLLINS was also of the same opinion. It was said that the agreement was conditional. But it was clearly not subject to any condition to be imported from the prospectus; neither, in his judgment, was it subject to any general implied condition. The appellant sought to bring the case within the authorities which showed that in certain circumstances a contract came to an end when its object was defeated. He thought that all that could be said here was that the appellant had gone into a speculation which had proved to be unsuccessful, and those authorities did not apply to this case.

Court of Appeal (Lindley, M.R., } 1897.
Chitty and Vaughan Williams, L.J.J. } Nov. 18.

BARRY RAILWAY CO. V. TAFF VALE RAILWAY CO.*

Railway—Carriage of goods—Rates—Barry Dock and Railways Act, 1888, sec. 23.

Decision of Romer, J. (13 *The Times* L.R., 370), affirmed.

This was an appeal from a decision of Mr. Justice Romer (reported 13 *The Times* L.R., 370). The question in dispute between the parties was whether the defendant company had complied with or evaded a clause providing facilities for coal traffic of the plaintiff company over the defendant company's system contained in the 23rd section of the Barry Dock and Railways Act, 1888, in the following terms:—"The Taff Vale Railway Company shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company (the Barry Company) from or to Treforest or any place northward thereof at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff, Penarth, or Barry." Litigation had taken place between the parties as to how the coal traffic rates over the defendant company's line were to be computed. In that litigation it was decided in the result that the charges made to colliery-owners competing with the plaintiff company were, comparatively speaking, too low. The Taff Vale Railway Company revised these charges, but at the same time they reduced, by the exact amount the carrying charges were reduced, certain dock or tipping and weighing charges on the same coal, which was shipped in the defendants' dock. Mr. Justice Romer held that as matter of fact the defendants had not *bona fide* reduced their dock charges for all shippers equally, and had not complied with the statutory requirements as to posting notices of reduction of such charges, and granted an injunction to restrain them from charging preferential rates. The defendants appealed.

Mr. W. J. NOBLE (Mr. Balfour Browne, Q.C., with him) argued in support of the appeal.

Mr. Moulton, Q.C., Mr. C. A. Cripps, Q.C., and Mr. Joseph Shaw, for the plaintiff company, were not called upon by their LORDSHIPS, who considered that no evidence had been adduced before them to show that the finding of fact by Mr. Justice Romer was not right, and they dismissed the appeal.

[Solicitors—Downing, Holman, and Co., for the plaintiff; Ince, Colt, and Ince, for the defendant.]

Probate, Divorce, and Adm. Div. } 1897.
(Gorell Barnes, J.) } Nov. 18.

THE PRINZ HEINRICH.*

Ship—Carriage of goods—Theft—Negligence of officers—Liability.

This case, which was before the Court on November 16 and 17, was concluded to-day. The facts sufficiently appear in the judgment delivered by Mr. Justice Gorell Barnes this morning.

Mr. Joseph Walton, Q.C., and Mr. Butler Aspinall appeared for the plaintiffs; Mr. Aspinall, Q.C., and Mr. Carver for the defendants.

MR. JUSTICE GORELL BARNES, in delivering judgment, said:—This is an action by the Chartered Bank of India, Australia, and China to recover for the loss of a quantity of gold coins which were stolen from a box shipped by them on the steamer *Hohenzollern*, belonging to the North German Lloyd, at Yokohama, on June 12, 1896, to be carried to London. The box was transhipped at Hong-kong into the *Prinz Heinrich*, by which vessel it was carried to England. The theft occurred on the *Hohenzollern*. The box was delivered to the purser of this vessel and placed by him in the mail room, which is in the 'tween decks abaft the engine-room on the starboard side of the vessel, and to which access is obtained by iron double doors opening outwards from the room and by a hatchway in the top of the room opening on the main deck and secured by a Chubb's padlock. The double doors are secured by a bolt at the top and another at the bottom of one door and two locks riveted on to the other door. The purser keeps the keys of the hatch and doors, the captain having a duplicate key of the hatch padlock. It appears from the evidence that the theft was committed by a quartermaster named Schmidt, who seems to have found an opportunity of secretly displacing the two bolts of the door when he was working in the mail room at Yokohama, and by this means to have been able on the night following the departure of the vessel from Yokohama to pull open the doors and get at the box. If the bolts were drawn the doors, though locked, could, as I understand, be pulled open outwards. The theft was not discovered till the box was opened in London, because, although it was transhipped at Hong-kong, Schmidt had fastened it up again and filled the place of the gold which he stole (being a portion only of the whole contents) with leaden bullets to make up the weight. Schmidt acted with the assistance or connivance of other quartermasters, one of whom, Adkin, was afterwards arrested and has since stated how the theft was committed. A portion of the gold was found in his possession. The other men have left the ship and have not been found. The loss sustained is £2,447 13s. 4d. The box was shipped under a bill of lading, which stated that the value of the coins was \$51,656.36. The material conditions of the bill of lading are:—Clause 1—"Owners to be responsible that the vessel is properly equipped, manned, and fitted out, and in all respects seaworthy and capable of performing her intended voyage; also for the faults and negligence of their servants in all matters relating to the proper stowage, custody, care, and delivery of the goods. All provisions and clauses to the contrary shall be null and void and of no effect in law"; clause 2, which exempts the owners from *inter alia* "thieves and barratry," and clause 5—"Ship not accountable for gold, silver, bullion, specie . . . above the value of £100, unless bills of lading be signed therefor and the value therein expressed and a special agreement be made." In consequence of the

*Reported by F. EVANS, Esq., Barrister-at-Law.

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

cases of "Taylor v. the Liverpool and Great Western Steam Company" (L.R., 9 Q.B., 546) and "Steinman v. Angier Line (Limited)" ([1891] 1 Q.B., p. 619) the exception of "thieves" was not relied on. The defendants rested their case on the exception of "barratry" and the said fifth clause. Mr. Walton, counsel for the plaintiffs, conceded that the theft was a barratrous act, but contended that the defendants are not exempted from liability for the loss by the exception of barratry in the circumstances, because the loss would not have occurred but for the negligence of the defendants' servants in relation to the proper care and control of the box, and he relied on clause 1 of the bill of lading. It was not disputed by the defendants that they would be liable for such negligence subject to a point raised on clause 5. The question, therefore, in the case comes to be one of fact. The negligence complained of is that the purser or one of the officers neglected to see that the bolts of the iron doors were properly fastened when the doors were last closed before the steamer left Yokohama. The answer made is that Schmidt was properly treated as a trustworthy person who assisted the purser in putting the box into the room and locking the doors, and that there was no negligence on the part of the purser or officers if this man tricked them, or one of them, into supposing that the bolts were fast by apparently fastening them, and yet dexterously withdrawing them at the same time. It is not at all clear at what precise time Schmidt managed to displace the bolts. The doors were closed and locked by him when the box was put in. I gather from the purser's evidence that this was done in his presence, and the keys handed to him. The doors were again opened to put in some parcels in charge of the second officer, who seems to have obtained the keys from the purser for that purpose, but I cannot ascertain that Schmidt was in the room then. The room was again entered on June 13, when mails were put into it. This was done through the hatch, and it does not appear that the doors were opened then, nor whether Schmidt was in the room then. The second officer thinks he was, but the master says that he had nothing to do with the mails. The regulations of the defendants provide that the purser is responsible for the right and good reception of specie, and for the custody and correct delivery of same, but the captain has to decide in what manner the loading shall be carried out, and in his evidence the purser states that it was his duty to take charge of treasure, shipments, and mails. There appears to me to have been some laxity about the way in which the room was used for treasure, parcels, and mails, as the purser sometimes used the keys himself and at other times allowed the second and third officers to have them for the purpose of dealing with parcels. Since this loss another room has been allotted for parcels, a bar has been put inside the doors, and they can only be opened from the inside after access is obtained to them by the hatch, and the officers no longer have to use the room or the keys for it. There is no doubt that Schmidt had observed that owing to the manner in which the room was used there might be an opportunity for him to displace the bolts without being observed, and that during the time the vessel was at Yokohama, while he was working in the room, he found and used his opportunity. I have also the advantage of being assisted by two of the Elder Brethren of the Trinity House, both of whom have had large experience in the carriage of treasure, and they advise me that, in their opinion, the facts to which I have adverted disclose a case of negligence on the part of those who had charge of this room. They consider that, taking a practical businesslike view of the matter, as I was invited to do by Mr. Aspinall, one responsible officer should have charge of this

room, as in fact the defendants' regulations indicate, and that he should himself personally see that the fastenings and locks are properly secured after each occasion on which the doors are opened. They consider it desirable to point out that the officer should never part with the keys for a moment, because if the keys are parted with for a short time to a sailor or other subordinate, it affords him the chance of secretly taking an impression of the keys. I agree with the opinion of the Elder Brethren. For these reasons I find that the loss was due to negligence, for which the defendants are responsible. With regard to the point raised on the 5th clause, it is sufficient to say that the value of the package was expressed in the bill of lading, and a special agreement was made. That there was a special agreement appears from the evidence of Mr. Leopold, clerk to the defendants' agents at Yokohama, and according to it the freight charged was about 20 times as much as it would have been if there had been no declaration of value. My judgment must be for the plaintiffs for £2,447 13s. 4d., with costs.

[Solicitors—Waltons, Johnson, Bubb, and Whatton; Clarkson, Greenwells, and Co.]

Judicial Committee of the Privy Council
(Lord Halsbury, L.C., Lords Hobhouse
and Davey, Sir R. Couch) } 1897.
Nov. 19.

ANNIE BROWN V. THE ATTORNEY-GENERAL FOR NEW ZEALAND.*

Privy Council Appeals—New Zealand—Criminal Law—Husband and wife—Marital control—Criminal Code, sec. 24.

This was an appeal from a decision of the Court of Appeal at Wellington, New Zealand, of May 22, 1896, upon a case stated by his Honour Sir James Prendergast, the Chief Justice of New Zealand, under the Criminal Code Act, 1893, No. 56.

Mr. Mayne appeared for the appellant; Sir Robert Reid, Q.C., and Mr. English Harrison for the respondent.

The case was stated under subsection 6 of section 412 of the Criminal Code. Annie Brown was indicted jointly with her husband, John Henry Brown, that they, with intent to procure the miscarriage of a certain woman named in the indictment, unlawfully used an instrument. A separate trial was applied for on behalf of the defendants and was granted. Annie Brown was tried first and convicted. The Chief Justice asked the jury whether or not they found that the woman was married to the other defendant, and, if so, did she in the part she took in the commission of the crime act freely and voluntarily or under the control and coercion of her husband? The jury answered that they found that the defendant was married to the other defendant and that she acted under his control. At the request of the woman's counsel the Chief Justice reserved the question whether the fact that the offence had been committed under the control or by the command of the husband was a defence. There was no evidence of such compulsion as was mentioned in the 24th section of the Criminal Code, but merely command and control of the husband without such threats. The doubt in the mind of the Chief Justice was whether since the passing of the Criminal Code, section 24, marital control or command was a defence. The husband was convicted as well as the wife and was sentenced to 18 months' hard labour. The matter was argued before the Court of Appeal on the question stated as follows:—"Whether the fact that the offence had been committed under the

*Reported by W. J. SOUTLEY, Esq., Barrister-at-Law.

control of the husband was a defence, or whether the circumstance that the appellant was not actually present, or if the jury thought so, not constructively present, made any difference as to the admissibility against her of the acts and declarations, accompanying, acts of the other defendant." The Court of Appeal adjudged that the conviction of the appellant should be affirmed, and she was therefore sentenced to two years' hard labour. From that judgment the present appeal was instituted.

The arguments were heard in February before a committee consisting of the Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Davey, and Sir Richard Couch, when their Lordships dismissed the appeal, intimating that they would give their reasons for their report to her Majesty to that effect at a future sitting.

THE LORD CHANCELLOR, in now giving these reasons, said,—Their Lordships intimated at the hearing of this appeal that they would humbly recommend to her Majesty that it should be dismissed. They think it right to add now that if the facts had been understood at the time application was made for leave to appeal, that leave would not have been granted. It is a little difficult to understand why even at the original trial any question was reserved for the Court of Appeal in the colony. In the case stated by the Chief Justice it is said that at the request of the prisoner's counsel he reserved the question whether the fact that the offence had been committed under the control or by the command of the husband was a defence; and further on the learned Judge states that the doubt was whether since the passing of the 24th section of the Criminal Code marital control or command was a defence. That section is as follows:—
"Section 24.—(1.) Except as hereinafter provided compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission by a person subject to such threats and who believes such threats will be executed (and who is not a party to any association or conspiracy the being a party to which rendered him subject to compulsion) of any offence other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson. (2.) No presumption shall be made that a married woman committing an offence does so under compulsion only because she commits it in the presence of her husband." Whatever may be the proper solution of these questions their Lordships are of opinion that none of them arise upon the evidence set out in the case. There was no evidence, as the Chief Justice himself states in the case reserved, of any such compulsion as is referred to in the section in question. The offence charged was not committed by one in the presence of the other at all. The evidence upon which the prisoner was apparently convicted, and properly convicted, was the procuring and contriving the commission of the offence committed by the husband in her absence and under circumstances wherein the section above set out could have had no application at all. The Chief Justice states that the jury at the trial found that the prisoner was married to the other defendant and that she acted under his control. For the latter proposition there is not a scintilla of evidence, and no such question should have been left to the jury. The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the commission of a crime her coverture furnished no defence (see Bracton, Book 3, c. 32, who says):—"Quid erit si uxor cum viro conjuncta fuerit, vel confessa fuerit quod viro suo consilium presterit et auxilium? Numquid tenebantur ambo? imo ut videtur." and he goes on to add, "sic

ut sunt participes in crimine, ita debent esse participes in pena." Questions have from time to time arisen how far the mere presence of the husband at the time of the commission of the offence should furnish a presumption of marital control, and the decisions on that subject have not been entirely uniform. But their Lordships are of opinion that here even that question does not arise. The acts attributed to the prisoner were acts done by herself in the absence of her husband, conclusively establishing that she was voluntarily acting and aiding and assisting in arrangements leading up to and intended to assist the commission of the offence which was afterwards consummated. Their Lordships are therefore of opinion that no such question was open upon the facts as detailed, and the finding of the jury is only intelligible on the ground that they supposed that the mere fact of coverture itself furnished legal evidence of compulsion within the rule of law, which view their Lordships are of opinion was entirely erroneous. It is for these reasons that their Lordships have thought it right humbly to advise her Majesty that this appeal should be dismissed.

[Solicitors—Royle and Co., for the appellant.]

Judicial Committee of the Privy Council } 1897.
(Lord Halsbury, L.C., Lords Hobhouse and Davey, Sir R. Couch) } Nov. 19.

GANGADHAR TILAK V. THE QUEEN-EMPRESS.*

Privy Council Appeals—India—Leave to appeal—Indian Penal Code, sec. 124a—"Disaffection" to the Government—Direction to jury.

This was a petition from Bombay for special leave to appeal.

Mr. Asquith, Q.C., Mr. Mayne, and Mr. Bannerman appeared for the petitioner; Mr. Cohen, Q.C., and Mr. J. H. A. Branson represented the Secretary of State for India.

MR. ASQUITH, Q.C., said the petition was for special leave to appeal against a conviction and sentence passed upon the petitioner by the High Court of Bombay. The petitioner was charged with an offence under section 124a of the Indian Penal Code. After a trial which lasted for some days before Mr. Justice Strachey and a jury of nine, he was, on September 14 last, found guilty by a majority of six to three of the jury, and sentenced to 18 months' imprisonment. The section in question was in these words:—"Whoever by words either spoken or intended to be read, or by signs or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India shall be punished with transportation for life or for any term to which fine may be added, or with imprisonment for a term which may extend to three years." Then followed the explanation:—"Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause." Under that section the petitioner was charged—first, with exciting feelings of disaffection, and, secondly, with attempting to excite feelings of disaffection. The words relied upon in support of these charges were to be found in two articles published in the issue of June 15 of a newspaper called the *Kesari*, a newspaper published at

*Reported by W. J. SOULEBY, Esq., Barrister-at-Law.

Poona, in the Mahratta language, of which the petitioner was admittedly proprietor and editor. The substantial ground upon which the application was raised was that the learned Judge in his summing up, having to direct the jury as to the meanings of the section and its application to the matter before them, misdirected them in serious and important respects. Two articles were relied upon by the prosecution. The first was a report of the proceedings which had taken place in connexion with a celebration of Shivaji, one of the heroes of the Mahratta race. It appeared that there had been of late years a revival of the memory of Shivaji. It had become customary to hold celebrations on the great anniversaries of Shivaji's life. The proceedings in question took place at one of such celebrations. Amongst those who took part in the proceedings was the present petitioner and two other gentlemen, Professor Bhanu, and Professor Jinsivale, whose speeches, as reported, were part of the incriminated matter. One of the incidents of the life of Shivaji, which had excited the greatest amount of controversy, was as to the circumstances under which he put to death one Afzul Khan. One party maintained that Shivaji treacherously murdered Afzul Khan; the other party contended that it was an act of self-defence. At the conclusion of his lecture Professor Bhanu said :—" Every Hindu or Maratha, to whatever party he may belong, must rejoice at this festival. We are all striving to regain our lost independence, and this terrible load is to be uplifted by us without any combination." It appeared from the proceedings that there had been doubt as to the exact English equivalent of the Maratha word translated "independence." One of the witnesses was of opinion that it referred to freedom of thought or speech. Professor Jinsivale said :—" If no one blames Napoleon for committing 2,000 murders in Europe, and if Caesar is considered merciful though he needlessly committed slaughter in Gaul many a time, why should a virulent attack be made on Shri Shiraji Maharaja for killing one or two persons. The people who took part in the French Revolution denied that they committed murders, and maintained that they were only removing thorns from their path. Why should not the same principle be made applicable to Maharashtra?" The learned counsel then read the report of Mr. Tilak's discourse, which was of a similar nature. The next matter upon which the prosecution was based was called Shivaji's utterances. It was in the same paper as the report before referred to, and was in the form of a poem. The evidence at the trial consisted of the proof that Mr. Tilak was proprietor and editor, and of a certain amount of controversy as to the proper translation of various words and phrases. It was elicited that some months before these articles were published the plague had been raging in Poona, and that there had been a controversy in the native community as to the measures adopted by the Government for stamping it out. It was shown that Mr. Tilak had very strongly taken the view that the native community ought to co-operate with the Government in the measures which were being taken. Mr. Tilak criticized some of the details of administration; but, on the whole, he thought that they ought to co-operate with the Government. It also appeared that this state of things had practically come to an end about May 18. The measures taken by the Government had proved successful, so that when the articles in question were published a month had elapsed since that state of things had come to an end. No evidence was called for the defence, and the learned Judge proceeded to direct the jury. The learned counsel read at considerable length the summing up of the learned Judge, and proceeded to say that, speaking generally, the objection which, on behalf of the petitioner, he had to take to that direction

was that the learned Judge had defined the offence described in section 124a in terms far too wide, and that, if the jury accepted the ruling of the learned Judge as a conclusive and binding definition of the law they would have found Mr. Tilak guilty of "disaffection," when, in point of fact, the highest and strongest charge that could be fairly brought against him was that he had commented, or allowed other persons to use his paper as a vehicle for commenting, severely no doubt, upon what he conceived to be social and political abuses, but comment which was recognized in his country and in British India as well within the scope of the functions of a public journalist. The question really depended upon what was the meaning to be given to the word "disaffection" in section 124a, having regard to the context and to the explanation. It was noteworthy that those who framed the section had not used the word "sedition," which was a term of art in English law, but they had chosen the word "disaffection," which had no technical meaning in this country in our system of jurisprudence. He did not wish to pin the learned Judge to the expression that "disaffection" meant merely "the absence of affection." No one could say that that was anything but a very vague and loose definition; but he thought he was not misrepresenting the general effect of the charge when he said that the learned Judge defined feelings of disaffection as meaning any feelings of hatred or ill-will or enmity to the Government; and therefore, if it could be shown that the intention or effect of the words used would be to inspire in those to whom they were addressed feelings of enmity towards the Government as by law established, that was sufficient to bring the person within the scope of the penal enactment. The learned Judge fortified himself in taking what, it was submitted, was far too extensive a view of the meaning of the word in question by the explanation which he treated as if it were an exhaustive enumeration by way of a negative of the cases which are not intended to fall within the section. That, he submitted, was not the proper function of an explanation. The learned counsel desired to point out the absurdity which would follow from the way in which the learned Judge had dealt with the explanation. The learned Judge had said the explanation spoke only of the "measures" of the Government; therefore the making of comments on the measures of the Government was not an offence within the clause. The word "measures," the learned Judge thought, meant that a journalist who criticized a particular Act such as the imposition of a tax, or an Act dealing with an epidemic, provided that it was compatible with the disposition to render obedience to the authorities, would be safe; but the moment he got beyond measures and went to the general policy of the Government he fell within the penal enactment. That, he contended, was a most irrational and unpractical suggestion. What was intended by the clause was that feelings of disaffection were to be something beyond disapproval or dislike. The dividing line was passed when the feeling sought to be excited was incompatible with the disposition to render obedience to the lawful authority of the Government. In other words, it was intended to be an essential ingredient of the offence that the effect calculated to be produced should be such a state of enmity as was incompatible with the disposition to obey. It might be that the object was to excite active resistance. The case then would of course be too clear for argument. It might be the object was only to excite passive resistance; that again would not be compatible with the disposition to render obedience to the lawful authority of the Government. It was quite sufficient for the purpose of bringing a man within the section that he should seek to inspire enmity, ill-will, or

hatred to the Government, and the protection given by the explanation only applied to criticisms of particular measures, and it was only then that they had to consider whether the disapprobation excited was compatible with the disposition to render obedience to the authority of the Government.

LORD HOBHOUSE.—You say “measures of the Government” ought to be read as if it were the whole course of Government?

MR. ASQUITH.—Yes; inasmuch as criticism upon the Government generally takes the form of criticism of some one or other measures. The word “measures” is not the governing word.

LORD DAVEY.—You would, I suppose, include administrative Acts and not merely legislative Acts?

MR. ASQUITH.—Certainly.

LORD HOBHOUSE.—Suppose a man said the Government was very wasteful, that it was neglecting irrigation and education and other things, that would not be a comment of any particular measure.

MR. ASQUITH.—It would not. The learned Judge ought to have told the jury that they must keep in their minds the question—Is the spirit of hostility which it was stated was engendered compatible with the disposition to render obedience to the lawful authority; and so long as the speeches at the meeting and the rhetorical poem were merely intended as a general attack upon the policy of the British Government in India or upon the change of social habits and institutions which had been brought about since the time of Shivaji, since the time when the Mahratta rule was founded, by the introduction of foreign laws and foreign customs, could it be said that there was anything there which necessarily tended to create a disposition not to render obedience to the lawful authority? It was not a case, perhaps, which ought to have been withheld from the jury, but that was the question to which their minds ought to have been directed. At various stages in his charge the learned Judge had assumed, without any evidence to warrant him in so doing, a state of inflamed feeling and of exasperation in the minds of those to whom the request was addressed, which, as he said, would almost require the jury to put a more severe construction upon the language than if it had been used in another place or at another time and in other cases, as in the reference to a thousand swords leaping from their scabbards and the comparison between Napoleon and Shivaji and the morality of ordinary men and of great men. The learned Judge had suggested a construction of words which those words would not legitimately bear. He was aware that such an application as the present, although not altogether unusual, yet, according to the decisions of their Lordships, required very strong grounds to support it. It had been said that a mere ordinary case of misdirection of a jury would not justify their Lordships in advising her Majesty to exercise her special prerogative. An application had been made to the Court in Bombay for leave to appeal, which application had been refused by the Chief Justice and two other Judges; but it was submitted that the present was not an ordinary case.

LORD HOBHOUSE.—Has the High Court complete discretion in a criminal case as to allowing an appeal?

MR. ASQUITH.—Yes; they can give leave to appeal, but they could not have heard the case themselves unless the Judge reserved a point or unless the Advocate-General certified that it was a case that ought to be reheard. As regards the general question whether the case was one in which the point had been made good, that where there was a substantial misdirection their Lordships would give leave to appeal, the matter was one which was entirely within their Lordships' discretion. He would refer to what was said by their Lordships in the case of “The Queen v. Bertrand” (L.R., 1 P.C., 520), in which their

Lordships said:—“The exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience that in them the Crown will be very slow to entertain an appeal by its officers on behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare. The opinions stated by this Committee in the case of ‘Ames and others’ (1), ‘The Queen v. Joykissen Mookerjee’ (2), and ‘The Falkland Islands Company v. the Queen’ (3) establish these positions. The result is that any application to be allowed to appeal in a criminal case comes to this Committee labouring under a great preliminary difficulty—a difficulty not always overcome by the mere suggestion of hardship in the circumstances of the case; yet the difficulty is not invincible. It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said that where the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future, and also where there is no other means of preventing these consequences, then it will be proper for this Committee to entertain an appeal, if referred to it for its decision.” This case, he contended, fell within the criterion there laid down. With the exception of the decision of Sir Comer Petheram, this was the first time that the particular section had come under judicial consideration. If there was no appeal from the construction which had been put upon the section by the learned Judge of the Court below, that, of course, would have to afford a precedent when the law was again invoked, and as the whole law as regards the rights and liabilities, not only of journalists, but of speakers throughout British India, depended upon whether or not that was the true construction of the section, it was, he submitted, a question of great and general importance likely to occur often, and also a case which must create a precedent for the future. In these circumstances he submitted that it was a fit case for granting the leave which the petitioner asked.

MR. ARTHUR COHEN, Q.C., on behalf of the Secretary of State for India, thought that he might perhaps direct their Lordships' attention to the last case before the Board in which the rule on which the Board proceeded was laid down. The judgment was delivered by the Lord Chancellor on July 14, 1897. He said the rule was accurately stated in the course of the argument in the case “*Re Abraham Mallory Dillet*” as follows:—“Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.” He did not wish to do more than remind their Lordships of the principle there laid down, and he did not think that at the present stage he should argue the case.

Counsel were directed to withdraw, and their Lordships deliberated for some time. Upon readmitting counsel and parties, their Lordships proceeded to deliver judgment.

THE LORD CHANCELLOR said:—Their Lordships are of opinion, taking the view of the whole of the summing up, which is of very great length, that there is nothing in that which, in their Lordships' opinion, calls upon them to indicate any dissent from or necessity to correct what is therein contained, looking at the summing up as a whole, and looking at each part of what was said

by the light of what else was said. Speaking generally of the argument which has been presented to their Lordships, they are of opinion that no case has been made out consistently with the rules by which their advice to her Majesty has been guided hitherto in giving leave to appeal in criminal cases, and therefore they will humbly advise her Majesty that this is not a case in which leave should be granted.

Special leave to appeal was therefore refused.

Court of Appeal (A. L. Smith, } 1897,
Rigby, and Collins, L.J.J.) } Nov. 19.
HUNT V. HUNT.*

Husband and wife—Separation deed—Covenant not to molest—Divorce proceedings in foreign country.

A husband living apart from his wife under a separation deed instituted divorce proceedings in the Courts of Texas; *Held*, that he had not committed a breach of the covenant not to molest contained in the separation deed.

Decision of Wright, J. ([1897] 2 Q.B., 304), reversed.

This was an appeal by the defendant from the judgment of Mr. Justice Wright at the trial of the action without a jury; reported in (1897) 2 Q.B., 304. The action was brought by a wife against her husband to recover damages for breach of a covenant in a separation deed not to molest her, and for an injunction to restrain him from continuing or prosecuting proceedings commenced by him against her in the district Court of the county of El Paso, in the State of Texas, in the United States. The defendant counterclaimed for damages for breach of a similar covenant by her not to molest him, alleging that in bringing the present action against him she had committed a breach of covenant. The plaintiff and defendant were married in Ireland on June 18, 1868. On November 24, 1880, a separation deed was executed, under which the parties agreed to live separate, and there was a covenant by the defendant "not in any way to molest her or institute any legal proceedings to compel her cohabitation with him." There was a similar covenant by the plaintiff. The parties accordingly lived separate, and in September, 1896, the defendant went to reside in Texas, and on December 5, 1896, he there filed a statement in the district Court of El Paso setting forth that he was resident there, and that he anticipated instituting a suit in that Court against his wife for dissolution of their marriage on the ground that she had, without cause, in October, 1880, abandoned him, and had continued to live apart from him, and stating that he desired to take the depositions of certain specified witnesses in England for the purpose of perpetuating their testimony, and using the same upon the trial of the suit. The defendant prayed for the issue of a copy of the statement to be served upon the plaintiff, in order that he might take out the necessary process to secure the depositions of the witnesses. The Court of El Paso issued a notice to the plaintiff reciting the above statement, and stating that, after the service thereof upon her, the defendant would apply to the clerk of the Court of El Paso for a commission to take the depositions of the witnesses. This notice and the defendant's statement were served upon the plaintiff in England, when she was asked whether she would accept service by post of the proceedings in the district Court of El Paso. She refused to do so, and brought this action. Mr. Justice Wright held that there was "molestation," and gave judgment for the plaintiff

for £15 damages, and granted an injunction restraining the defendant from doing any act or taking any proceedings in this country for continuing or prosecuting the proceedings commenced by him, or any similar future proceedings, in the district Court of El Paso against the plaintiff for dissolution of marriage. The defendant appealed.

The defendant appeared in person, and contended that there was no "molestation" on his part, and referred to "Thomas v. Everard" (6 H. and N., 448); "Fearon v. Earl of Aylesford" (14 Q.B.D., 792); "Flower v. Flower" (20 W.R., 231); "Rowley v. Rowley" (L.R., 1 H.L. Sc., 68).

Mr. TINDAL ATKINSON, Q.C., and Mr. HERBERT JACOBS, for the plaintiff, contended that it was sufficient if there was, in fact, an annoyance. There was an annoyance here. Further, if intention to annoy was necessary to cause molestation, there was evidence of such intention.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the separation deed did not contain a covenant by the defendant not to take proceedings for divorce against his wife, but merely a covenant not to molest her. The defendant went to Texas in September, 1896, and the inference which his Lordship drew from the facts was that he went to Texas in order to get a divorce from his wife, it having been stated by the plaintiff's counsel that the Courts in Texas did not recognize separation deeds, and therefore the defendant, in relying in those Courts upon desertion, would not be hampered by the separation deed. The question was whether there was molestation. In "Thomas v. Everard" it was held that the bringing of a suit in the Divorce Court for judicial separation was not a breach of a covenant not to molest. In "Fearon v. Earl of Aylesford" it was stated, as it seemed to him, by Lord Esher and Lord Justice Cotton that, to constitute molestation, there must be an act done which in fact annoyed and which was done with the intention of annoying. Lord Justice Cotton said that there must be an act done with the purpose and intent to annoy and injure, and, of course, when a person did an act the natural tendency of which was to annoy and injure, *prima facie* that person must be supposed to have that intention. With that statement of the law he agreed. Of course, there might be some acts done as to which it was obvious that an intention to annoy existed. But if the acts were of such a nature that they did not necessarily show an intention to annoy, the circumstances must be looked at. What were the circumstances in this case? In Texas the defendant could get a divorce more easily than in this country. Did the defendant go to Texas to annoy the plaintiff or to get a divorce? Mr. Justice Wright did not deal with the question of intention. He merely said that it was vexatious to take proceedings in Texas. The only inference he (the Lord Justice) could draw was that the defendant merely intended, in going to Texas, to take divorce proceedings against his wife. That being so, it was not a breach of the covenant not to molest; though, if the covenant had been not to take proceedings, it would have been a breach of that covenant.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitor—J. F. Rowe.]

Chan. Div. } 1897,
(Wright, J.) } Nov. 19.

IN RE THOMAS EDWARD BRINSMEAD AND SONS

(LIMITED)—TOMLIN'S CASE.*

Company—Winding up—Contributories—Appli-

cation to remove name—Conditional application for shares.

T. applied for an allotment of shares in a company "provided that the total number of shares are applied for." He was allotted shares, and subsequently in the winding up of the company discovered that the total number of shares had not been applied for.

Held, on the facts, that he had done nothing to estop him from denying that he was a shareholder, and that he was entitled to have his name removed from the list of contributories.

Mr. G. W. F. Tomlin was attracted by a prospectus issued by the abovenamed company—which has on several occasions been before the Courts—and on July 24, 1896, he signed and sent in the following application:—

"Form of Application for Shares.—Thomas Edward Brinsmead and Sons (Limited).—To the Directors of Thomas Edward Brinsmead and Sons (Limited), 94, Cannon-street, London, E.C.—Gentlemen (Having paid to your bankers the sum of £ — being a deposit of 10s. per share payable on application for — shares of £5 each in) Thomas Edward Brinsmead and Sons (Limited), I request you to allot me *five hundred pounds in* [that number of] one hundred shares, and I agree to accept the same, or any smaller number that may be allotted to me, upon the terms and conditions of the prospectus and memorandum and articles of association of the company. I request you to place my name on the register of members in respect of the shares so allotted to me, and I undertake to pay the further instalments upon such allotted shares as and when the same become due, *provided the total number of shares are applied for, and I undertake to pay in full on allotment.*—Ordinary signature, —.— Name (in full), *George William Flowers Tomlin.*—Address, *Dudley-street, Leighton Buzzard.*—Description, *No occupation.*—Date, *24th July, 1896.*—If you desire to pay in full on allotment sign the following:— I desire to pay in full on allotment. This form is to be filled up, cut out, and forwarded, together with cheque or cash for the amount payable on application to the bankers, &c., or to the secretary at the offices of the company, 94, Cannon-street, London, E.C."

The application was made upon one of the usual printed forms, but Tomlin altered the form in ink by striking out the portions which are above enclosed in square brackets, and by adding the words which above are printed in italics. He did not sign at all at the end of the words "I desire," &c., and he never paid any money to the company. The company shortly afterwards went to allotment, but all the shares in it were not applied for, and only about 58,000 (including those applied for by Tomlin) out of a larger number were allotted. No notice of the allotment was given to Tomlin, but he soon afterwards found that there was something wrong with the company, and on August 17, 1896, he served on the company a notice of motion, under section 35 of the Companies Act, 1862, for rectification of the register by removing his name therefrom on the ground of misrepresentation in the prospectus. It was admitted that had this motion been proceeded with, and Tomlin had done nothing to affect his position, he would have been entitled to the relief claimed. The motion stood over by consent until certain test proceedings of the same nature had been disposed of, but before these came before the Court a petition was presented to wind up the company. Tomlin gave the usual notice as a contributory that he intended to appear and oppose the petition; and he actually did

appear and oppose it. A winding-up order was made by Sir R. Vaughan Williams, and the notice of appeal from that order was given on behalf of Tomlin and others. The Court of Appeal dismissed the appeal with costs against the appellants. Tomlin now applied that his name might be struck off the list of contributories in the winding up. It was contended on his behalf that there was no contract with the company; and that even if there was a voidable contract he had done nothing which prevented him from applying for relief. The following passage from *Palmer's Company Precedents*, 7th edition, Part II., p. 353, was read to the Court:—"A number of shareholders"—in this company—"had repudiated their shares on the ground of misrepresentation, and had taken proceedings to enforce such repudiation, and had thus definitively elected to avoid their contracts, they could have voted without danger, for 'if a man once determines his election it shall be determined for ever' (Com. Dig., Elections, c. 2), so held by the Court of Appeal in 'Foulkes v. Quartz Hill Company' in 1884 (Em. Dig., 1884, p. 102)." In "*Foulkes v. Quartz Hill Consolidated Gold Mining Company*" (reported in *Cababe and Ellis's Reports*, p. 156), after issue joined and notice of trial given in an action by a shareholder to have his name removed from the register of shareholders on the ground of fraud, the plaintiff attended and voted at a meeting of shareholders held in the liquidation of the company, and it was decided by Baron Pollock that the shareholder's conduct debarred him from prosecuting his action for fraud; but the following note appears at the foot of the report:—"The Court of Appeal reversed the above decision, holding that the issue of the writ was a distinctive election to rescind, and that this election was not affected by the subsequent voting at the meeting." On behalf of the liquidator, it was contended that there was a voidable contract, but that Tomlin, notwithstanding his notice of motion, had by his subsequent conduct deprived himself of the right to relief.

Mr. Norman Craig was for the applicant, Tomlin; and the Hon. Frank Russell for the Official Receiver and liquidator.

MR. JUSTICE WRIGHT delivered judgment to the following effect:—"The case has been concisely and ably argued, and I think that no point has been overlooked. The applicant in July, 1896, applied for shares, altering the printed form of application by inserting a proviso which must, I think, be taken to be general in effect and to affect the whole of the previous words. It was, therefore, a conditional application for shares, and the whole of the shares were not allotted. The shares applied for by the applicant were allotted to him, but no notice of allotment was given to him, and he has never paid the company anything in respect of the shares. He discovered that there was something wrong with the company, but whether he knew that the total amount of shares was allotted or based his objection on another ground is not apparent. In August, 1896, he served notice of motion under section 35 of the Companies Act, 1862, for rectification of the register on the ground that he had applied for the shares on the faith of misrepresentations in the company's prospectus, and not on the ground of non-performance of the condition on which he applied. The motion by consent stood over to abide the result of some test cases, and in due course the test motions would have come on. But the motions were out short by the presentation of a petition to wind up the company. The applicant cannot, therefore, be said to have been in default prior to the hearing of the winding-up petition. But he gave notice of his intention to appear as a contributory at that hearing and oppose the petition. There was, however, nothing in that amounting

to a deliberate election to be a shareholder if he was not already one, or to alter the applicant's position. He also appeared at the hearing and opposed, and was a party to the appeal from the decision, but he never voted at any meeting of shareholders. There was no contract at first between the applicant and the company—that is, prior to notice (if any) of the fact of allotment being communicated—because the application was subject to a condition which was never complied with, or, so far as the evidence goes, waived. It is said that it was waived by the attendance in Court and by the notice of motion to rectify, and that the appearance in Court amounted to adoption of the contract. I must, however, hold that the applicant did not intend to render himself liable for the shares; throughout he was endeavouring to obtain relief from liability. When he gave his notice of motion he probably did not know that he could escape on the ground of non-compliance with the condition; but in my judgment he has done nothing to estop himself from denying that he was a shareholder; indeed I do not see what else he could have done, and in my judgment he is entitled to have his name taken off the list of contributories. It is unfortunate that the decision of the Court of Appeal in “Foulkes v. Quartz Hill Company” was not fully reported, as it is a very important one; but I doubt whether the Court meant to lay down the rule so absolutely as is stated in the note to the report. I do not think that note goes so far as the note in Mr. Palmer's book.

[Solicitors—Eall and Co.; Day, Russell, and Co.]

Q.B. Div. (Lord Russell of Killowen, C.J.,) 1897.
and a Special Jury } Nov. 19.

TREGELLAS V. THE LONDON COUNTY COUNCIL.*

County Council—Liability—Personal injuries—
Nonfeasance.

The plaintiff suffered personal injuries through the defendants' neglect of their duty to lop the branches of the trees in Victoria-park; *Held*, that this being mere non-feasance defendants were not liable.

In this action Mr. Thomas Tregellas, an estate agent, carrying on business at 12, Hobart-place, Eaton-square, claimed damages from the London County Council for the loss of his left eye, owing to a blow from the branch of a tree in Victoria-park, which extended over the highway and struck him while he was travelling on the top of a tramcar along Grove-road. The defendants denied that there had been any negligence on their part, and contended that the statement of claim disclosed no cause of action.

Lord Coleridge, Q.C., and Mr. Lindsey Smith were counsel for the plaintiff; and Mr. Dickens, Q.C., and Mr. English Harrison appeared for the defendants.

The accident in question occurred on June 26, 1896. The plaintiff was travelling on the top of a tramcar in Grove-road, when he received a blow in the eye from a branch of one of the trees overhanging the road from Victoria-park. At the time he did not know his eye was much injured, but on going to the Oval to play cricket he found he could not see the ball. He thereupon consulted several oculists, and it was found necessary at once to remove the eye. In consequence of his injuries the plaintiff had been put to considerable

suffering and expense, and had incurred serious business losses.

Evidence was given by the plaintiff, and by other persons who had been struck by the branches of trees in Grove-road when travelling by tram.

The facts were not disputed, and at the close of the plaintiff's case Mr. DICKENS contended that this action would not lie against the London County Council. Victoria-park was a Royal park, and the trees were the property of the Crown, and, assuming that it was the duty of the County Council to lop the trees, they would not be liable for non-feasance thereby. There was nothing in the Acts of Parliament under which the management and control of Victoria-park became vested in the London County Council which imposed upon them liability for mere non-feasance. The learned counsel cited “Cowley v. Newmarket Local Board” (1892) Ap. Cas., 345, “Sanitary Commissioners of Gibraltar v. Orfila” (15 Ap. Cas., 400), “Municipality of Pictou v. Geldert” (1893) Ap. Cas., 524, and “Saunders v. Holborn Board of Works” (1895, 1 Q.B., 64).

LORD COLERIDGE contended that the doctrine of non-liability of a public body for non-feasance applied only to highway authorities and sewerage authorities, and in support of this contention he cited “Cowley v. Mayor of Sunderland” (30 L.J., Ex., 167), “Glossop v. Iseworth Local Board” (12 Ch. D., 102), “Gilbert v. Trinity House” (17 Q.B.D., 795), “Borough of Bathurst v. Macpherson” (4 Ap. Cas., 256), “Thompson v. Mayor of Brighton” (1894) 1 Q.B., 332, and “White v. Hindley Local Board” (44 L.J., Q.B., 114). The learned counsel also argued that the negligence in this case was misfeasance, and not non-feasance.

After hearing the arguments of counsel the LORD CHIEF JUSTICE asked the jury, assuming the defendants were liable, to assess the amount of damages.

The jury fixed the damages at £1,250.

The LORD CHIEF JUSTICE held, on the point of law, that the plaintiff was not entitled to recover. It was the duty of the London County Council to do all that was reasonably necessary for the proper regulation of the parks and to insure the safety of people using them. They were bound to see that the trees should not be allowed to extend beyond the confines of the park so as to be a danger or nuisance to persons lawfully using the highways, and it was the duty of the park-keepers or some such persons to report such an evil if it existed, so that the trees might be lopped. Trees had been allowed to extend their branches so as to be a danger and a nuisance, and the plaintiff had suffered injury. The trees, however, were not planted by the defendants, nor during the period in which they were charged with the control and management of the park. They neglected their duty of lopping the branches, but that was an act of non-feasance only. There was no statute which put an exceptional liability on the London County Council beyond that which the general law imposed. The state of the law on this matter was, his Lordship said, unsatisfactory. If the servants of the London County Council had in pursuance of their duty lopped the trees so as to prevent them from being a nuisance and in the course of doing so had negligently let a branch fall on a passer-by, and so caused an injury, then that would have been a misfeasance, and the London County Council would have been liable. After considering the cases on the subject he was of opinion that the defendants were not liable for an act of non-feasance, and he therefore gave judgment for them.

Q.B. Div.
(Bigham, J.) }1897.
Nov. 19.ROBSON V. THE PALACE CHAMBERS, WESTMINSTER,
COMPANY (LIMITED).*

Landlord and Tenant—Lease—Covenant for quiet enjoyment—Light—Interference—Building on adjoining land.

Having regard to the circumstances existing at the date of the lease, and known to both parties, *Held*, that the defendants had committed no breach of a covenant for quiet enjoyment by building on adjoining ground, and so interfering with plaintiff's light and air.

This was an action brought by the plaintiff to recover damages for breach of a covenant for quiet enjoyment contained in an agreement in writing dated April 1, 1880, whereby the defendant company demised to a Mr. Whichcord certain rooms in Palace-chambers, Westminster, for a term of 21 years, at a yearly rent of £210. The plaintiff, who was an architect, claimed as assignee of Whichcord's interest under the agreement. The covenant in question was in the following terms:—"The tenant, on payment of the rent hereby reserved and performing the agreement herein contained, shall have quiet enjoyment of the said rooms during the said tenancy." The breach complained of was that the defendant company had let certain vacant land belonging to them and adjoining Palace-chambers on a building lease, and had permitted a high building to be erected thereon within about 26 feet of one of the plaintiff's rooms in which he carried on his work as an architect, whereby the said room was rendered dark, unwholesome, and of less value to the plaintiff. The defence raised was that the plaintiff had notice when he took the premises that the vacant land would be built upon, that if he ever had a right to light he had abandoned it by his conduct, that the rooms had been let to Whichcord at a specially low rent because this land was to be built upon, and that the plaintiff was bound by an equity arising from that arrangement. It was admitted that there was an obstruction to the light of the room.

Mr. Tindal Atkinson, Q.C., and Mr. A. J. Ram appeared for the plaintiff; Mr. Lawson Walton, Q.C., and Mr. Sargent for the defendant company.

The plaintiff was called and stated that one of his rooms was specially valuable to him as having a good north light, and that he did his finest work in it. He estimated that the annual value of the rooms had decreased to the extent of £65. He claimed £325 on that head, £190 as the unexhausted value of certain improvements he had made, and £25 for time lost in looking for other offices.

Mr. Henry Currey, the well-known architect, estimated the depreciation of the value of the north room at the capitalized sum of £225.

Mr. SARGENT, for the defendant company, submitted that the implication that Whichcord by the agreement took a right of light over the adjoining land of the defendant company was in this case rebutted by the particular circumstances existing at the date of the agreement. He cited "*Birmingham District Bank v. Ross*" (38 Ch. D., 295). Secondly, if Whichcord had ever acquired an easement of light, it had been subsequently abandoned. On this point he referred to "*Moore v. Rawson*" (3 B. and C., 334).

Mr. James S. Beale, solicitor, said that he recollected the formation of the defendant company in 1880. He, Whichcord, and Mr. Driver,

the surveyor, were the first directors. At the time Whichcord entered into his agreement of tenancy it was perfectly well understood by him that the light to his rooms would eventually be obstructed by the buildings which it was intended should be erected on the company's vacant land. The matter was discussed at a meeting of the directors in March, 1880, and the rooms were on that account let to Whichcord at a rent 25 per cent. less than their then value. After the agreement Whichcord himself prepared plans for the new buildings which would have caused an obstruction to his light, and Whichcord negotiated with several intending lessees of the vacant land. When the plaintiff was in occupation of the rooms after Whichcord's death, he entered into negotiations with the company on behalf of intending purchasers of the vacant land.

Mr. Conder, manager of the company, stated that when the plaintiff was thinking of taking the rooms after Whichcord's death, he (the witness) informed him that the light would be obstructed when the adjoining land was built upon. This witness estimated the damage to the value of the premises at £20 per annum.

Mr. TINDAL ATKINSON contended that the express language of the covenant could not be limited by a previous verbal arrangement between Whichcord and the company. The lessor could not derogate from his own grant. The premises must be taken as they existed at the time of the agreement. No authority had been quoted to show that a verbal agreement between the parties before the lease was signed could limit or control the express terms of the document itself. The contention of the defendants was contrary to one of the most fundamental principles of the law.

MR. JUSTICE BIGHAM said that the action was brought upon a covenant for quiet enjoyment contained in an agreement for a lease entered into by the defendant company with Whichcord, an architect, by which four rooms in a building known as Westminster Palace-chambers were demised to Whichcord for a term of 21 years. The lessee took the rooms for the purposes of his profession as an architect. It was important to remember the circumstances under which the rooms were taken by Whichcord. The defendant company was formed in 1880, Whichcord being one of the promoters, with the object of acquiring these very buildings and some adjacent land which was at that time vacant. The scheme was that buildings should be erected on that vacant land, either by the company or by lessees from them. His Lordship was satisfied that Whichcord and the other directors all knew perfectly well that the new buildings, when erected, would interfere with some of the light of the old building, and in particular with the light of one of the rooms let to Whichcord. His Lordship accepted Mr. Beale's statement that when Whichcord, who was to act as architect to the company, negotiated with the board of directors for the term of 21 years of these rooms, he obtained them at a rent considerably below the rack rent because he knew, and the company knew, that the value of the rooms would be decreased by the erection of the new buildings. In these circumstances the question was, What did the covenant for quiet enjoyment mean, especially with reference to light? What was the light which the defendant company undertook that Whichcord should enjoy? His Lordship was of opinion, taking all the circumstances into consideration, that the light to be enjoyed by Whichcord was all that light which would, during the term, come through the window after the new buildings had been erected. All the parties knew of the intention to erect new buildings, and the contract was made with reference to that existing state of

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

things. It was true it was only an intention, but the intention was just as much a part of the existing state of things as the old building itself. It was not contended that the plaintiff's rights were any better than those of Whichcord, but his Lordship found as a fact that the plaintiff when he took over the rooms was well aware of all the circumstances under which the agreement was entered into by Whichcord. His Lordship came to the conclusion that no right granted to Whichcord by the defendant company had been interfered with, and as the plaintiff had no better right than Whichcord, his judgment must be for the defendant company. In the event of the plaintiff being held by another Court to be entitled to recover, his Lordship, to save further expense, assessed the damages at £150.

[Solicitors—Gedge, Kirby, and Millett, for the plaintiff; Beale and Co., for the defendant company.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J. } Nov. 20.

RYNER V. BULLARD, KING, AND CO.*

Negligence—Ship, loading of—Tallying clerk—Insufficient means of access from barge to ship—The maxim *volenti non fit injuria* held not to apply.

This was an appeal from the judgment of the late Mr. Justice Cave at the trial of the action with a jury. The action was brought under Lord Campbell's Act by a widow to recover compensation for the death of her husband. The deceased was a tallying clerk in the service of the defendants, who were shipowners. It appeared that the deceased had occasion to go on board one of the defendant's ships from a barge, which was lying alongside, and on which he had been engaged in tallying cargo. He was in the act of climbing up by means of a rope attached to the ship when he fell and was killed. It was proved that the defendants knew that the rope was used for the purpose of getting on board, and that complaints had been made to them that no ladder was provided for that purpose. The jury found that there had been negligence on the part of the defendants in not supplying a ladder as a means of communication between the barge and the ship, and the learned Judge gave judgment for the plaintiff accordingly. The defendants appealed, and asked that judgment might be entered for them on the ground that there had been no evidence to connect the accident with the negligence. They also contended that there was no evidence that the deceased was acting in the course of his employment when he fell from the rope, and further that the proper inference to be drawn from the case presented by the plaintiff was that the deceased well knew the risk he was running, and the defendants therefore were entitled to rely on the doctrine *volenti non fit injuria*.

Mr. Bucknill, Q.C., and Mr. Disturnel appeared for the defendants; Mr. Witt, Q.C., and Mr. Herbert Jacobs for the plaintiff.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the defendants asked for judgment on the ground that there was no evidence to support the plaintiff's cause of action. The plaintiff in order to succeed had to establish that the defendants had been guilty of negligence in not providing a safe means of access from the barge to the ship, and that the deceased while acting in the course of his employment had lost his life in consequence of that negligence. It was true that no evidence was actually given at the trial to show what duties the

deceased was engaged on at the time of the accident. But it was proved that he was a tallyman in the service of the defendants, and that he had been engaged on the barge in tallying cargo which was being loaded, and the point was not taken at the trial that he was not acting in the course of his employment when he left the barge to go on board the ship. It must, therefore, now be taken that he was at the time carrying out his duties. In his opinion there was evidence to go to the jury that the defendants had provided insufficient means of access from the barge to the ship, and the jury had so found. But the defendants now said that the deceased had voluntarily incurred the risk of danger, and that on that ground no action lay. But after referring to the case of "Smith v. Baker" ([1891] A.C., 325) he thought that the true inference to be drawn from the facts in this case was that the deceased did not undertake the risk so as to make the maxim *volenti non fit injuria* apply. In his opinion, therefore, the accident was consequent on the defendants' negligence only, and the appeal must be dismissed.

LORD JUSTICE RIGBY was of the same opinion. The important point in the case was whether the maxim *volenti non fit injuria* applied. The question whether a workman who undertook dangerous employment with knowledge of the danger undertook the risk of danger so as to make the maxim apply was a question of fact for the jury. And in his opinion there was plenty of evidence here that the deceased had not taken on himself that risk in discharge of his employers.

LORD JUSTICE COLLINS said he had felt considerable doubt, but he thought that the learned Judge at the trial had acted rightly. The question was whether there was evidence in support of the plaintiff's case fit to be left to the jury. The evidence was of a very meagre description. The plaintiff had to show a breach of duty towards the deceased himself, and that the accident was caused by that breach and not by anything else. It was assumed at the trial that it was necessary for the deceased to go to and from the ship in the performance of his duties, and evidence was given to show that the defendants were negligent in substituting a rope for a ladder. The difficulty was as to whether the accident was due to this default on the part of the defendants. He thought that the plaintiff had just succeeded, but only just succeeded, in giving *prima facie* evidence of negligence causing the accident. He therefore agreed that the appeal must be dismissed.

Q.B. Div. (Lord Russell of Killowen, C.J., } 1897.
Wright and Darling, J.J. } Nov. 20.

BAGLEY V. BUTCHER AND ANOTHER.*

Election Law—Parliament—Registration—Statement of qualification—Validity—Joint occupation of a dwelling-house.

A claim in respect of the joint occupation of a dwelling-house is good, provided the dwelling-house is of sufficient value.

This was an appeal, by case stated, from the decision of the Revising Barrister for the Eastern Division of the county of Wilts, sitting at Marlborough and, afterwards, at Devizes. An important question was raised with regard to certain persons claiming to be placed on the occupiers' list of voters under a qualification the nature of which was stated to be "dwelling-house joint." The Revising Barrister, having expunged the names of these persons from the list of voters, stated a case for the opinion of the High Court.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Mr. W. Graham appeared for the appellant; and Mr. Lewis Thomas for the respondents.

In Division I. of the occupiers' list of voters for the parish of Presbute the names of three persons—Christopher Pearce Hussey, John Compton Hussey, and William James Hussey—appeared, the nature of whose qualification was stated in the third column to be "dwelling-house joint," and the property, in respect of which the vote was claimed, Clatford-house. Two other names—Alexander Taylor and Thomas Taylor—appeared with the same qualification and with the property stated to be Manton-house. In Division I. of the occupiers' list of voters for the parish of Pewsey the names of Charles Arthur Dixon and Henry Partridge Dixon appeared with the same qualification, the property being stated to be Southcote. All seven persons were objected to on the ground that the nature of their qualification was expressly forbidden by the proviso to section 3 of 30 and 31 Vict., c. 102. In each instance the dwelling-house was used only as a residence, and was of more than sufficient value to give £10 a year annual value to each joint occupier. No claim for amendment was made, nor was any statutory declaration under section 24 of 41 and 42 Vict., c. 26, made, and the Revising Barrister did not, in fact, make any amendment of the entry in the list.

Mr. GRAHAM said that the question was decided by two cases—"Townsend v. St. Marylebone" (L.R., 7 C.P., 143) and "Druitt v. Gossling" (20 L.T., 325).

THE LORD CHIEF JUSTICE.—It seems as if there might be a good objection to the names on the ground that the joint occupants of some of the houses are father and son, and therefore no such occupation as the statutes contemplate.

Mr. GRAHAM said that there was no finding to that effect. The only ground of objection raised was that the qualification named was forbidden by law. The Reform Act, 1832 (2 and 3 Will. IV., c. 45), section 27, gave the franchise in cities and boroughs to persons occupying, as owner or tenant, houses of the annual value of £10 and upwards. Section 29 provided that where any premises in any such city or borough should be jointly occupied by more persons than one as owners or tenants, each of such occupiers should be entitled to vote if the clear yearly value of such premises should be of an amount which, when divided by ten, should give not less than £10 for each of such occupiers. That was the state of the occupation franchise in boroughs until the Representation of the People Act, 1867 (30 and 31 Vict., c. 102), was passed, the scheme of which was to give the franchise to all inhabitant occupiers of dwelling-houses in boroughs. By section 3, every man was entitled to vote in a borough who was of full age and not subject to any legal incapacity, and was an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough. To that clause there was a proviso "that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house." The object of that proviso was to prevent a number of votes being derived from one house which might be of very small value. Section 6 conferred the franchise in counties upon occupiers, as owner or tenant, of lands and tenements of not less than £12 yearly value. That section was repealed by the Representation of the People Act, 1884 (48 Vict., c. 3) section 5, but only for the purpose of reducing the qualification from £12 to £10. Section 27 of the Act of 1867 provided that in counties "where premises are in the joint occupation of several persons as owners or tenants, and the aggregate rateable value of such premises is such as would, if divided amongst the several occupiers, so far as value is concerned, confer on each of them a

vote, then each of such joint occupiers shall, if otherwise qualified, and subject to the conditions of this Act, be entitled to be registered as a voter, and when registered to vote at an election for the county; provided always that not more than two persons, being such joint occupiers, shall be entitled to be registered in respect of such premises, unless they shall have derived the same by descent, succession, marriage, marriage settlement, or devise, or unless they shall be *bona fide* engaged as partners carrying on trade or business there." The Act of 1884, section 5, provided that every man occupying any land or tenement in a county or borough of the clear yearly value of not less than £10 should be entitled to a vote. In "Townsend v. Overseers of St. Marylebone" it was held that a qualification in the list of voters for a borough described as "dwelling-house" was good and needed no amendment, the voter having shown that he was in such joint occupation of a dwelling-house as amounted to a qualification in respect of a "house" under the Reform Act, 1832, sections 27 and 29. The point raised in the present case was that if the qualification was described as a dwelling-house it was under section 3 of the Act of 1867 and subject to the proviso in that section.

THE LORD CHIEF JUSTICE.—Is it conceded that there would have been a good claim if the qualification had been described as "land or tenement joint?"

Mr. THOMAS.—Yes; but here they have made a claim under a qualification forbidden by law.

Mr. GRAHAM, continuing, said that the person claiming had a good claim under section 5 of the Act of 1884.

Mr. THOMAS said that the question was whether there could be a qualification described as "dwelling-house joint." The occupation franchise was first conferred by what was called the Chandos clause in the Reform Act, 1832, which entitled every man to a vote who occupied lands or tenements of a yearly value not less than £50. The Act of 1867, section 6, reduced the qualification to £10. That went on till 1884, but by the Act of 1867, section 3, a new qualification was given in boroughs which stood side by side with the old occupation franchise. That was the franchise in respect of dwelling-houses, and it was confined to boroughs. To prevent the creation of faggot votes the proviso against joint occupation was inserted. The Act of 1884 expressly extended to counties the dwelling-house franchise conferred on boroughs by section 3 of the Act of 1867, the object being to produce a uniform franchise in boroughs and counties. The qualification claimed was that conferred by section 3 of the Act of 1867 and is subject to the proviso. There were two occupation qualifications—(1) occupation as owner or tenant of lands or tenements; (2) occupation of a dwelling-house, which was an absolutely distinct qualification and did not permit of joint occupation. If the claim had been made in respect of the occupation of "lands or tenements," it would have been good. The Revising Barrister had no power to amend the claim actually made, because the amendment would have involved not merely a change in the description, but a complete alteration of the qualification. The learned counsel referred to the terms of section 27 of the Act of 1867 as supporting the contention he made, because the provisions in that section were all applicable to cases where there was land of a money value, and could not apply in the case of a dwelling-house qualification with no money value. Counsel also referred to the Local Government Act, 1888, section 76 (7), and the Registration Order of 1895, made thereunder, Part I, General Instructions, sections 7 and 8. He further contended that "Townsend v. St. Marylebone" did not cover this case, because the entry in the list in that case was "dwelling-

house," and not, as in the present case, "dwelling-house joint," which was expressly forbidden.

Mr. GRAHAM replied.

The LORD CHIEF JUSTICE gave judgment allowing the appeal. He said,—We have to deal with this case in the way in which it is presented to us. It is not open to us to consider objections which might have been, but have not in fact been, taken. One cannot look into the circumstances of this case without seeing that the claims of the three persons named Hussey could not have been supported, for this being a county *two* joint occupants only are allowed to be on the register by section 27 of 30 and 31 Vict., c. 102. It is probable also that the names of the persons jointly occupying the other two houses were the names of father and son, who might not be able to prove such occupation as the statutes require—viz., as "owner or tenant." The short point is this. There is an entry in the occupiers' list of persons whose qualification is described as "dwelling-house joint." The question seems to me to be whether we are bound to treat this claim as one for the household franchise, in which case it would be bad, or whether it may not be treated as a claim for the occupation franchise. So regarded, there is authority which settles the question. "*Townsend v. Overseers of St. Marylebone*" covers the point, supported by the later case of "*Druitt v. Gosling*." The language of the late Master of the Rolls (Lord Esher), who, in "*Townsend v. St. Marylebone*," differed from Mr. Justice Willes, shows that that learned Judge regarded the decision in the case as bearing the interpretation which this Court prefers to place upon it—namely, that where a qualification is named which may in fact be supported by the Reform Act of 1832, the mere fact that the word "dwelling-house" is used does not prevent the claim from being capable of being substantiated for a qualification other than the household franchise. Mr. Justice Darling has called my attention to another case—"Ford v. Boon" (L. R., 7 C. P., 150)—in which the same Judge again refers to "*Townsend v. St. Marylebone*." He says (p. 156):—"As to the main point, I confess that, but for the decision of this Court in '*Townsend v. St. Marylebone*,' I should have had considerable doubt. The claim is in a borough in which there are qualifications in respect of the occupation of a house, and also in respect of an ownership of a freehold; and the claimant describes his qualification simply as 'house.' It was urged by Mr. Kingston that that description was not merely insufficient, but that it leaves out a material part of the qualification, and throws upon the objector the burden of preparing himself to meet a claim before the Revising Barrister which may be put in either of two ways; and in support of his argument he cited passages from the judgments of Mr. Justice Erie, in '*Daniel v. Camplin*,' and of Mr. Justice Williams, in '*Howitt v. Stephens*.' I must confess I should have thought the objection a very forcible one but for the case of '*Townsend v. St. Marylebone*.' There the claimant, whose qualification was as joint occupier of a house of the value of more than £20 a year, described his qualification as 'dwelling-house.' Under that he might clearly have shown a qualification as an inhabitant occupier under the Representation of the People Act, 1867; and the decision of the Court, as I understand it, was, not that 'dwelling-house' did not sufficiently describe the qualification under that Act, but, assuming that it did, it also described a qualification under the old Reform Act, and might therefore be applied to that qualification. It is conceded by the learned counsel that a very slight alteration would be enough—if the qualification had been described as 'house and land' or 'house and garden,' for instance. The point is

not one of substance, and, in our opinion, it is decided by the cases cited.

MR. JUSTICE WRIGHT and MR. JUSTICE DARLING concurred.

The LORD CHIEF JUSTICE.—I ought to have added that, even if we did not agree with the decision in "*Townsend v. St. Marylebone*," that case is one from which we should not dissent, but we do agree with it.

Leave to appeal was given.

[Solicitors—Ayrton and Biscoe, for the appellant; Russell-Cooke and Co., for the respondent.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov. 22.

DIEDERICHSSEN V. FARQUHARSON BROTHERS AND CO.*
Ship—Bill of lading—Charterparty—Incorporation of conditions.

The clause "Freight and all other conditions as per charterparty" held not to incorporate in the bills of lading a condition in the charterparty that the cargo should be at merchants' risk (Rigby, L.J. dissenting).

Decision of Divisional Court (13 *The Times* L.R., 437) affirmed.

This was an appeal from the judgment of the Divisional Court (Mr. Justice Day and Mr. Justice Lawrence) reversing a judgment of the Common Serjeant, sitting at the Mayor's Court, London, reported in 13 *The Times* Law Reports, 437. The plaintiff was the owner of the ship *Thes*, and the defendants were the endorsees of a bill of lading for timber shipped upon the vessel at a port in Sweden for London. The ship was under charter, and by the charterparty the ship was to load a full and complete cargo of battens, including a deck cargo "at merchants' risk, . . . and . . . proceed to London . . . and deliver the same." The timber, which was carried on deck, was shipped under bills of lading which stated that the goods were "shipped in good order and well-conditioned, . . . and to be delivered in like good order and condition. . . . Freight and all other conditions as per charterparty." The action was brought in the Mayor's Court for freight. The defendants counterclaimed for damage to the goods. The defendants were also the endorsees of the other bills of lading for the cargo carried. The jury found that the goods were damaged while on the voyage to the extent of £10, that the damage was not caused by the negligence of the shipowner or his servants, that the ship was seaworthy when she sailed, and that the damage was not caused by unseaworthiness. The question of law, which arose upon the counter-claim, no question arising upon the claim, was whether the condition in the charterparty that the timber should be "at merchants' risk" was incorporated in the bills of lading. The Common Serjeant held that it was and gave judgment for the plaintiff upon the claim and counter-claim. The Divisional Court held that the words "at merchants' risk" were not incorporated in the charterparty and entered judgment for the defendants upon the counter-claim for £10. The plaintiff, by leave, appealed.

MR. J. LAWSON WALTON, Q.C., and MR. E. BEAVY, for the plaintiff, contended that the words "all other conditions as per charterparty" included all those conditions in the charterparty which were not inconsistent with and were applicable to the bill of lading—"Porteus v. Watney" (3 Q.B.D., 534); "*Gullischnen v. Stewart*" (13 Q.B.D., 317); "*Gardner v. Trech-*

mann" (15 Q.B.D., 154); "Hamilton v. Mackie" (5 *The Times Law Reports*, 677). In most of those cases, and also in "Russell v. Niemann" (17 C.B., N.S., 163), "Gray v. Carr" (L.R., 6 Q.B., 522), and "Serraino v. Campbell" ([1891] 1 Q.B., 283), the words "all other conditions as per charterparty" followed the words "paying freight," and the general words were consequently limited to those conditions which were to be performed by the receiver of the goods. Here the general words followed "freight" alone, and could not be limited to conditions to be performed by the receiver of the goods. The words "at merchants' risk" were therefore incorporated in the bill of lading.

Mr. J. A. HAMILTON, for the defendants, contended that the word "freight" preceding the words "and all other conditions as per charterparty" was the same as if the words "paying freight" preceded those words, and that the rule of construction laid down in "Serraino v. Campbell" and "Manchester Trust v. Furness, Withy, and Co." ([1895] 2 Q.B., 539) was applicable. The terms as to the carriage were not "conditions" and were not incorporated. Again, the contract in the bill of lading was an absolute contract to carry. Apart from custom, of which no proof was given in the present case, it was implied in a contract to carry that the cargo should be stowed below deck, and if the cargo was carried on deck, it was carried at the shipowners' risk, "Royal Exchange Shipping Company v. Dixon" (12 App. Cas., 11). Therefore, liberty to carry the timber on deck and to do so "at merchants' risk" could not be incorporated in the bill of lading, as it would contradict it.

The COURT, having taken time to consider, delivered judgment, dismissing the appeal, Lord Justice Rigby dissenting.

LORD JUSTICE A. L. SMITH read a judgment, in the course of which he said that they were called upon to consider the at one time much debated question as to how much of a charterparty is incorporated into a bill of lading which contained the words "he or they paying freight and all other conditions as per charterparty." The question in this case was whether the form of the charterparty as to the deck cargo being carried "at merchants' risk" was incorporated into the bill of lading by the words "freight and all other conditions as per charterparty," for, if not, the plaintiff was liable under the counter-claim to the defendants. There was a body of authority which had established conclusively that the words in a bill of lading, "paying freight for the goods and all other conditions as per charterparty," did not incorporate all the conditions of the charterparty, but only those conditions "which would apply to the person who has taken the bill of lading and is taking delivery of the cargo, such, for instance, as payment for demurrage, the payment of freight, the manner of paying, and so on." Those were the words of Lord Blackburn in the House of Lords in "Taylor v. Perrin" (cited in [1891] 1 Q.B., at p. 295). It would be a waste of time to go through all the cases upon this question, especially as this was done by Lord Justice Kay in this Court in 1890 in "Serraino v. Campbell" ([1891] 1 Q.B., 283), and he would only take three cases to show what had been held to be incorporated in a bill of lading containing the words "paying freight and all other conditions as per charterparty," and what was the rule of construction to be applied thereto. Thirty-three years ago, in the case of "Russell v. Niemann" (17 C.B., N.S., 163), Mr. Justice Willes gave the judgment of the Court of Common Pleas upon this point as follows:—"We now proceed to dispose of the second point—that is, whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words

'and other conditions as per charterparty' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with those previously mentioned—viz., payment of freight, conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it is enough to say that the latter is the construction we put upon those words." That case had never been overruled, but, on the contrary, this Court in "Serraino v. Campbell" pointed out that it had been expressly approved of by the House of Lords. In "Serraino v. Campbell" Lord Esher, M.R., laid down the rule of construction thus:—"After full consideration, I think the words ought to be construed as meaning all the conditions of the charterparty which would have to be performed by the receiver of the goods." Lord Justice Lopes and Lord Justice Kay arrived at the same result. Again, in "Manchester Trust v. Furness, Withy, and Co." ([1895] 2 Q.B., 282, 539), Mr. Justice Mathew treated this rule of construction as then well known and settled, and in the same case on appeal the present Master of the Rolls said that the effect of the reference was to incorporate so much of the charterparty as related to the payment of freight and other conditions to be performed on the delivery of the cargo, but there was no authority whatever for incorporating more than that. The rule of construction was therefore settled by conclusive authority. It was now insisted by the plaintiff that when he by his captain signed this bill of lading containing the words "freight and all other conditions as per charterparty," the word "paying" being left out, he, by so doing, incorporated into the bill of lading conditions which otherwise would not have been incorporated. His Lordship could not agree with the contention that the word "freight" did not mean "paying freight" in this mercantile document. The words meant the same thing. If they were to accede to the plaintiff's contention they would, in his opinion, be unsettling that which had been long settled and upon the faith of which business had been transacted for years. In his opinion, the rule of construction above-mentioned applied to all bills of lading which sought to incorporate parts of a charterparty by the words "paying freight and all other conditions as per charterparty," or "freight and all other conditions as per charterparty," unless there was something therein clearly showing that the well-known rule was to be excluded. To point out that the contract of carriage contained in the bill of lading in the present case was absolute and without exceptions did not avail the plaintiff, for it did not, in his opinion, show that the rule was to be excluded, it being a rule as applicable to a bill of lading containing no exceptions as to one containing exceptions. He did not propose to discuss the question whether the term in the charterparty, "including a deck cargo at merchants' risk," was or was not inconsistent with the bill of lading, which was silent as to a deck cargo, and only covered a cargo which was to be carried at shipowners' risk. In his opinion the Divisional Court were right in holding that the clause in the charterparty was not incorporated into the bill of lading, and the appeal must be dismissed with costs.

LORD JUSTICE RIGBY read a judgment in which he said that he was unable to concur in the conclusion that the counterclaim of the defendants should succeed. The question was one of construction only, and the issues were two:—(1) Whether the words "freight and all other conditions as per charterparty" in the bill of lading were to be construed to extend only to conditions to be performed by the holder of the bill of lading, in which case none of the terms of the charterparty relieving the shipowner

from responsibility would be introduced; (2) whether the clause relied upon as a defence to the counterclaim ought not to be treated as incorporated by the general words of reference on the ground of its being repugnant to the other terms of the bill of lading. As to the first issue, the argument depended entirely upon the decisions of which "*Serrano v. Campbell*" was a conspicuous example. He had not the slightest intention of laying down anything inconsistent with that class of case. The real question was what those cases in fact decided, and it was as important not to extend them so as to cover a case not really included as to preserve their authority with reference to cases really covered by them. None of those cases went beyond what was laid down by Mr. Justice Willes in "*Russell v. Niemann*." In all of them the words were "paying freight and all other conditions as per charterparty," or their equivalent. Mr. Justice Willes held that they were limited to conditions to be performed by the receiver of the goods. That learned Judge and the Court of Appeal in "*Serrano v. Campbell*" treated the matter purely as a matter of construction of the very words used, and had no intention of laying down any general rule as to the meaning of the words "all other conditions" independently of the introductory words "paying freight." The Court of Appeal in "*Gardner v. Trechmann*" (15 Q.B.D., 154) seemed to him to have held that the words "all other conditions as per charterparty," when not controlled by the context, were sufficient to introduce all the terms of the charterparty not repugnant to the contract contained in the bill of lading. What was the effect of "freight" preceding the general words? Was it equivalent to the words "paying freight"? The word "performing" could not be brought in without first getting in "paying." "Freight as per charterparty" meant freight as fixed by the charterparty, and nothing else. The phrase did not convey the idea of payment any more than if the rate followed the word in the bill of lading itself without having to be imported from the charterparty. In each case the obligation to pay would be involved as an implication of law. But on the question of construction it was necessary to distinguish clearly between the interpretation of the language used and the consequences arising in law from using it. In his opinion the authorities relied upon were not applicable, and the reference could not be cut down to mean only conditions to be performed by the holder of the bill of lading. As to the second question—namely, whether the term "that a deck cargo was to be carried at merchants' risk" was to be rejected as repugnant to the bill of lading—the bill of lading was a contract of carriage, and in so far as the charterparty might contain terms not applicable to such a contract they would not be treated as incorporated. But here the term proposed to be introduced had direct reference to the carriage of the goods. In nearly every bill of lading and in nearly every charterparty there were provisions cutting down and limiting the absolute obligation of the shipowner to deliver. Was it more reasonable to suppose that the parties intended the contract to be interpreted literally, and so to incorporate the terms of the charterparty, or not? In the first case, the shipowner would be getting in freight a consideration commensurate with a limited obligation. In the second he would be entering into an exceptional contract. In his opinion the literal interpretation of the contract was the most reasonable one, and therefore the correct one.

LORD JUSTICE COLLINS read a judgment concurring with that delivered by Lord Justice A. L. Smith.

[Solicitors—Harper and Battcock, for the plaintiff; W. A. Crump and Sons, for the defendants.]

No. 5.—VOL. XIV.

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov. 22.

EX PARTE PAGE AND ANOTHER.*

Mandamus — Prerogative writ — Application granted—Admission of copyholder.

This was an application for a rule *nisi* for a prerogative writ of *mandamus* calling upon the lord and the steward of the manor of Kingsland to admit the applicants, who were the devisees of a copyholder of the manor, as tenants of a copyhold tenement in the manor.

Mr. A. LYTTELTON, for the applicants, said that the Divisional Court (Mr. Justice Wright and Mr. Justice Kennedy) had refused (*ante* p. 34) to grant a rule *nisi* for a prerogative writ of *mandamus* upon the ground that an action for a *mandamus* was the more convenient remedy. But the remedy by an action for a *mandamus* was only ancillary to an existing remedy at law, and in this case the applicants had no cause of action at law against the lord or the steward. There was an old equitable remedy by subpoena before 1760, but that remedy had fallen into decay, and since that date the only remedy had been by prerogative writ of *mandamus*. In this case the lord became entitled to a heriot on a tenants' admission, and by the custom of the manor the heriot payable was either the best beast, or the best jewel, or the best suit of wearing apparel of the deceased tenant. The farmer who had been tenant of this small copyhold farm had no beast, as he owned his cattle in common, and naturally he had no jewels, and so the farmer's best suit of wearing apparel was tendered to the lord (laughter), which he rejected, demanding a fee of 20 guineas. The learned counsel submitted that a prerogative writ of *mandamus* was the only remedy now available, and that therefore the well-known rule that a prerogative writ of *mandamus* would not be granted when there was another sufficient remedy did not apply; and he referred to "*Reg. v. Lambourn Valley Railway Company*" (22 Q.B.D., 463); "*Smith v. Chorley District Council*" ([1897] 1 Q.B., 532, 678); and "*Baxter v. London County Council*" (63 L.T., N.S., 767).

The COURT granted a rule *nisi*.

[Solicitors—Whitehead, Marshall, and Co., for H. J. Southall, for the applicant.]

Prob., Divorce, and Adm. Div. (The } 1897.
Right Hon. the President, Sir Francis } Nov. 22.
Jeune)

IN THE GOODS OF MARIA STILES, DECEASED.†

Executor—Renunciation—Retraction of renunciation.

The Court has power to permit an executor, who has renounced his executorship, to retract his renunciation.

This was a motion on behalf of Henry Tournay Stiles for liberty to retract his renunciation of his executorship to the will of the deceased, and, further, it was prayed that probate of the will might be granted to him as executor.

Mr. BARNARD appeared in support of the motion, and said that Maria Stiles had made a will on November 3, 1877, and subsequently, on August 18, 1879, executed a codicil. The executors to these testamentary documents were Mr. H. T. Stiles and Mr. Edmund Cammack. On her marriage the testatrix settled £1,000 which was invested by the trustees of the settle-

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

†Reported by J. H. MURPHY, Esq., Barrister-at-Law.

ment. The continuing trustees of this settlement were a Mr. William Armstrong and Mr. Edmund Carmack. The deceased died on October 24, 1880, and on November 16, 1884, Henry Tournay Stiles renounced his executorship on the ground that the estate would be saved expense thereby, and on the ground that his co-executor, being a solicitor, would be better suited to fulfil the duties entailed. On December 3, 1884, probate of the will and codicil was granted, and in January, 1895, Edmund Carmack absconded, and he had never been heard of since. Inasmuch as part of the estate relating to the £1,000 invested under the settlement had still to be dealt with, the learned counsel said that he now applied to the Court to allow Mr. Stiles to withdraw his renunciation for this purpose. Whether or no the Court had power to do this did not appear to be very clearly decided, but it was submitted that there was power. If, however, the learned President decided that he was unable to do that, counsel said that he would ask that a grant of administration in a limited form should be made under the Act of 38 Geo. III., cap. lxxxvii., sections 1 and 3; but he put this merely as an alternative course.

The PRESIDENT.—Can a valid renunciation be retracted, do you say?

Mr. BARNARD.—Certainly, my Lord. What I contend is that section 79 of the Probate Act of 1857 has not interfered with the practice of the Ecclesiastical Courts in regard to this matter. What that practice was, I submit, can be gathered from the cases I shall ask your Lordship to be good enough to consider. The meaning of section 79 of the Probate Act with regard to this point is limited to this—that where an executor has renounced his executorship it is not necessary to cite him in subsequent proceedings. In the case of “In the goods of George Badenoch,” reported in 3 Swabey and Tristram, p. 465, the headnote says:—“Where one of several executors, who, after intermeddling in his testator’s estate, executed a renunciation, and probate had been granted to his co-executors, the Court, on the application of the renunciant, declared his renunciation to be invalid and directed the record of it on the probate to be cancelled.” Lord Penzance in the course of the case, referring to the 79th section of the Act in question, said:—“There is nothing in it to prevent the Court from allowing a retraction according to the old practice in a case fit for it.” Of course this was but an *obiter dictum*, but coming from such a high authority no doubt your Lordship will give it due consideration. “In the goods of Gill” (L.R., 3 P. and M., 113), the headnote to the case reads as follows, “It has never been decided that an executor who has filed a renunciation of his rights may not afterwards retract such renunciation (notwithstanding section 79 of the Probate Act, 1857), but he certainly would not be permitted to do so unless he can show that such retraction will be for the benefit of the estate or of those interested under the deceased’s will.” There again the learned Judge said:—“Unless on fuller consideration I should feel that the words of the statute are imperative, I should not hastily decide that this Court is powerless to permit an executor who has renounced on good grounds to retract his renunciation. I do not decide the point on the present occasion.” In the case of “In the goods of Morant” (L.R., 3 P. and M., 151) it was held that “a party may retract a renunciation at any time before it is filed and recorded in the registry.” Lord Hannen there laid it down that “a renunciation does not exist as an effective instrument until it has been recorded.” Whether it can afterwards be retracted is another question. Your Lordship no doubt has in mind the case of “In the goods of Whitham” (reported at

page 303 in L.R., 1 P. and M.). I think, however, that it is my duty to bring it under your Lordship’s notice, inasmuch as it appears that it is an authority against me.

The PRESIDENT, after listening with great attention to the argument of counsel, said that this point had long remained undecided. As far as he could see, he saw no indication that the Legislature had intended that the relief which the Court was now asked to give should be withheld. With regard to the case of “In the goods of Whitham,” referred to by Mr. Barnard, he thought that that case was quite distinct from the present case, as the retraction in that case was wanted for the specific purpose of renouncing a second time. The other cases cited showed clearly that the point had never yet been decided. He thought, therefore, that as it was for the benefit of the estate, there being the special circumstances alluded to by the Court in the cases referred to, since the co-executor in this case had absconded, he could properly grant the relief asked for, and therefore probate would issue to the applicant and leave be given to retract the renunciation.

[Solicitors—Robbins, Billing, and Co., agents for William J. Stiles, Spalding.]

Chan. Div. }
(North, J.) }

1897.
Nov. 23.

PEGGE V. THE NEATH AND DISTRICT TEAMWAYS COMPANY (LIMITED)—PEGGE’S CLAIM.*

Company—Debentures—Equitable and legal debenture-holders.

This was a claim in a debenture-holder’s action by a person to whom the defendant company were under an obligation to issue second debentures to rank in the receipt of dividends *pari passu* with the actual holders of debentures of the second series. Mr. Pegge was one of two plaintiffs, holders of debentures forming a first charge on the assets of the company. He had severed for the purpose of making this claim. In November, 1882, Mr. Pegge was a director of the company; the company required money to pay off debentures then falling due. Mr. Pegge and some other persons found the requisite money. The sum then advanced by Mr. Pegge was £300; he took as security a promissory note of the company for £800, carrying interest at 5 per cent., and an undertaking by the company at any time to issue to him debentures to a like amount of a series then being issued and forming a second charge on the assets of the company. In 1884 Mr. Pegge lent the company a further sum of £100 on similar terms. Judgment in the action was given in January, 1895. At the end of 1896 Mr. Pegge carried in a claim to be allowed to exercise his option to take debentures in lieu of the promissory notes he held, and to be treated as the holder of second debentures and to be paid *pari passu* with them. He had received interest on his promissory notes down to judgment. Some of the second debentures had not been issued. The Master before whom the matter was heard in Chambers rejected the claim, which was adjourned to Court by way of appeal, and now came on with the further consideration of the action.

Mr. Dighton Pollock, for Mr. Pegge, supported the claim; Mr. Ashton Cross (Mr. Swinfen Eady, Q.C., with him), for the other plaintiff, opposed; and Mr. Hume Williams was for the company.

Mr. JUSTICE NORTH considered the case was concluded

*Reported by D. FITCHER, Esq., Barrister-at-Law.

by his own decision "*In re the Queensland Land and Coal Company*" ([1894] 3 Ch., 181; 10 *The Times* L.R., 550), and that Mr. Pegge was entitled, as an equitable debenture-holder, to the amount of £400, to rank *pari passu* with the legal debenture-holders of the second issue. As there would not be enough, he understood, to pay interest, it was not necessary to go into the question whether he would be entitled to interest previously to his exercising his option.

Solicitors—Everett and Hodgkinson, for the plaintiff Pegge and the Company; Tamplin, Tayler, and Joseph, for the other plaintiff.]

Chan. Div. } 1897.
(Stirling, J.) } Nov. 23.

LONDON AND NORTH-WESTERN RAILWAY COMPANY
V. THE RURAL DISTRICT COUNCIL OF RUNCORN.*

Local Government—Sewers—Vesting in public authority—Exceptions—"Sewers made under local or private Act"—Public Health Act, 1875 (33 and 34 Vict., c. 55), sec. 13 (2).

The plaintiffs in this case were the London and North-Western Railway and the Great Western Railway Companies and they claimed an injunction to restrain the defendants from connecting certain new sewers of the defendants in the township of Helsby and parish of Frodsham, in the county of Chester, with certain land drains and ditches belonging to the plaintiffs, and from causing or permitting sewage or water to flow from the said new sewers into the said land drains and ditches of the plaintiffs. The question at issue in the case was whether the land drains and ditches, which had been constructed by the plaintiffs or their predecessors in title on their own lands, were now vested in the plaintiffs, or, as the defendants alleged, had under the provisions of the Public Health Act, 1875, become vested in the defendants as the rural sanitary authority of the district. The plaintiffs were the successors of a railway company constituted by an Act of 1846 (with which was incorporated the Railway Clauses Act of 1845) for the purpose of making a railway from the Chester and Birkenhead Railway to the Manchester and Birmingham Railway. This railway was made about the year 1850, and subsequently by an Act of 1861 was, together with all the rights and obligations of the original company, transferred to the plaintiffs. At the trial the defendants' case was rested on the alleged user of the ditches in question for the purpose of carrying off the sewage from certain houses near the line. This sewage, it was alleged, passed from the ditches into a system of pipes and drains which had been constructed by the plaintiffs for the purpose of land drainage, and consequently it was contended that these had become sewers within the meaning of the Public Health Act, 1875, and were now vested in the defendants.

Mr. Hastings, Q.C., and Mr. Shearman were for the plaintiffs; and Mr. Jelf, Q.C., and Mr. Hewitt for the defendants.

MR. JUSTICE STIRLING, in giving judgment this morning, came to the conclusion upon the evidence that a certain quantity of sewage did find its way from the houses in question into the pipes or drains on the plaintiffs' lands, but that at the same time there was nothing to affect the plaintiffs with knowledge that before 1896 such sewage did so pass into their system of drains or pipes. His Lordship further came to the conclusion of fact that these drains and pipes were not con-

structed for the purpose of carrying away sewage from any house, but were constructed (in the language of the Act of 1845) for the purpose of carrying the water "as clearly from the lands lying near or affected by the railway as before the making of the railway." After referring to sections 4, 13, 15, and 21 of the Public Health Act, 1875, his Lordship then said that the contention on behalf of the defendants might be stated as follows:—The pipes and drains were at the present time and were previously to 1896 used *de facto* for the drainage of more than one building only; consequently they were "sewers" within the definition of section 4 and were vested in the defendants under section 13. To this the plaintiffs answered (1) that none of the owners of the houses in question had acquired against the plaintiffs any legal title to send sewage into these pipes and drains: that according to the doctrine of "*Mulliner v. Midland Railway Company*" (11 Ch.D., 611), approved by the House of Lords in "*Ayr Harbour Trustees v. Oswald*" (8 App. Cas., 623), it was competent for the plaintiffs at any time to put an end to the user which had taken place, and that the vesting under section 13 did not put an end to this right—see "*Reg. v. Godmanchester Board of Health*" (5 B. and S., 886; L.R., 1 Q.B., 328), where a strong opinion was expressed that the Public Health Act, 1848, was not intended to interfere with rights of a private nature; (2) that the rights vested in the plaintiffs by the special Act for a specific purpose could not be held to be overridden by a subsequent statute conferring on a public body general powers for a different purpose; and (3) that the pipes and drains in question, if sewers within the Act, were "sewers made and used for the purpose of draining land under a local or private Act of Parliament," and consequently fell within the second exception in section 13. His Lordship came to a conclusion in favour of the plaintiffs on this third point, and it was consequently unnecessary for him to express a concluded opinion on either of the other two. With respect, however, to the first, his Lordship said that as at present advised he was not satisfied that the plaintiffs' argument was consistent with the general scheme of the Public Health Act, 1875. It was well established by cases decided subsequently to "*Reg. v. Godmanchester Local Board*" that the Public Health Act, 1875, did apply to sewers constructed by the owner of houses on his own land for the use of those houses; and consequently the Act did to some extent interfere with private rights. As regarded the second point, although the rule as to the construction of statutes which was relied on was well established, still it was one which yielded to indications of contrary intention. Section 13 of the Act of 1875 appeared to show that the Legislature contemplated that the provisions of that section might possibly affect sewers which had been brought into existence under prior legislation, for there were excepted from the operation of the very wide terms of the enacting part a class of sewers made under the authority of certain Acts of Parliament, and his Lordship was not at present satisfied that other sewers of a different statutory origin were meant to be exempted. With regard to the third point, it was said that the pipes and drains in question were not made under a local or private Act, but under a general statute—namely, the Railway Clauses Act, 1845. It was to be observed, however, that the special Act under which the railway was constructed did in terms incorporate the Act of 1845. The special Act must therefore be read as if the provisions in the Railway Clauses Act had been repeated verbatim therein. It seemed to his Lordship, therefore, that the pipes and drains were made under the special Act. How the matter would have stood if there had been no express incorporation of

the public Act it was unnecessary to consider. In the result, therefore, his Lordship gave judgment for the plaintiffs.

[Solicitors—C. H. Mason; Preston, Stow, and Preston.]

Q.B. Div. (Wright and)
Kennedy, JJ.)

1897.
Nov. 23.

EX PARTE DAVID HOPE KYD AND OTHERS.*

Election Law—School Board—Illegal hiring—
Application for relief—Municipal Elections
(Corrupt and Illegal Practices) Act, 1884, secs.
16 and 20—Notice of application, sufficiency of.

An application for relief under the Municipal
Elections (Corrupt and Illegal Practices) Act,
1884, may be properly made before the election is
held.

This was a motion on behalf of David Hope Kyd, David Laing, Charles Lancelot Andrews Skinner, and William Winnett, candidates for the election for the School Board for London (Westminster Division) for an order allowing the act of using on November 8, 1897, the premises known as St. George's Institute, Little Grosvenor-street, for holding a meeting for the purpose of promoting or procuring their election, being premises on part of which intoxicating liquors are supplied to members of a workmen's club, to be an exception from the provisions of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, which would otherwise make the same an illegal hiring, on the ground that such act arose from inadvertence, and did not arise from any want of good faith. It appeared from the affidavits that there is an entrance to the hall of the institute in Little Grosvenor-street, and also one in Grosvenor-mews. At the entrance in Grosvenor-mews, by the side of the door, is a board, having painted on it "St. George's, Hanover-square, Men's Club." As one enters the door in Grosvenor-mews there is a small passage, after which a flight of winding stairs leads up to the gallery of the hall and to the said men's club. There is no means of reaching the gallery except by ascending the stairs. At the foot of the staircase is a door, which leads into a room or lobby, which leads into the hall. Refreshments and beer can be obtained in the workmen's club. Neither of the applicants nor their agent had any knowledge that refreshments of any description were supplied on any part of the premises which in any way communicated with the hall. It appeared that no bills or notices of the present application had been posted in any part of the electoral division.

Mr. S. H. DAY, in support of the motion, said that under section 16 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 and 48 Vict., cap. 70), what had been done was an illegal hiring, and the application for relief was made under section 20 of the Act. Notice of the application had been given to the other candidates and to the returning officer.

Mr. A. H. SPOKES said that he appeared for one of the other candidates—viz., Hubert Morgan-Browne. He did not oppose the application, but wished to place the facts before the Court, and applied for an adjournment. It was not the practice to apply for relief before the election. Other illegal acts might be committed which might influence the Court in exercising its discretion as to whether relief should be granted. No notice of the application had been posted. With the exception of that given to the candidate and returning officer, no notice of the application had been given to any one except by advertisements in *The Times*,

Standard, and *Pimlico News*, and these were not papers which the supporters of his clients would be likely to see. All the rules as to what ought to be done were laid down in "*Re Election of County Councillors*" (5 *The Times Law Reports*, 173). Moreover, according to the practice, the affidavits ought to have been delivered four days before the application. Two were delivered on Saturday and one on Monday, and that was not within a reasonable time.

MR. JUSTICE WRIGHT, in giving judgment, said that it seemed to him that this was a case in which an admitted breach of the law arose from inadvertence and not from want of good faith. It was a matter in which the Court could and ought to give relief. An objection had been taken that the application was premature, but the Court had consulted a most experienced officer and had been informed by him that the application was properly made before the election was held. The affidavits were delivered within a sufficient time. It was also said that notices of the application ought to have been posted as well as advertisements being published in the district in which the election was held. It appeared, however, that the Courts had not insisted, for some time past, upon the posting of notices even in Parliamentary elections, and in the present case the notice given might be held to be sufficient. The relief asked for would, therefore, be granted.

MR. JUSTICE KENNEDY concurred, and added that it appeared to him that, in the public interest, there was a great deal to be said in favour of these applications being made with as little delay as possible. The truth was more likely to be arrived at when the matter was fresh, and the result of the election unknown. If a candidate were not elected the matter might be allowed to drop.

Relief asked for granted. Costs reserved.

[Solicitors—Tillards, for the applicants; Radford and Frankland, for the respondents.]

Court of Appeal (Lindley, M.R.,) 1897.
Chitty and Vaughan Williams, L.JJ.) Nov. 24.

EDWARDES' MENU COMPANY V. CHUDDEIGH.*

Contract—Agreement—Construction—Injunction.

Decision of Kekewich, J. (*ante*, p. 47), affirmed.

This was an appeal by the defendant against the decision of Mr. Justice Kekewich, which is reported in *The Times* of the 18th inst. The plaintiff company moved before the learned Judge for an injunction, until the trial or further order, to restrain the defendant, Mr. Arthur Chudleigh, who was or is the lessee of the Court Theatre, from excluding the plaintiffs from the bars, refreshment room, cloak-room, and wine cellar of the theatre, in breach of an agreement between the plaintiffs and the defendant. By the agreement in question, which was dated February 6, 1896, it was provided that the defendant should, "so long as the Court Theatre should remain in his hands," let to the plaintiff company, at a weekly rent of £25, "the free and exclusive use" of the bars, &c., the agreement carrying with it the privilege of letting spaces for advertisements in the bars, &c., and selling programmes. The agreement was carried out until July 9, 1897, when the theatre was closed for the summer season. Upon its being reopened in October, the defendant, as the plaintiffs alleged, refused to allow them the use of the bars, &c., and the plaintiffs then brought this action, and served the defendant with a notice of

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

motion for an injunction as above stated. The defendant's case was that the agreement in question had been entered into by him on behalf of the Court Syndicate (Limited), who were then the real tenants of the theatre, and that he was merely their manager; that his tenancy came to an end on July 31 last; and that negotiations were in progress between the owner of the theatre and himself, acting on behalf of another syndicate called the Buckingham Syndicate (Limited), for a new tenancy of the theatre, but no lease had yet been executed. He admitted, however, that he had not yet given up possession of the theatre, but he contended that the theatre was no longer "in his hands" within the meaning of the agreement. It appeared that he had made an offer to relet the bars, &c., to the plaintiffs, but at an increased rent of £30 a week, in consequence, as he said, of his having improved and enlarged the bars. Mr. Justice Kekewich held that the theatre remained in the defendant's hands within the meaning of the agreement, it being under his control as manager, and his Lordship accordingly granted the injunction. The defendant appealed.

Mr. a'Beckett Terrell was for the defendant; Mr. Warrington, Q.C., and Mr. G. Cave, for the plaintiffs, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the question turned entirely upon the construction of the agreement. In his Lordship's opinion, the construction which Mr. Justice Kekewich had put upon the agreement was perfectly right. So long as the defendant had control over the theatre as manager so long were the plaintiff company to be entitled to the benefit of the agreement. Upon the facts proved his Lordship had no doubt that Mr. Chudleigh had all along had the control of the theatre as the manager. The theatre had, to use the words of the agreement, "remained in his hands" from the date of the agreement till now, and it was still in his hands. Mr. Justice Kekewich was perfectly justified in granting the interlocutory injunction.

LORD JUSTICE CHITTY and LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Fladgate and Co.; William Stark and Co.]

Chan. Div. } 1897.
(North, J.) } Nov. 24.

THE SOUTH AFRICAN REPUBLIC V. LA COMPAGNIE
FRANCO-BELGE DU CHEMIN DE FER DU NORD DE LA
RÉPUBLIQUE SUD-AFRICAINE.*

Jurisdiction—Foreign Government—Counter-claim against, when allowable.

In an action in this country by a foreign Government defendants cannot counter-claim on questions independent of the subject-matter of the action.

This action was commenced by the Transvaal Government against the defendant railway company, which is a Belgian company, Baron Robert Oppenheim, and Messrs. Barclay and Lloyds banks to restrain the dealing with large sums that had been deposited with the defendant banks in the joint names of Baron Oppenheim, as trustee for the railway company, and the late Beelaerts van Blokland, as trustee for the Transvaal Government, and for the appointment of a new trustee in the place of Beelaerts van Blokland. On notice for an interim injunction, it may be remembered, the money in the hands of the bankers was by arrangement paid into Court, and the bankers were dismissed the action. The

money in England had been placed here in accordance with an agreement between the Transvaal Government and the railway company, concessionnaires for the construction of a branch line to the Selati mines. The railway company put in a defence and counter-claim, asking, by the latter, relief on three heads:—(1) Payment by the Transvaal Government of three sums of £60,000, £1,800, and £147,895 16s. 8d., alleged to be due in respect of the concession; (2) £100,000 damages for libel; (3) an injunction to restrain the plaintiff Republic from proceeding in their own Courts to avoid the concession and expropriate the property of the railway company in South Africa, or, in the alternative, £500,000 damages. The plaintiffs on summons in Chambers got an order (confirmed by the Court of Appeal) (13 *The Times* L.R., 567) striking out the counter-claim in respect of libel. The present application was a summons, brought on motion, to strike out the other two branches of the counter-claim.

Mr. SWINFEN RADY, Q.C., and Mr. WAGGETT, for the Republic, argued that it was well settled law that a foreign Government cannot be sued in this country, with the exception only that, when it has itself taken proceedings in this country against a British subject or in respect of funds in this country, it has so far submitted to the jurisdiction that cross-proceedings (since the Judicature Acts by counter-claim), for the purpose of discovery or in mitigation of the relief claimed, can be taken against such Government.

Mr. VERNON SMITH, Q.C., and Mr. WHINNEY, for the railway company, argued that the Republic had, by itself taking proceedings, submitted to the jurisdiction generally so far as related to any question in relation to the whole agreement relating to the railway concession.

MR. JUSTICE NORTH did not think it necessary to call for a reply. He said the exemption of a foreign Government from the jurisdiction of the Courts in this country, with very limited exceptions, was established by a number of cases, of which he would only refer to two. His Lordship read a passage from the judgment of Lord Langdale in "The Duke of Brunswick v. the King of Hanover" (6 Beav. 1, at p. 38). "The cases which we have upon this point go no further than this—that, where a foreign Sovereign files a bill or prosecutes an action in this country, he may be made a defendant to a cross-bill or bill of discovery in the nature of a defence to the proceeding which the foreign Sovereign has himself adopted. There is no case to show that, because he may be plaintiff in the Courts of this country for one matter, he may, therefore, be made a defendant in the Courts of this country for another and quite distinct matter." And the exposition of the law by Lord Justice James in "Strousberg v. Republic of Costa Rica" (20 *Weekly Reporter*, 125). "It appears to me that it is due from one nation to another that one Sovereign should not assume or usurp jurisdiction over another Sovereign. It is a violation of the respect due to every Sovereign, whether it be a monarchy or a Sovereign State, to issue the process of our Courts against such Sovereign or State. There is, in my opinion, but one exception, if it can be called an exception, to that rule—namely, that where a foreign Sovereign or State comes into the municipal Courts of this country for the purpose of obtaining a remedy, then by way of defence to that proceeding (by way of counter-claim if necessary), to the extent of defeating that claim, the person sued here may file a cross-claim, or take any other proceeding against that Sovereign State for the purpose of enabling complete justice to be done between them." Applying the principles laid down in the judgments he had read as to the third part of the counter-claim, he said it was conceded that no order could be made restraining proceedings in the foreign Court: it

*Reported by D. FICKLEIN, Esq., Barrister-at-Law.

was hardly suggested that damages in respect of that could be given; the more serious part of the case was the claims for three sums in respect of alleged breach of contract; they were not sums in respect of which the defendant railway company had any claim against the funds, the subject-matter of this action; he did not see how, having regard to the passages he had read, the counter-claim on this head against the plaintiff Government could be sustained; it was entirely outside and independent of the subject-matter of the action. His Lordship struck out the counter-claim; but, as the whole of the counter-claim might have been disposed of by one application, he gave no costs.

[Solicitors—Clarke, Rawlins, and Co., for the plaintiff Republic; Harwood and Stephenson, for the defendant Railway Company.]

Q.B.Div. }
(Bigham, J.) }

1897.
Nov. 24.

CHANDLER V. BLOGG.*

Insurance—Marine—Collision, what constitutes
—Striking sunken vessel.

Damage caused by striking a sunken vessel
held covered by a policy against collision.

This was an action on a policy of reinsurance. The plaintiff and the defendant were both underwriters at Lloyd's. The plaintiff and others had underwritten policies of insurance on the steamship *Newburn*, by which she was insured to the total amount of £300 for 12 months, commencing February 12, 1894. The policies were in the usual Lloyd's form. By a policy of reinsurance the defendant underwrote one-third of the sum insured, the policy being declared to be a reinsurance, subject to the same clauses and conditions as the original policy, and to pay as might be paid thereon, but only to pay all claims for loss and (or) damage done and (or) received through collision. On December 2, 1894, during the continuance of the risk insured, the *Newburn* while swinging off the Regent's Canal in the River Thames struck, with her port side abreast the engine-room, the sailing barge *Lizzie*, which had just been sunk by collision with the steamship *Lodore*. The *Newburn* remained fast on the *Lizzie* for several hours. The *Lizzie* was raised on December 3, and having sustained comparatively small damage at once sailed to Faversham, her home port. The *Newburn* received considerable damage, and the plaintiff had paid a loss at the rate of £20 10s. 1d. per cent. The defendant contended that the contact between the *Newburn* and the sunken barge *Lizzie* was not a "collision" within the meaning of the policy.

Mr. ROBSON, Q.C. (with him Mr. Scrutton), for the plaintiff, submitted that the word "collision" was applied not only to the impact of a moving object with another moving object, but also with a stationary.

Mr. JOSEPH WALTON, Q.C., and Mr. JOSEPH HURST, for the defendant, contended that the word "collision" when used by itself in a policy only meant the coming into contact of two navigable things. The *Lizzie* when at the bottom of the river was not navigable. She was for the time being quite useless, a mere sunken wreck.

The following authorities were referred to in the course of the arguments:—"Union Marine Steamship Company v. Borwick" (1 Com. Cas., 87); "*The Douglas*" (7 P.D., 151); "*The Utopia*" (L.R., 1893, A.C., 402); "*The Munroe*" (L.R.,

1893, P. 248); "*The Zeta*" (L.R., 1893, A.C., 468); "*Reischer v. Borwick*" (L.R., 1894, 2 Q.B., 548); "*Hough v. Head*" (54 L.J., Q.B., 294).

MR. JUSTICE BIGHAM said that he agreed with Mr. Walton's definition of "collision," as arising out of the circumstance of two things which could be navigated coming into contact. The *Lizzie* was a barge, which, for the moment, happened to be sunk. For a few hours, no doubt, she could not be navigated, any more than a ship on the mud awaiting the incoming tide, or a vessel at anchor with an unshipped rudder, could be navigated. But in these cases it could not be said that the vessels were not navigable vessels, and in the same way the *Lizzie* was, all the time, a navigable vessel. There had therefore been a collision within the meaning of the clause in the policy, and judgment must be entered for the plaintiff with costs.

[Solicitors—Thomas Cooper and Co., for the plaintiff; Pritchard and Sons, for the defendant.]

Chan. Div. }
(North, J.) }

1897.
Nov. 25.

IN RE GLUBB (BARNFIELD V. ROGERS).*

Will—Bequest—Charitable legacies—Construction of will.

This action was brought for the administration of the estate of the late Rev. Peter Southmead Glubb, of Kevor, in the parish of Falmouth, who died on April 26, 1891, leaving property of considerable value. He made a holograph will, dated May 7, 1889, in which he mentioned that he was entitled to a vested reversion on the death of Mrs. Lyne Stephens (she died on September 2, 1894), out of the residue estate of his relation, her deceased husband, being a 93rd portion of the same. The testator bequeathed a number of legacies, some of which were charitable, and with regard to those legacies questions arose, the language of the will being peculiar. The testator directed that all his bequests made by his will, except those made to his wife, should be postponed and not paid until after one year from the death of Mrs. Lyne Stephens, unless his share of the reversionary Lyne Stephens residuary estate had been realized in possession of his trustees and executors, and not until the time had arrived when that estate had been so reduced into the possession and at the command of his representatives, but he trusted that all would be paid off without unnecessary delay, before or after the year had elapsed. The will also contained the following clauses:—"I give, conditionally as hereafter set forth, the following sums of money to benevolent and charitable institutions:—To the Royal Society for the Prevention of Cruelty to Animals, whose offices have been established in Jermyn-street, London, the sum of £1,000, provided the society can show how their benevolent operations can be by this sum extended and increased £2,000 or double the sum received by them under this will, and proved to be the result of this bequest to the satisfaction of the Bishop of London and the Deans of St. Paul's and Westminster. To the infirmary or hospital or dispensary established in Cornwall for the benefit and assistance of really poverty-stricken and sick people, the sum of £800; but, inasmuch as more than one such may be in existence in that county, I direct that inquiry shall be made as to the one most in need of assistance, and the question left to the decision of the Sheriff of Cornwall, who shall state his reasons and the circumstances influencing him publicly or by advertise-

*Reported by F. O. ROBINSON, Esq., Barrister at-Law.

*Reported by W. L. CABELL, Esq., Barrister at-Law.

ment, but preference shall be given *ceteris paribus* to that institution which can prove itself least guilty of carelessly and indiscriminately affording assistance to persons able to pay for their cures or relief, or who have relations able to do so and should do so. I give unto the National Industrial Home for Crippled Boys, in Wright's-lane, Kensington, founded 1877, the sum of £800, provided the boys are educated to get their living. I give to the charity designated Dr. Barnardo's Home for Friendless and Destitute Children, the sum of £800, provided the Bishop of London and the Deans of St. Paul's and Westminster will testify after inquiry that this charity is fairly doing the work which Dr. Barnardo advertises himself as performing, and provided his accounts are audited and tested by some independent authority and made openly, I having no reason to distrust him or his work. I give unto the institutions for the care of idiots established near Powderham Castle in Devon, and the other or similar institution, an Asylum for Idiots, established some 41 years ago, and which in 1884 celebrated its anniversary in Aldersgate-street, London, the sum of £800, provided each institution for idiots can prove that they have been obliged for lack of funds not to take in patients, which, having the means, they would assuredly have done. Proof must be adduced by the institution claiming any bequest to the satisfaction of the aforesaid Bishop and Deans as regards the latter, and the Bishop of Exeter and the Dean as to the former. I give to the institution, whatever its correct title may be, which receives or assists 'incurables' and incurables only, the sum of £800, and, provided they can fulfil my conditions seven years after my decease, another sum of £800, provided the society can prove satisfactorily that they have been obliged to deny the benefit of their charity to candidates for want of funds, and legal proof may be required. The conditions to be strictly enforced and exacted on and from each and every benevolent or charitable institution to be benefited by and named in this my will before participating in its provisions are these, namely:—Each such society or institution shall not be entitled to receive all or any part of my respective benefactions hereinbefore mentioned in their favour until the would-be recipient shall produce indisputable proof, or such as would satisfy the County Court Judge, that my respective legacy has been the means of obtaining fresh donations respectively to meet my gift, either entirely or in part, that is to say, pound for pound, thus doubling the sum in each case taken or obtained from my estate under this will. A committee of not less than three persons connected with such institutions; and of whom no officers or managers shall form a part, or any one in his private capacity peculiarly interested, shall adduce proof and evidence that my bequest has attracted fresh donations or subscriptions which otherwise would not have been preferred or rendered, or, in other words, were given to meet my bequest, which such proofs and evidence shall be submitted not only to my trustee and executors, but on demand to the other societies benefited by my will who would have a residuary interest derived from a provision hereinafter mentioned, and finally to the persons interested finally in the residue not disposed of otherwise by my will a final appeal would be made to the County Court of the county wherein the institution was established, and it is my will that the whole or any part of these charitable bequests respectively not absorbed or taken up or not met with equivalent sums as aforesaid shall after four years be offered to the charitable institutions herein named, observing the order appointed by me as regards priority and reasonable time be allowed to each *separatim* to avail itself of my gift as before prescribed, provided that at the end of seven years have

expired all such sums not taken up shall sink into my residuary estate hereinafter disposed of." The testator appointed three nephews and a niece his residuary legatees, and three of them are the plaintiffs. The trustees and executors are the defendants. The Master by his certificate found, with regard to the Royal Society for the Prevention of Cruelty to Animals, "the conditions have been satisfied or fulfilled, but not within the four years prescribed by the will." With regard to the "infirmary or hospital or dispensary established in Cornwall, &c.," the Master found that the Cornwall Royal Infirmary, Truro, was meant, and that "a committee was appointed to satisfy or fulfil the conditions in the testator's will on January 28, 1897, and subscriptions have been received to meet the bequest of £800 to the amount of £887 12s. 2d., but none of such subscriptions were obtained within the four years prescribed by the will." With regard to the National Industrial Home for Crippled Boys the Master found "the conditions have been satisfied or fulfilled." With regard to Dr. Barnardo's Home the Master found "the conditions have been satisfied or fulfilled, but not within the four years prescribed by the will." With regard to the "institution for the care of idiots, established near Powderham Castle," the Master found that the Western Counties Idiot Asylum, Starcross, was meant, and that "the conditions as to proof to the satisfaction of the Bishop and Dean of Exeter have been satisfied or fulfilled, but the condition as to obtaining an equivalent amount of subscriptions within the four years prescribed by the will has not been and cannot be satisfied or fulfilled." By "Asylum for Idiots established some 41 years ago, &c.," the Master found that the Asylum for Idiots, Earlswood, was meant, and that "the conditions have been satisfied or fulfilled." With regard to the "institution, whatever its title may be, which receives or assists incurables, and incurables only," the Master found that the British Home for Incurables, Streatham, was meant, and that "the conditions have not been satisfied or fulfilled, nor are they capable of being satisfied or fulfilled." The action now came on for hearing upon further consideration, as well as upon some applications to vary the Master's finding. One question argued was whether the period of four years mentioned in the will was to run from the date of the testator's own death, or from that of the death of Mrs. Lyne-Stephens. If the latter date was the right starting point, the period of four years would not yet have expired.

Mr. Cozens-Hardy, Q.C.; and Mr. Younger were for Dr. Barnardo's Home and the Society for the Prevention of Cruelty to Animals; Mr. Vernon Smith, Q.C., and Mr. J. G. Wood were for the British Home for Incurables; Mr. Vernon Smith, Q.C., and Mr. Stewart Smith were for the Cornwall Royal Infirmary; Mr. Rawlins, Q.C., and Mr. R. J. Parker were for the residuary legatees; Mr. Waggett was for the Western Counties Idiot Asylum; Mr. Frederic Thompson was for the Earlswood Asylum; Mr. Swinfen Eady, Q.C., and Mr. Rowden were for the executors; Mr. Ingle Joyce was for the Attorney-General.

MR. JUSTICE NORTH held that the four years ran from the testator's death and so affirmed the finding of the Master. But his Lordship held that a charity which had in part complied with the condition, by raising funds to meet the bequest in part, would be entitled to the benefit of the bequest *pro tanto*. His Lordship held also that the two legacies of £800 to the British Home for Incurables were distinct, and that though the charity was not entitled to the first £800 it might become entitled to the second £800, if

the conditions were fulfilled within the seven years from the death of the testator.

[Solicitors—Nesbitt, Daw, and Nesbitt; Coode, Kingdon, and Cotton; Robbins, Billing, and Co.; Guscotte, Wadham, and Co.; H. J. and T. Child; Mackrell, Maton, Godlee, and Co.; The Solicitor to the Treasury.]

House of Lords (Lord Halsbury, L.C., } 1897.
Lords Herschell, Macnaghten, Morris, }
Shand, and Davey) } Nov. 26.

THE VESTRY OF ST. MATTHEW, BETHNAL-GREEN, V. THE
SCHOOL BOARD FOR LONDON.*

Metropolis—Sewers—Liability to repair—Sewers made without approval of Metropolitan Board of Works or of vestry—Metropolis Management Act, 1855.

Decision of Court of Appeal ([1896] 2 Q.B., 319) affirmed.

This was an appeal from an order of the Court of Appeal affirming an order of the Queen's Bench Division directing a writ of *mandamus* to issue directed to the vestry of the parish of St. Matthew, Bethnal-green, commanding them to maintain and from time to time to repair a certain conduit for drainage which passes through land purchased by the School Board for London.

Sir E. Clarke, Q.C., Mr. Asquith, Q.C., and Mr. Beavan appeared for the appellants; and Mr. Bosanquet, Q.C., and Mr. Cunningham Glen for the respondents.

The facts of the case were these. In July, 1894, the School Board for London acquired the freehold of certain lands situated in the appellants' parish, which included a street known as Tyrrell-street, in which were certain houses. Previously to 1866 these houses had no drains, but in that year a line of pipes was laid by the then owner of the houses to carry the sewage to the sewer belonging to the appellants. No evidence was forthcoming of any notice in writing having been given by the owner of the houses of his intention to lay the line of pipes or of any order of the vestry in relation thereto having been made. In the Queen's Bench Division and in the Court of Appeal it was found as facts that the vestry knew and did not disapprove of the connexion of the line of pipes with the sewer vested in the vestry. The question raised was whether in these circumstances the line of pipes constituted a drain which the respondents would have to repair, or whether it was a sewer which the appellants were bound to repair. The Queen's Bench Division held that the line of pipes constituted a sewer and issued a *mandamus* commanding the vestry to repair it, and their decision was affirmed by the Court of Appeal. The vestry appealed.

At the conclusion of the arguments, Their LORDSHIPS dismissed the appeal.

The LORD CHANCELLOR, in giving judgment, said that the circumstances in which the case came before their Lordships were somewhat unsatisfactory. The parties did not seem to have recognized the importance of bringing the whole system of drainage before the House, and not merely a plan of the immediate neighbourhood. It was clear, apart from statutory definitions, that this was what everybody would understand to be a sewer. He had not the smallest doubt that the officers of the vestry perfectly well knew what was being done. It was not a small operation; the highway must have been taken up and

the local authorities must have been fully aware of the purpose and effect of the work. If, then, this was a sewer, it was impossible to avoid the application of the language of the Act of Parliament or the conclusion that the sewer was vested in the vestry and must be repaired by them. There were circumstances in which a combined system of drains might be constructed, under an order of the vestry, by a private person, and in that case the burden of repair would rest with that private person. In such a case the combination would still be a drain, and not a sewer. But there was no evidence of any such state of things. It was clear that those who alleged that this was a drain and not a sewer must prove that such an order of the vestry was made. But no such order was produced, and he did not believe that any order of the kind was ever made. Then it was said that the vestry had no authority to make this drain or sewer without the sanction of the Metropolitan Board of Works. He was disposed to believe that the vestry did procure that sanction. But, if they did not, the construction of the system was not necessarily unlawful. There was a fatal objection to the contention that this was merely a drain, and the judgment of the Court of Appeal must be affirmed.

LORD HERSCHELL concurred, and said that this construction clearly came within the definition of "sewer" in the Metropolis Management Act, 1855, unless it was shown to be taken out of that definition and brought within the definition of "drain." This could only be done by showing that there was an order of the vestry under the provisions of section 74. There was no record of such an order and no reason to believe that any such order was made. As to the argument that the approval of the Board of Works was necessary before the vestry could construct a sewer, the only evidence was that of the gentleman who had been vestry clerk since 1884, who said that there was no record in the vestry books. But that was not evidence that the work was done without the sanction of the Board of Works. But, even if it were, it did not follow that this was not a sewer and repairable by the vestry. The Legislature had not said that, if the sanction of the board was not obtained, the structure was not a sewer, and an act was not necessarily void because the requisite consents to its performance were not obtained.

LORD MORRIS and LORD SHAND concurred.

The appeal was, therefore, dismissed with costs.

[Solicitors—R. Voss, for the appellant; C. E. Mortimer, for the respondent.]

Q.B. Div. (Wright and } 1897.
Kennedy, JJ.) } Nov. 26.

IN RE HUMPHREYS, EX PARTE ROBERTS.*

Solicitor—Costs—Power of Court to charge property recovered with payment of costs—Bankruptcy proceedings—Solicitors Act, 1860, sec. 28—Rule 125 of Bankruptcy Rules—Order of priority of payments.

This was an appeal from the decision of the County Court Judge at Portmadoc, in Wales, and raised a question of some importance to solicitors in the following circumstances. Early in February, 1895, W. Humphreys, a farmer in Carnarvonshire, having realized his assets, sailed for Australia with about £800. On March 6 a warrant for his arrest for the alleged forgery of a promissory note was issued in England at the instance of the Public Prosecutor, and on this

*Reported by C. MARSH DENISON, Esq., Barrister-at-Law.

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

warrant Humphreys was arrested on April 1, 1895, at Adelaide, Australia, by the Adelaide police, and £813, which was found upon him, was taken charge of by the Adelaide police. Meantime, on March 15, 1895, a receiving order was made against W. Humphreys on a creditor's petition presented in the Portmadoc County Court, and on March 23 following he was adjudicated a bankrupt, and the appellant, Mr. Roberts, became the trustee in bankruptcy, with a committee of inspection. Messrs. Lloyd-George and Co., solicitors at Cricieth, were employed as solicitors for the petitioning creditor, and were appointed by the committee solicitors for the trustee in bankruptcy. On April 10, 1895, the trustee in bankruptcy signed the usual official report and request to the Judge of the County Court to order a prosecution of the bankrupt for offences alleged to have been committed by him under sections 11 and 12 of the Debtors Act, 1869, which prosecution was ordered on April 24, 1895, and a constable was sent out to Adelaide and returned with the bankrupt as his prisoner. The bankrupt was discharged by the justices on the alleged charge of forgery, and was subsequently tried at the assizes for the alleged offences under the Debtors Act, 1869, and was acquitted. No special resolution was passed by the committee of inspection authorizing Messrs. Lloyd-George and Co. to prosecute the bankrupt for the alleged bankruptcy offences under the Debtors Act, 1869, but they acted as solicitors for the prosecution. In the meantime a power of attorney was sent out to Adelaide by Messrs. Lloyd-George and Co., as solicitors for the trustee in bankruptcy, under which the £813 in the hands of the police was remitted home to the trustee, and it was the only asset in the bankruptcy. On November 10, 1896, the County Court Judge, on a petition presented by Messrs. Lloyd-George and Co. in the bankruptcy and under the Solicitors Act, 1860, held that the £813 had been recovered and preserved for the bankrupt's estate through the instrumentality of proceedings duly instituted by Messrs. Lloyd-George and Co. on behalf of the trustee, and granted them a charging order thereon for all their costs, charges, and expenses of and incidental to the recovery thereof, including their costs and expenses in procuring the arrest of the bankrupt upon the charges for the alleged offences under the Debtors Act, 1869, and of the proceedings taken before the justices preliminary to and consequent upon such arrest. The trustee appealed against this decision.

Mr. H. Reed, Q.C., and Mr. Carrington appeared for the appellant; Mr. Robson, Q.C., and Mr. S. T. Evans appeared for the solicitors.

MR. JUSTICE WRIGHT delivered the considered judgment of the Court as follows:—On the facts in evidence and the findings of the Judge we come to the conclusion that the solicitors were employed by the trustee, with the sanction of the committee of inspection, expressly or mainly for the purpose of the recovery of the money in question for the benefit of the creditors. Therefore three questions of law are raised, each of them of some importance and difficulty. The first is whether the money can be regarded as having been recovered or preserved by the solicitors in or by the bankruptcy proceedings. No jurisdiction was exercised by the Bankruptcy Court in or towards the recovery or preservation of it. So far as appears all that was done was this. The solicitors, in their capacity as solicitors employed by the trustee, made an application for the money to the police authorities in Adelaide, and obtained it from them. The mere fact that this was done by the solicitors as solicitors in the bankruptcy does not seem to us sufficient. Suppose that I instruct a solicitor to bring an action to recover my horse from a person who has wrongfully obtained possession of it,

that the solicitor commences an action against that person, but, hearing that the horse is in the hands of a third party, applies to the third party for and receives from him the horse, could it be said that the horse was recovered or preserved by or in the action within the meaning of the statute? On the contrary, the action in such a case has been ineffectual, and may have been improvident. The second question is whether, if the money ought to be regarded as recovered or preserved in the bankruptcy proceedings, the Bankruptcy Court has jurisdiction to make a charging order under section 28 of the Solicitors Act, 1860. *Prima facie* the proceedings in a bankruptcy appear to be, within the language of the section, a "suit or proceeding in a Court of justice;" nor does there seem to be any force in the objection that the money was already vested in the trustee by the bankruptcy. Property is often recovered in an action by a solicitor for the very reason that it was already vested in his client. Nor do we think the question decided by "*In re Suffolk*" (20 Q.B.D., 693) or by "*In re Wood*" ([1897] 1 Q.B., 314). Apart from these authorities the principal difficulty in the way of holding that there may be cases in which a Bankruptcy Court could make such an order is that Rule 125 of the Bankruptcy Rules prescribes a certain order of priority of payments, and the effect of a charging order would presumably be to vary this order of payment in favour of the solicitor, although he must be taken to have accepted his retainer with knowledge of the prescribed priority. Although in the view which we have taken of the first question it may not be necessary to express an opinion, on this second point we do not at present see how this difficulty could be got over. The third question, again, arises only if the views above expressed are wrong. If the Court is entitled to make an order to what costs will the order extend? On the one side it is said that the order will extend to all the solicitor's costs in the bankruptcy and in prosecutions directed by the Court. On the other side it is said that the order ought to be limited to the costs of the actual application for and obtaining the money. We do not think that the whole of the proceedings in a bankruptcy can for this purpose be regarded as necessarily one. There may be separate cases against each of ten or of a hundred debtors of the bankrupt. The claims of each of ten or of a hundred creditors may have to be disputed in several ways, and in such a case it could hardly be contended that money recovered from one debtor could be charged with the costs of all the cases. On the other hand, there may be instances in which all the proceedings in the Court really are directed to one matter, and in such a case the charge, if any, might properly extend to all the costs. In the present case we think that we have not sufficient information to enable us to decide on which side of the line the case falls, and that, if it were necessary to decide this question, the matter ought to go back for further inquiry. The appeal will be allowed with costs here and below.

[Solicitors—Saffery, Huntley, and Son, agents for Breeze, Jones, and Casson, Portmadoc; Lloyd-George and Co., Cricieth.]

Q.B. Div. (Wright and Kennedy, JJ.) } 1897.
Nov. 26.

BE AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND THE CITY OF LONDON BREWERY COMPANY.*

Metropolis—Street improvement—Valuation for "betterment"—Publichouse—Evidence as to takings—Licensed "tied" premises—Tied

house covenant, whether to be considered in the "initial" valuation.

This was a special case stated by an arbitrator appointed by the Local Government Board on a betterment question arising under the London County Council (Tower Bridge Southern Approach) Act, 1895, in respect of "tied" licensed premises. Under that Act an "initial" valuation of property affected is to be made before the improvement takes effect, and then within three years after it has been completed an assessment is to be made on the improved value as a basis for a charge to be imposed on property the value of which is permanently increased by the improvement. The question raised was whether in respect of licensed "tied" premises the value of that covenant was to be taken into account. The lessors, the brewery company, desired that the initial valuation should be made as high as possible, so that the increase in value on which a charge might be made should be kept down. The house in question was a licensed house known as the Old Rose, 42 and 44, Tanner-street. The tenant had a lease of less than 21 years. A question arose as to the meaning of the words "excluding from each such valuation any trade interest" in section 36 of the said Act. By an order made by the Hon. Baron Pollock upon an originating summons of July 7, 1896, the arbitrator was ordered to make his valuation (in the said order called an award) in the form of a special case for the opinion of the Queen's Bench Division. The Court having on the 1st day of November, 1897, considered the matter, it was ordered that the award be remitted for amendment. The questions for the consideration of the Court were then stated to be as follows:—(1) Whether, according to the true construction of the said Act, evidence of the takings and payments of the publichouses, 42 and 44, Tanner-street, was admissible. (2) Whether the Old Rose, being let on a lease whereof 19 years are unexpired at a rental of £100 per annum subject to the ordinary covenant tying the purchase of malt liquors, its value to the lessor's interest of such covenant is to be excluded. The arbitrator then stated alternative findings of the figures according to the result of the judgment of the Court. There was besides the case of the Old Rose that of another publichouse not a tied house. This was dealt with in the judgment in the Court.

Mr. Bosanquet, Q.C., and Mr. Cababé appeared for the brewery company; the Hon. A. Lyttelton for the London County Council.

Mr. BOSANQUET said this was the first time these betterment clauses had come before the Court. He contended that the value of the tied covenant should not be excluded. In one alternative the County Council might have to purchase the property. It was therefore to the interest of his clients that the initial valuation should be high.

Mr. LYTTELTON argued that the tied house covenant was no enhancement of the market value and should not therefore be considered. A tied house covenant in cases of compensation under the Lands Clauses Acts was always treated as a trade interest. The actual takings of the business also ought to be excluded. As regards traders, it was the purpose of the Act they were to receive something less than the true value of the property if they objected to pay the improvement charge. It should be remembered that the whole cost of the inquiry was to be paid by the London County Council. It was important therefore that each inquiry should not have to enter into the question of the profits of trade of each individual. It was not likely that Government should have intended to make this necessary. In rating cases it was the market value of the income that was the basis of assessment. He cited

Dodd's case (1895) 2 Q.B., 133; "Alison v. Monkswearmouth" (23 L.J., M.C. 177; 4 G. and B., 413); "Sunderland Union v. Sunderland Overseers" (34 L.J., M.C. N.S., 121).

Mr. BOSANQUET said the Sunderland case was only an authority that a brewery was not for certain purposes to be deemed more valuable because it had tied houses attached.

The considered judgment of the Court was delivered by Mr. JUSTICE WRIGHT, but before reading it he said,—Though the arbitrator has not expressly stated that he has left out the "trade interests," we assume that that is so. The counsel on each side having assented, the learned Judge continued,—By an Act passed in 1895 (58 and 59 Vict., ch. cxxx.) the London County Council were empowered to make certain street improvements. Section 36 of the Act recites that, "whereas the improvement will be effected out of public funds charged over the whole county, and will or may substantially and permanently increase in value lands in the neighbourhood of the improvement which will not be acquired for the purpose thereof, and it is reasonable that provision should be made under which, in respect or in consideration of such increased value, a charge should be placed on such lands"; and it proceeds to make provision for the ascertainment of the area which will receive permanent benefit from the improvement and for the estimation of the increased value which will accrue to each separate property in that area and for the assessment on the said properties of an annual charge respecting such increase of value. The provisions for these purposes comprise four distinct operations. The Council (subsection 3) are to make a specification of the properties which in their judgment will be so increased in value. Then (subsection 3) a valuer appointed by the Local Government Board is to make an initial valuation of each property after hearing interested parties. Then (subsection 4) the Council are to make an assessment showing in the case of each property the amount of enhancement of its market value which in the judgment of the Council will accrue from the improvement and the amount of redeemable annual charge which is to be imposed in respect thereof (being about 1½ per cent. on the estimated enhancement). Lastly, an arbitrator appointed by the Local Government Board is to determine any objections to any of the above-mentioned matters, and also the incidence of the charge as between the parties having various interests in any property. Among the provisions relating to the assessment of enhancement of value is one (subsection 9) providing that the owner of any property assessed may, alone or in concurrence with termors for 21 years unexpired, if dissatisfied with the assessment, require the Council to purchase his estate and interest in the property at the value specified in the "initial valuation," and thereupon the Council must either purchase as required or abandon the proposed charge on that property. The questions for decision in the present case arise in relation, not to the specification or the assessment by the Council or to the final arbitration, but solely to the "initial valuation" of the properties. In making that valuation the valuer is to distinguish and assess the value of the site apart from that of any existing building thereon. He is, secondly, to value the site and buildings as a whole without reference to the intended improvement. He is, thirdly, to "separately value" "the interest" of the owner of the site and buildings and "the interest" of any lessee thereof for 21 years unexpired (excluding from each such valuation any "trade interest," which expression we understand to refer to goodwill and expectation of profit, and any other similar matters and the estimated value of takings and payments), and in doing so he "shall only take into consideration the

value of the said site and buildings without reference to the intended improvement." In the present case of the Old Rose there is not a lessee for 21 years, but there is a shorter lease with the common "tying" covenant. In valuing the site apart from the buildings on it the valuer has, with the assent of the County Council, taken into consideration the fact that the premises are licensed as a publichouse, and no question arises on that point, though it would seem that the fact, if admissible at all as an element of value in the first or second parts of the valuation, should be considered as an element of value of the site and buildings rather than of the site alone. On that basis he has made alternative valuations of the site, dependent on the two questions whether the takings and payments of the publichouse and the fact that it is tied are elements of the value of the site or of the site and buildings. It seems to us plain that neither of them can be considered in valuing the site apart from any existing buildings "thereon." In the next part of the valuation—namely, that of the site and buildings "as a whole"—the same two questions arise. As regards the takings and payments, we think that they cannot be treated as elements of value of the land and building—i.e., as in themselves evidence of value—and that evidence of them should not be admitted even for the purpose of testing the evidence of witnesses. In "Dodds v. Assessment Committee of South Shields" ([1895] 2 Q.B., 133) it was so held with reference to questions of rating, and we think that the principle of that decision, although partly based on practice, is applicable to the present case. The admission of such evidence must tend to induce a consideration of trade value instead of the market value of the land and buildings. As regards the "tying" covenant, we think that the valuation of the site and buildings must in effect be the same as if that covenant were considered. The real question is, as it seems to us, what is the market value of the premises fit for a publichouse, considered apart from any particular distribution of the interests in it—i.e., considered as an unqualified freehold? If indeed the owner held subject to a covenant not to use the premises as a publichouse, a different question would arise. But, as things are, the property must be valued as that of a person who is in all respects a beneficial owner. The fact that the house is tied has not increased its value, but only amounts to this—that the owner has not parted with that part of its value which consists of the power to tie. The value of the premises is practically the same either way. If the owner chooses to tie he may get less rent, but more benefit in other ways. If he does not tie he may get more rent, but less of the other benefits. The enhancement of the value of the premises which will result from the improvement will be the same, whether the premises are tied or not, though the benefit of it may be differently apportioned between lessor and lessee; and the charge is intended to be proportioned to the total enhancement of value. The third part of the valuation appears to be introduced for the purposes of subsection (9), and although it seems *prima facie* to be required only when there is a lessee for at least 21 years, yet in order to give full effect to subsection (9) it seems necessary to construe the provision for this third part of the valuation as requiring in every case a valuation of the owner's interest. The only alternative would be to treat the owner as interested to the extent of the whole valuation. This would not work any injustice apart from subsection (9), because the incidence of the charge will be apportioned by the arbitrator under subsection (17); but it would work grave injustice under subsection (9), because the Council would be compelled either to pay for much more than what the owner's real interest might be or to abandon

the charge altogether. Then it only remains to determine whether in the present case the fact that the house is "tied" ought to be considered in this third part of the valuation. We think that it ought, in the same manner as in the valuation of the site and buildings, though not for the same reasons. This part of the valuation is a valuation not of the site and buildings, but of the owner's interest in them, and anything, not being a trade interest, ought to be considered which affects the question of that interest. It is not so much that the covenant is to be valued as that the owner's interest has not been diminished by alienation of the power to tie. If he had leased the house without tying it his interest would have been less, unless he got a compensating rent. The effect, as we understand the matter, will be that if the owner requires the Council under subsection (9) to take his interest, and they do not abandon the charge on his property, they will have to pay him the value of his actual interest in the premises, and the charge will continue to be apportioned between the Council and the lessees, just as if the Council had always been the owner and as if the existing leases had been held from them. We have so far dealt with the case of the premises described as the Old Rose. In the case of the Raven and Swan similar questions arise with this exception—that the premises are under lease for an unexpired term exceeding 21 years without any "tying" covenant. This circumstance will not, in our opinion, of itself affect the first or second part of the valuation, though it may or may not be material to be considered as tending to show that the rent is or is not a fair criterion of value. But it may be material in the third part of the valuation. If the owner gets a rent different from the rent which he could get if the house were tied, and if that difference fairly represents the value to the lessee of his freedom from such a covenant, then the existence or non-existence of such a covenant would seem to be immaterial, otherwise the value of the interest of one or other party would be increased or diminished as the case may be. The valuation will therefore stand as a valuation according to the last tables in each case.

[Solicitors—W. A. Blaxland, for the London County Council; Western and Sons, for the appellant.]

Court of Appeal (Lindley, M.R., } 1897.
Chitty and Vaughan Williams, L.J.J.) } Nov. 27.

IN RE ROLLASON'S DESIGN.*

Copyright—Design—Novelty—Pattern—Patents,
Designs, and Trade Marks Act, 1883, secs.
47, 51, 60.

This was an appeal from a decision of Mr. Justice Kekewich, dated July 14, directing the removal from the register of a design for coffin plates registered by Charles Rollason on May 28, 1894, under the number 232,908. This design was stated in Mr. Rollason's application to be applicable for the pattern. The design as used by Mr. Rollason consisted of an irregular hexagonal brass plate with leaf-shaped projections at the four outer corners, each of which contained a raised shell-pattern ornamentation, and it was a feature of the design that the centre of the plate was depressed below the level of the outer border. Mr. Rollason having sued Messrs. Heath and Co. in the County Court for infringing his design, they replied by a motion in the High Court to have the design removed from the register. The principal ground of their appli-

cation was that the design was not new or original. In support of this contention they alleged that the design had been anticipated by a design registered by Messrs. Sanders, Son, and Payne in 1892, and by other designs which were common to the trade. They alleged, further, that even if any novelty could be claimed by Mr. Rollason for his design as used the drawing annexed to the certificate of registration did not show sufficiently the nature of the design, inasmuch as no section was given, and there was no indication that the centre of the plate was to be depressed below the level of the outer border beyond the fact that the boundary of the centre of the plate was defined by a double line, which was relied upon by Mr. Rollason as suggesting a difference of level. The result, it was said, was that the design as shown by the drawing might be infringed in various ways, as by making the centre plate flush with the outer border, or by raising or depressing it. Mr. Rollason, on the other hand, claimed that his design was a new and original combination of certain characteristics of three earlier designs—viz., the outline of one, the depressed centre and raised moulding of another, and the raised shell device of a third, with further additions and modifications. Another ground for the application for removal was that section 51 of the Patents Act, 1883, had not been complied with. That section provides that before delivery on sale of any articles to which a registered design has been applied the proprietor of the design shall cause each such article to be marked with the prescribed word or words or figures denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to insure the marking of the article. It appeared that one type of plate used by Mr. Rollason was by the inadvertence of the die-sinker whom he employed marked 252,908, instead of 232,908, but that the mistake was rectified as soon as it was called to Mr. Rollason's attention. Mr. Justice Kekewich held that the design was bad for want of novelty, and directed its removal on that ground, but he decided the point upon section 51 in favour of Mr. Rollason.

Mr. Rollason appealed.

Mr. Warrington, Q.C., and Mr. E. P. Hewitt appeared in support of the appeal; Mr. Renshaw, Q.C., and Mr. W. N. Lawson were for Messrs. Heath and Co.

The COURT allowed the appeal.

The MASTER of the ROLLS said that the Act of Parliament had nothing to do with designs in the abstract, but had to do with designs intended to be applied to a particular article. It was therefore necessary to consider what this design was for. The design was registered for coffin plates, and it was registered in respect of pattern. It was no part of the Act of Parliament to say how the design was to be carried out, and in his Lordship's opinion it was immaterial to consider whether or not the design was capable of being copied in more ways than one. In considering the question whether this design was new and original a good deal turned upon whether the lines in the drawing did or did not show that the centre of the plate was to be lower than the edges, and it was said that that could not be inferred from the drawing. If the drawing were looked at apart from the thing to which it was to be applied that might be so, but looking at it in reference to coffin plates his Lordship thought that any ordinary person would infer that this was a design having a depressed centre. If that was the true view, in his Lordship's opinion this design had not been anticipated. But if not he thought that there was still sufficient difference in this design to make it new and original. According to the principles laid down in "*Le May v. Welch*" (28 Ch. D., 24) and "*In re Clarke*"

([1896] 2 Ch., 38) the test was whether this was a substantially new pattern. Treating the word "pattern" as including the ornamentation as well as the outline, his Lordship came to the conclusion that there was in this design sufficient originality to entitle Mr. Rollason to keep it on the register. With regard to the objection based upon section 51 the mistake was not one which would readily catch the eye of a casual observer, and it had been rectified as soon as it was discovered. In these circumstances in his Lordship's opinion Mr. Rollason had brought himself within the saving clause in the section. The appeal should therefore be allowed.

LORD JUSTICE CHITTY concurred. Mr. Rollason's design was made up of several old designs which he had combined together. In his Lordship's opinion these old designs in combination presented to the eye a new design.

LORD JUSTICE VAUGHAN WILLIAMS was not sure that he agreed with the other members of the Court as to the principle upon which the question of novelty and originality ought to be determined. Having regard to sections 47 and 60 of the Patents Act, 1883, his Lordship thought it clear that the Legislature intended to draw a distinction between (1) pattern, (2) shape or configuration, (3) ornament, and intended, at all events in a case where the applicant himself limited his application to one of those three heads, that such applicant should pay attention to the question of what he claimed to have registered as new and original—whether the claim was for pattern, shape or configuration, or ornament. Moreover, the rules made in pursuance of the Act of Parliament prescribed that applications for registration should be in the forms set forth in the schedule to the Act, and the forms E and O, which were applicable to designs, drew a distinction between pattern and shape. Inasmuch as the Act of Parliament and the rules clearly enabled, if they did not compel, an applicant to draw that distinction, in his Lordship's opinion if the applicant chose to draw that distinction that ought to be borne in mind in considering the question of novelty and originality. In this case the application being limited to pattern he thought that the Court ought not to go outside anything which properly fell within the definition of pattern in this particular application; it was not enough to find novelty or originality in something which was clearly shape as distinguished from pattern. It was a condition precedent to claiming the benefit of this Act of Parliament that the applicant for registration should have complied with its provisions, and in any case where it was uncertain whether or not he had claimed a particular thing the decision ought to be given against him, because it was his duty to make it perfectly clear what he sought to appropriate to the exclusion of the general public. It was said that part of the design claimed in this case was the depressed centre. His Lordship doubted whether the applicant had any intention of claiming that as part of his design, but if he had, he had not made his intention sufficiently clear to entitle him to registration. Treating this, then, as the registration of a pattern and putting out of consideration the depressed centre, was there within the principles laid down in "*Le May v. Welch*" a clearly marked difference between this design and those which had gone before? Speaking for himself his Lordship came to the conclusion that there was a sufficiently marked difference to entitle the design to remain upon the register, though he felt some hesitation in differing from the learned Judge below on a question as to the quantum of difference.

[Solicitors—Preston, Stow, and Preston, for Ansell and Ashford, Birmingham; Stibbard, Gibson, and Co., for Rowlands and Co., Birmingham.]

Court of Appeal (Lindley, M.R., } 1897.
Chitty and Vaughan Williams, L.JJ.) } Nov. 27.

HAWES V. HARDING AND CO.*

Patent—Validity—Specification held bad.

This was an appeal from a decision by Mr. Justice Kekewich, dated July 8. The action was brought to restrain the infringement of a patent for a watering-pot shaped like a canister—that is to say, having the neck of the vessel of a smaller circumference than the body, with a tipping handle joined on to the body and neck of the vessel and a carrying handle joined on to the neck and spout. After describing the vessel in the specification, the plaintiff claimed—" (1) the canister shape of the vessel ; (2) the make, shape, and position of the tipping handle, by which the vessel is so balanced as to allow of its being manipulated with one hand, leaving the other free ; (3) the introduction of a carrying handle, which strengthens the spout and allows of the can being carried by the hand in a natural position." And the specification concluded as follows :—" This new invention forms a watering-pot that is much easier to carry and tip, and at the same time being much cleaner and more adapted for use than any other put before the public." Mr. Justice Kekewich held that the patent was invalid, and gave judgment for the defendants. The plaintiff appealed.

Mr. Warrington, Q.C., and Mr. Willis Bund appeared for the plaintiff. Mr. Walter and Mr. J. H. Gray, for the defendants, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that, with every desire to support meritorious inventions, care should be taken not to strain the language of the specification unduly. The plaintiff might be right in contending that this was a claim for a combination, but he claimed something else as well. He claimed—first, the shape of the can ; secondly, the make, shape, and position of the tipping handle ; and, thirdly, the introduction of the carrying handle as separate and distinct things. Construing the specification most favourably to the plaintiff, it was a claim for a combination *plus* the three things specified. The specification was clearly bad, and the appeal should be dismissed.

LORDS JUSTICES CHITTY and VAUGHAN WILLIAMS concurred.

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.JJ.) } Nov. 27.

ATTORNEY-GENERAL V. BROWN.†

Revenue—Succession duty—Partnership deed between father and son—Death of father—16 and 17 Vict., c. 51, sec. 2.

Held, reversing the decision of the Divisional Court (13 *The Times* L.R., 364), that the arrangement under a partnership deed by which a son acquired the share of his father on his death was not in the nature of a sale by the father to the son, and so excluded from the operation of the Succession Duty Act.

This was an appeal from the judgment of a Divisional Court (Mr. Justice Vaughan Williams and Mr. Justice Kennedy), on the hearing of an information laid by the Attorney-General claiming succession duty, reported in 13 *The Times* Law Reports, 364. By an indenture, dated March 30, 1881, the father of the defendant,

George Brown, and the defendant, George Thomas Brown, entered into a contract of partnership for carrying on the business of cotton spinners and manufacturers for a term of five years. The assets of the business were valued at £62,445. The defendant brought no capital into the business, but he was to be considered as having brought one-third of the capital, and the father two-thirds. The father was to take two-thirds of the profits, and the son one-third. Paragraph 29 of the indenture was as follows :—" If the said George Brown shall die during the partnership, the said George Thomas Brown shall be absolutely entitled for his own use and benefit to the whole or entirety of the capital of the partnership of and in the money, property, stock-in-trade, debts, effects, and assets of the partnership. And the said George Thomas Brown shall, within six calendar months next after such death, duly execute and deliver unto the executors or administrators of the said George Brown a bond in a penalty double the principal sum payable to them conditioned for the payment to them of the principal sum of £10,000. . . . But if the said George Thomas Brown shall die during the partnership, the said George Brown shall be absolutely entitled for his own use and benefit to the whole or entirety of the capital of the partnership ; and the said George Brown shall, within six calendar months next after such death, duly execute and deliver unto the executors or administrators of the said George Thomas Brown a bond in a penalty double the principal sum payable to them conditioned for the payment to them of the principal sum of £15,000." There was also another contract of even date drawn up in relation to the freehold property of the firm, in which it was provided that £139 per annum was to be paid to the father. The indenture took effect, and the defendant and his father carried on business in partnership until October 12, 1884, when the father died. The Crown claimed succession duty in respect of the capital of the partnership passing to the defendant, less his original share therein and the sum of £10,000 payable to the estate of the deceased. The Divisional Court gave judgment against the Crown. The Crown appealed.

The Solicitor-General and Mr. Vaughan Hawkins appeared for the Crown ; Mr. Haldane, Q.C., and Mr. Danckwerts for the defendant.

The COURT, having taken time to consider, delivered judgment this morning, allowing the appeal.

LORD JUSTICE RIGBY read the judgment of the Court as follows :—" In this case the Crown claims as from the defendant, George Thomas Brown, succession duty in respect of any benefit derived by him from his acquisition, on the death of his father and partner, George Brown, of the share of the latter (being two-thirds of the whole) in a partnership business of George Brown and Co., carried on by the father and son down to the death of the father in 1884. The real question is whether the arrangement (to use a neutral phrase) under which the son acquired the share of his father was or was not in the nature of a sale by the father to the son within the meaning of "*Fryer v. Morland*" (3 Ch. D., 675), and so excluded from the operation of the Succession Duty Act. The facts of the case are not in dispute. George Brown, the father, to the end of the year 1880 carried on the business of cotton spinner and manufacturer, his son, George Thomas Brown, assisting him in the management of the business, but having no share therein. George Brown, the father, being minded to take his son into partnership with him, caused a valuation to be made of his assets employed in the business as on January 1, 1881, and a general statement of account showing his position in the business on the same day. In this statement of account the items on the credit side were the values

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

†Reported by F. G. RUCKEN, Esq., Barrister-at-Law.

of the assets at the prices put upon them, a large banker's balance of £10,000 (obviously, we think, made up to an even sum considered sufficient to start the new firm), and the accounts due to the business. The total of these assets on the credit side was £63,824 8s. 11d. On the debit side was placed the amount of the accounts owing in the business, being £1,378 16s. 1d., and there resulted a net balance to the credit of the business of £62,445 12s. 10d. This statement of account was taken as the starting point of the new firm, and the credit balance attributed as to £41,630 8s. 6d. (two-thirds of the whole) to the father as his capital, the remaining one-third, or £20,815 4s. 4d., being attributed to the son, though the whole amount was in truth brought in by the father. We have thought it desirable, with reference to the arguments pressed upon us, to state plainly the way in which the exact balance was arrived at, but for greater simplicity that balance will hereafter be dealt with as if it were a round sum of £60,000. The articles of partnership, which contained or evidenced the terms of the only contract between the father and the son, were dated March 31, 1881. They carried the partnership back to January 1, 1881, and made the term of the partnership five years, if both partners should so long live, subject to a clause enabling either partner to expel the other in case (among other events) of lunacy, bankruptcy, or breach of the articles. The benefits conferred upon the son by the articles included the following:—He got at once one-third of the capital, say £20,000, and one-third of the profits. If the partnership continued for the five years, or determined by any other reason then the death of a partner, his share of capital was to be one-half, say £30,000. If his father died during the term, he was to have the whole capital, say £60,000, subject to his giving his father's executors, within six months after his death, a bond conditional for payment of £10,000 and 4 per cent. interest thereon from the father's death by ten instalments of £1,000 a year, the first payable, with interest as provided, at the end of 12 calendar months from the date of the bond, thus giving 18 months for the first payment at the son's election. In the event of the son's death during the term, his father was to have back the business (formerly his own), but was to pay the son's executors £15,000, secured by his bond in a similar manner. The consideration given by the son (and it cannot be suggested that it is not in law a good consideration) was his agreeing to be a partner and thereby taking upon himself liability for the debts of the firm, and his rendering services as a partner, with the addition in the sole case of his succeeding to the whole business of the money consideration involved in his giving the bond for £10,000. The money payment and the obligation to indemnify the father's estate against the debts of the firm constituted the only additional consideration for the acquisition of the father's two-thirds. Can the arrangement above summarized, looking at the case in its substance apart from form, be fairly described as a case of sale and purchase within the meaning of the exception established by "*Fryer v. Morland*"? The contract between father and son is one and indivisible, and it is not permissible to isolate one of its terms from the other. The event which has actually happened does involve a money payment by the son, but for the purpose of arriving at the true meaning of the arrangement it is necessary to consider also what did and what might have happened independently of that event. Now, the son actually got one-third of his father's capital without having to make any money payment to the father at all. If the partnership had lasted throughout the five years or been determined by the father expelling the son or the son the father, the son would have got half

the capital without having to pay anything. If it had been determined by the death of the son, his estate would have had £15,000, but would not have had to pay anything. It would hardly have been possible to say that in any of these cases the contract was one of sale and purchase in the sense in which that phrase is to be used for present purposes or in any ordinary sense. If the true nature of the arrangement was not in the important cases referred to a contract for sale and purchase, the argument for its being so construed in the particular case which happened is greatly weakened, if not altogether destroyed. Looking at the contract broadly we do not think that it is one which ever would have been entered into with a stranger (unless the father chose to treat him as a son), but that it was to a great extent at any rate an arrangement for the benefit of the son, and that it is not converted into a contract for sale and purchase simply because the father stipulated for a money payment in a certain event to his estate. The distinction between the present case and that of "*Fryer v. Morland*" seems plain. Sir George Jessel in that case gives two reasons why ordinary contracts for sale and purchase should not be within the Act. The first and the main reason is the absurdity which would be involved if sales and purchases were to be included. In effect he says:—If sales and purchases are to be included, then sales by auction must be. But it is altogether absurd to suppose that a stranger purchasing at an auction should pay 10 per cent. duty when a son purchasing in the same manner would pay 1 per cent. only. The same observation would apply to sales by private treaty. To an arrangement like that in the present case the argument would have no application. The other reason founded on the language of section 2 seems to be equally inapplicable. The Master of the Rolls remarks upon the difficulty of holding that a purchaser in an ordinary case of sale and purchase derives title from his vendor. He derives it from his own money paid out of his own pocket. Is that the case here? It would seem that the provision as to giving the bond for £10,000 involves no such conclusion. Immediately on the father's death his two-thirds share (amounting, say, to £40,000) is to pass to his son with, of course, the subsequent produce whether the son carries on the business or not. He has it either to sell or keep, and it is at least as easy to infer that he is to have this property to enable him to pay conveniently the instalments, as that £10,000 is to be fixed as a contractual value for property taken on the face of the contract as worth £40,000. The true conclusion seems to be that the father was actuated by mixed motives of business and bounty, and that in the case of the son becoming entitled to the whole business £10,000 was fixed as a reasonable sum which could be paid without inconvenience out of the business for the benefit of the father's general estate, and not at all as a measure of the value of the property taken. This conclusion would be in accordance with the usual or, at any rate, a very general practice in the case of a successful trader carrying on an important business and taking into partnership one of several sons. It is highly improbable that in such a case the whole arrangement should be based upon the ordinary pecuniary basis which would exist between vendor and purchaser. The partnership agreement is founded on mutual confidence between the parties, and it seldom, if ever, happens that the son gives full pecuniary value for the share secured to him, whilst some provisions for the other members of the family are very generally imported so as to make the arrangement analogous to, if it cannot properly be called, a family arrangement. Hitherto no reference has been made to the point, very strongly relied upon by the Solicitor-General, that, quite apart from

the inadequacy of the sum to be paid on the son taking over the father's two-thirds share, the contrast between that sum and the £15,000 to be paid by the father on taking the son's one-third shows that the sums were fixed, not on the basis of sale, but rather with reference to the presumed and reasonable claims of the son in the particular events. This contrast, if not explained, is a strong ground for supposing that the whole arrangement was in the main an arrangement for the son's benefit. The judgment then proceeded to deal at some length with the reasons of the learned Judges in the Divisional Court, and continued as follows:—Having stated these reasons for differing in matters of comparative detail with the learned Judges in the Court below, we conclude by pointing out what, in our judgment, and with all deference to them, seems to be the main defect in their reasoning. They do not treat the contract as a whole, but, picking out and dealing separately with one clause of it, they seem to add together all the considerations given by the son for any part of the advantage secured to him and concentrate them on the single case of the taking over by the son of the father's two-thirds, not allowing for the circumstance that, with the exception of the £10,000 and the indemnity to be given for the debts due at the father's death, for the whole of which the son was liable to the creditors, the whole considerations moving from the son would have equally moved from him had he never become the taker of his father's share at all. The result is that the judgment of the Court below is to be reversed, and the Crown held to be entitled to succession duty, of course giving credit in the usual way to the son for the sum of £10,000 in estimating the value of the succession. Costs will follow the event.

Chan. Div. } 1897.
(North, J.) } Nov. 27.

LABOUCHERE V. HESS AND MRS. SALA.*

Letters—Property in—Publication—Injunction to restrain.

The Court has jurisdiction to restrain the publication of a letter against the will of the sender.

Mr. Justice North this morning gave judgment in this action heard yesterday, of the arguments in which we have given a summary. Mr. Labouchere sought to restrain the publication of private letters from himself to the late Mr. George Augustus Sala. His action was commenced on account of a paragraph in the *African Critic*, the journal of Mr. Hess, which threatened publication of letters he believed to Mr. Sala. Mr. Hess admitted his having such letters in his possession and his intention to publish one, and claimed the right to publish all. Mrs. Sala denied any collusion with Mr. Hess or illwill to Mr. Labouchere. She said she had parted with, among other things, letters to her husband from Mr. Labouchere, which had been given to her as a wedding present during the time her husband was ill and incapacitated from work. The action was brought on on motion for an interlocutory injunction, therefore on affidavit evidence only; but the application was treated as the trial, thus disposing of it entirely.

Sir Edward Clarke, Q.C., and Mr. Rowden were for the plaintiff; Mr. Carson, Q.C., Mr. C. F. Gill, and Mr. J. W. Leonard for the defendant Hess; and Mr. F. Cooper Willis and Mr. Abinger for Mrs. Sala.

MR. JUSTICE NORTH said:—Mr. Hess, the defendant, was the proprietor and publisher of the *African Critic*.

In the issue of October 2 there was a supplement of some 55 pages in length. On the title-page was printed, "The stock-jobbing of Henry Labouchere, M.P. for Northampton, proprietor of *Truth*, and late member of the British South Africa Committee, with five facsimile letters and four cartoons." His Lordship had looked very cursorily through the pages, and he thought he was justified in describing them as an attempt to make out that Mr. Labouchere was a consummate hypocrite, if not worse, and was wholly unworthy of association with men of common honesty and honour. At page 4 there occurred this passage:—"I have, however, in my possession complete proofs that Mr. Labouchere also carried on his stock-jobbing transactions in later years, and, if necessary, I shall be quite willing to publish them; but before doing so I desire to challenge Mr. Labouchere to refute, if he can, the charges already proved against him by me. This is the second day of October, 1897. I will give him until the last day of this year—i.e., three months—to have 'his innings,' as his friends call it, and take such steps to vindicate his character as the aspersions I have cast upon it call for. If by December 31, 1897, he shall not have taken any such measures, I intend, beginning with my issue of January 1, 1898, to commence a series of revelations about his latter-day conduct, which, I promise, will pale the exposures already made into utter insignificance." In the issue for October 7, 1897, of *Truth*, a journal of which Mr. Labouchere was the proprietor, in an article headed "An African Editor and Myself," running over several pages, was this passage:—"You have my leave to comment on my articles in the *World* as you please. You may publish and republish my letters to Mr. Beer as often as you please. I should not have to bring an action in order to hinder this. A letter belongs to the writer, and I might obtain an injunction to-morrow to prevent your publication of any of mine. I have, however, you will be glad to hear, not the remotest intention to take this course. You may continue to scatter broadcast gratis copies of your journal in which you prove that I was a quarter of a century ago worthy of penal servitude, or, if you prefer it, that I ought to have been hanged a quarter of a century before that. You will not draw me." The *African Critic* of November 6 contained this paragraph:—"Mr. Wm. Holloway, B.A., objected to any Jew or journalist sitting on the jury in the libel action which he brought this week against the *Pall Mall Gazette*. He got his non-journalist, non-Jewish jury, and also a verdict against himself. Next time, I take it, Mr. Holloway will afford Jews and journalists a trial. They could not do worse for him than his selected jury did. This is *à propos* of nothing South African, except that this paper is greatly interested in libel cases, having five in hand at present, with expectations of one more in the near future. Mr. Labouchere rather fancies Jews as jurors. . . . One of the first Labouchere letters which I shall publish in facsimile next year will show the reason why Mr. Labouchere considers Jews to make good jurymen." That threat of publication having been made, Mr. Labouchere brought this action for an injunction. He made an affidavit, in which he said:—"During the life of George Augustus Sala, deceased, who was a man of literary eminence, I was for many years on terms of intimate friendship with him, and in the course of our said friendship I wrote and sent to him a large number of letters, extending over a period of 20 years, such letters being of such a character as would usually pass between intimate friends, and wholly of a private nature. The said George Augustus Sala died in or about the year 1895. The defendant Elizabeth Sala is his widow, and on his death acquired possession of his papers and documents, including numerous

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

letters written by me to him during his life. I have been informed and believe that the defendant Elizabeth Sala, at the instigation of and acting in collusion with the defendant Henry Hess, has recently made over to the defendant Henry Hess a considerable number of the said letters written by me to the said G. A. Sala, or has supplied him with copies of extracts from such letters for the purpose of publication, and I verily believe that, so far as any of my letters written to the said G. A. Sala remain in her custody or possession, she will be induced by the defendant Hess, and in fact threatens and intends to deliver the same or some of them or copies of or extracts from such letters or some of them to the defendant Hess for publication. I have been informed and believe that the defendant Henry Hess, under the circumstances aforesaid, has in his possession certain of my letters written to the said George Augustus Sala, or copies of or extracts from such letters, and that he threatens and intends to publish the same and in particular to set forth copies or facsimiles of such letters or of portions of the contents of such letters in the said newspaper known as the *African Critic*, or in a new journal or publication shortly to be issued by the defendant Henry Hess, and to be known as the *Critic*. Amongst other grounds I have for making this statement is the following. In a supplement to the *African Critic* for October 2, 1897, the defendant Hess has set forth both prints and facsimiles of certain correspondence of mine which is not the subject of the present action, and relating to certain alleged actions or conduct of mine 20 years ago." That Mr. Hess had letters from the plaintiff to Mr. Sala in his possession was admitted; but Mr. Hess and Mrs. Sala gave somewhat different statements as to the circumstances under which they came into his possession. Mrs. Sala said that on her marriage with her husband he made her a wedding present of, among other things, a number of letters to him from well-known persons, and that shortly before his death, when by his illness he was incapacitated from earning money, she disposed of a considerable number of these and applied the proceeds entirely for his benefit. Mr. Hess deposed:—"I have been informed and believe that the said Mrs. Sala was lawfully in possession, after the date of the said George Augustus Sala's death, of certain letters written to him by the plaintiff". . . "I have never undertaken to publish such letters, or any of them; and I have never stated to any one that I intended to publish letters written by the plaintiff to the said George Augustus Sala. I say, however, that on November 6, 1897, I published in the *African Critic* an extract of the current issue of the newspaper *Truth*, together with the following comment" (which his Lordship had referred to):—"I admit that the one letter here referred to was a letter purporting to have been written by the plaintiff to the said George Augustus Sala. This is the only one of such letters to which my comment refers; but I maintain, as I am advised and believe, that I have a right to publish any or all of the said letters, or the contents thereof, which the plaintiff may have written to the said George Augustus Sala." Though he said he was only intending to publish one letter, he there claimed a right to deal with all letters from Mr. Labouchere that he had acquired. The first point argued before his Lordship on behalf of the defendant Hess was that as a matter of law the Court would not, as a general rule, restrain the publication of letters. That was put on general grounds independently of particular reasons against the granting an injunction. He thought the authorities very clear and express against persons having any such right of publication. His Lordship dealt with the authorities, first referring to the case of "*Pope v. Curl*" (2 Atk., 342), relating to a case of

publication of a collection of "Letters from Swift, Pope, and others." He read from Lord Hardwicke's judgment as follows:—"Another objection has been made that, where a man writes a letter, it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver; possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer." His Lordship passed to the case of "*Thompson v. Stanhope*" (Amb., 737), a case relating to the publication of letters from Lord Chesterfield to his natural son, which the widow of the son was intending to publish. There his Lordship read:—"Lord Apsley was very clear that an injunction ought to be granted that the widow had no right to print the letters without the consent of Lord Chesterfield or his executors. That she had obtained neither the one nor the other." "He said it was within the reason of several cases where injunctions had been granted, and cited the cases of Mr. Forrester, of Mr. Webb, Mr. Pope's letters published by Curl, and Lord Clarendon's life, advertised to be published by Shebbear." The next case touched on by his Lordship was that of "*Percival v. Phillips*" (2 Ves. and Beames), where an injunction that had been obtained was discharged on the ground that publication was authorized; the case was an exception to the rule which was clearly recognized as established. But his Lordship did not think he should be doing justice to the arguments if he did not say that it seemed that the Vice-Chancellor would have doubted the jurisdiction if the matter had come before him as a new one. There was a case "*Gee v. Pritchard*" (2 Swan, 402) before Lord Eldon, the leading case on the subject. He thought, looking at the whole report, that if the matter had come before Lord Eldon for the first time he also would have doubted whether an injunction could be granted; but finding what the law was, as long established by a number of cases, he considered that an injunction could properly be granted. After referring to, among other cases, "*Boosey v. Jeffery*" (6 Ex., 580), his Lordship considered the case of "*Hopkinson v. Lord Burghley*" (L.R., 2 Ch. Ap., 447), where it was sought to excuse the production of letters for the purpose of justice on the ground that the sender objected. Lord Justice Turner said:—"I am of opinion that these letters must be produced; the writer of a letter trusts the receiver with the letter, and he must take the consequences of its being in his possession. The question which now arises is between a stranger and the receiver. If the sender of a letter wishes to restrain the receiver from showing it to any other person, he must file a bill for that purpose. Unless that is done, the property is in the receiver. There must, however, be an undertaking not to use the documents, or any copies of them, for a collateral object." Lord Cairns, one of the strongest lawyers and ablest judges who ever sat on the bench, said:—"The question in all these cases is what was the purpose or object in the mind of the person sending the letter. The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose. But, if there is a lawful purpose for which a letter can be used, it is the production of it in a Court of Justice for the furtherance of the ends of justice. In the present case the recipients were justified in declining to produce the letters without the direction of the Court; but they cannot now refuse to produce them. There must be an undertaking in the terms of the undertaking in '*Richardson v. Hastings*' (7 Beav., 354)." "The Court, therefore, clearly had jurisdiction. Then what were the reasons why the defendant Hess should not be restrained in

this case? First, counsel for Hess raised the defence of leave and licence. Hess did not himself set up that defence in his affidavit. Counsel relied on the passage from *Truth* his Lordship had read. When one looked at the passage it was an invitation to publish letters to Mr. Beer and to Mr. Sala, and if it were he did not see why it should not be revoked. In the next place it was said that Mr. Labouchere had adopted the same course towards Mr. Hess that he complained of towards himself. He had published in *Truth* a letter that was said to have been written by Mr. Hess. Mr. Hess denied that he had ever written the letter—a letter which Mr. Labouchere stated that he obtained from the records of a Transvaal Court of Justice. Mr. Hess's statement must be taken to be correct as against himself, and his Lordship did not see how the publication by Mr. Labouchere of a letter not written by Mr. Hess could justify the publication of a letter written by Mr. Labouchere. But putting aside the question of authenticity, supposing the letter to have been a genuine letter of Mr. Hess, his Lordship was not then in a position to judge, as he might have been had the case gone to trial with witnesses, to know whether the circumstances were such as to justify the publication, and on this ground he did not see any reason to refuse the injunction. Lastly, Mr. Carson relied on the exception given in "*Thompson v. Stanhope*," and other cases, that you may publish letters written by some one else for the purpose of clearing your character. The defendant did not say that he proposed to publish the letters for that purpose; his only purpose was not to whitewash himself, but to blacken the plaintiff; not to prove his own honesty, but to prove the dishonesty of the plaintiff. He must grant the injunction asked, except that the notice of motion went too far in asking to restrain the informing any one of the contents of the letters. It was true that in some of the forms given in "*Seton on Decrees*" such words were inserted, but his Lordship knew nothing of the circumstances in which those injunctions were granted; he had no doubt the words in those particular cases were proper to be inserted. His Lordship then referred to what he had understood to be a suggestion that the injunction, if granted, could be evaded by getting some one else to publish the letters, observing that Mr. Hess and his friends would in such case stand a good chance of finding themselves in Holloway Gaol if such course were adopted, and said he would add to the injunction words expressly prohibiting any improper use of the letters. As regards Mrs. Sala the case stood on a different footing. She had made an affidavit as to how she had parted with the letters she had parted with, denying all collusion with the defendant Hess, and saying she had no malicious motives or ill-feeling against Mr. Labouchere, and also saying that she had no intention of publishing any letters of Mr. Labouchere except that she had some intention of writing a memoir of her late husband to be called "*The Life and Letters of George Augustus Sala*," in which some letters of Mr. Labouchere and other well-known men might appear. His Lordship thought that she should be well advised before she published letters of Mr. Labouchere without his consent. He did not think that Mrs. Sala had acted prudently in parting with the letters in the way she had, but he did not see that what she did many years ago under the circumstances in which she acted could disentitle her to have the injunction refused, and costs must follow the event. Mr. Hess must pay costs.

Mr. CARSON, Q.C., said his Lordship had not apprehended the meaning he intended to convey. Mr. Hess certainly had no intention or desire to go outside or evade any order of the Court.

Mr. JUSTICE NORTH said he quite accepted this explanation, though he certainly did misapprehend some

of the argument; however, he was not sorry that he had made the observations he did make.

[Solicitors—Lewis and Lewis, for the plaintiff; Guedalla and Cross, for the defendant, Hess; J. Barnard Abrahams and Co., for the defendant, Mrs. Sala.]

Chan. Div. }
(Romer, J.) }

1897,
Nov. 27.

IN RE SMYTH, DECEASED—LEACH V. LEACH.*

Revenue—Probate duty—Devise upon trusts—Asset, English or foreign—Local situation of asset.

This was a petition for the distribution of funds subject to the trusts of the will dated May, 1837, of Francis G. Smyth, who died in June, 1839. A question arose as to the payment of probate duty, and his Lordship delivered a considered judgment.

Mr. Neville, Q.C., and Mr. R. J. Parker appeared for the petitioners; and Mr. Vaughan Hawkins for the Crown.

HIS LORDSHIP said,—The question as to probate duty which arises in this case may be shortly stated as follows:—A testator, who at the dates of his will and death was living and domiciled in England, made an English will whereby, in effect, he devised and bequeathed a plantation in Jamaica to trustees upon trusts for the benefit of certain persons for life and their issue, and upon the deaths of those persons and failure of issue upon trust to sell the plantation and divide the proceeds amongst several persons therein named. The trustees were at the above dates domiciled in the United Kingdom and one of them after the testator's death proved the will in England and acted as trustee and as trustee in this country held the plantation upon the trusts of the will. The trust for sale ultimately took effect and the proceeds of sale of the plantation became devisable amongst the several persons named in that behalf in the will or their legal personal representatives. One of those persons (I will call him the legatee), who was at the time of his death living and domiciled in England, died while the persons entitled for life were in existence, and the question is whether probate duty is not payable here on his death in respect of his interest under the will. Now that interest was admittedly of the nature of personalty, and the question, therefore, narrows itself down to this—Is the interest to be considered an English asset or to be treated as foreign because the plantation was situate in Jamaica? In my opinion it is to be regarded as an English asset. The case is governed by the principles which led to the decision of the "*Attorney-General v. Lord Sudeley*" ([1896] 1 Q.B., 354), and the judgment of Lopes, L.J., as reported at p. 363, applies almost word for word to the case before me, and that judgment was approved of and adopted by the Lords in the House of Lords when it came for consideration before them on appeal (L.R. [1897], A.C., 11). At the time of his death the only right the legatee had in the case before me was to have the trusts of the will duly performed, and in particular to have the trust for sale carried into effect at the due time, and the net proceeds of the sale, after paying costs and the expenses of the trustee, divided between the legatees and the other persons entitled. As matters stood he was not entitled to the plantation itself or to any specific part or share of it. The trustee was not a trustee of the plantation or of any specific part or share of it for him; all he was entitled to was his proportion of the net proceeds of the plantation after realization. He

had no claim against the plantation to recover it or any portion of it; that was a claim enforceable only by the trustee. The right of the legatee as against the trustee was only to have the trusts of the will administered. Administered where? The testator was domiciled in England, his will was proved in England, his trustee was in England, and the money recoverable would in the ordinary and proper course be brought to England. The trustee could be properly and in the ordinary course sued in the English Court by the legatee, who was in England. The asset was an English equitable chose in action, recoverable in England, and an English and not a foreign asset, and as such subject to probate duty here. It was suggested as against the Crown that possibly under some circumstances an action might have been brought by the legatee to enforce his rights in Jamaica. I am bound to say that at present I do not see what action could have been properly brought there. But even admitting that, under some conceivable circumstances or change of circumstances, some action might have been brought there, the question is not in what place under extraordinary circumstances an action might be brought, but what place under existing circumstances was the natural and proper place in which the legatee should enforce his rights? In other words, what was the proper forum for deciding upon the legatee's claim? and the answer to this clearly is that the forum was English. And in reference to this view I may refer to the case of "*In re Cigala*" (L.R., 7 Ch.D., 351) and the observations of Jessel, M.R., in that case. I therefore decide that the probate duty is payable.

[Solicitors—Norris, Allens, and Chapman; The Solicitor for Inland Revenue.]

Q.B. Div. (Crown Cases Reserved)
(Lord Russell of Killowen, C.J.,
Pollock, B., Hawkins, Lawrence,
and Collins, JJ.) 1897.
Nov. 27.

REG. V. LYNCH AND ANOTHER.*

Criminal Law—Offences against the person—Conspiracy and Property Protection Act, 1875, sec. 7—Exception of "seamen" from Act—"Seaman," who is.

A seafaring man, when not actually engaged or employed as such, is not a seaman within the section which excludes "seamen" from the operation of the Conspiracy and Property Protection Act, 1875.

The Lord Chief Justice read the written judgment of the Court. The question raised in the case was whether a seafaring man who was not actually engaged or employed at the time was a "seaman" within the 16th section of the Conspiracy and Property Protection Act, 1875, that section being one which excluded "seamen" from the operation of the Act.

Mr. J. D. Crawford appeared for the prisoners; Mr. B. F. Williams and Mr. Arthur Lewis for the Crown.

The case was stated by Mr. Justice Ridley as a Judge of Assize. The prisoners were indicted at the Glamorgan July Assizes under section 7 of the Conspiracy and Property Protection Act, 1875 (38 and 39 Vic., c. 86), for having, with a view to compel one William Eten to abstain from doing that which he had a legal right to do—that is to say, from performing a contract which he had entered into with the owners of the steamship *Lesraux* to serve as a seaman on board the said ship—intimidated the said William Eten, and watched and beset the place where he then was, and followed

him with others in a disorderly manner. The facts were as follows:—William Eten and two others signed articles on board the *Lesraux*, then lying under a coaling tip in Penarth Dock. The articles were signed on board the vessel instead of at the shipping office as usual because the owners of the *Lesraux* were paying a lower rate of wages than that allowed by the Seamen and Firemen's Union, and in consequence of apprehended violence from the members of the union. On coming ashore the prisoners, together with a number of persons, surrounded Eten and the others, intimidated and assaulted them, following them for about 300 yards. The prisoners followed the sea as a calling, each of them having been engaged as a fireman on board steamships, but on the day in question they were not engaged or employed as firemen or seamen on board ship. It was not shown where either of them had been last so employed, but they followed the sea as an occupation. It was contended for the prisoners that there was no evidence to go before the jury in support of the indictment, on the ground that by section 16 of the Conspiracy and Property Protection Act it was provided that "This Act shall not apply to seamen or apprentices to the sea service," and that therefore the prisoners could not be convicted. For the prosecution it was contended that the term "seamen" in the Act applied only to seamen actually engaged or employed on board ship within the definition in the Merchant Shipping Acts, 1854 and 1894—namely 17 and 18 Vic., c. 104, s. 2, and 57 and 58 Vic., c. 69, s. 742. The Judge directed the jury that the prisoners were not within the exception, and they were accordingly convicted and sentenced.

The LORD CHIEF JUSTICE, after stating the facts, said the question for the Court was what was the proper construction to be put upon the word "seaman" in section 16 of the Act of 1875. If there were no reason to the contrary "seaman" might well be construed in its largest sense as meaning a seafaring man or person whose ordinary occupation was that of a seaman. In construing an Act of Parliament, however, it was necessary to inquire into the intention of the Legislature, giving due effect to the language employed, and take into account other legislation bearing on the question. The question then arose, Why should seamen be exempted from the provisions of the Act and not carpenters or other workmen? If "seamen" meant seafaring men it would be difficult to suggest any reason for so large an exception, whereas if it was taken in the limited sense of the definition in the Merchant Shipping Acts a reason might be found in the special legislation of those Acts applicable to "seamen" as therein defined. If, for instance, there were a series of clauses similar in principle to those in the Act of 1875 by their language specially adapted to the case of sailors in actual employment, the distinction would be obvious and the argument in favour of the prosecution would be irresistible. But although the provisions of the Merchant Shipping Act, 1854, as to sailors in actual employment were not similar to those in the Act of 1875, the Act of 1854 had provisions which had an important bearing on the present case. By the interpretation clause (section 2) it was enacted that "seaman shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." By section 243 it was provided that for wilful disobedience to lawful command a seaman should be liable to imprisonment. By section 257 every person who persuaded or attempted to persuade any seaman to refuse to join his ship, or to desert, or to absent himself from duty should in respect of each such seaman incur a penalty not exceeding £10. These provisions created a wide distinction between a seaman

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

actually employed or engaged under the Merchant Shipping Act and a mere seafaring man not so actually employed or engaged. With reference to the offence dealt with by the Conspiracy Act, 1875, the captain of a vessel had ample power to deal with a seaman under his command. He might require him as a lawful command under section 243 (4) to abstain from intimidating, or if the seaman attempted to persuade another to refuse to join or to desert the captain might summon him for the penalty. Under these circumstances the Legislature may well have considered the mischief dealt with by the Conspiracy Act of 1875 already sufficiently provided against, and have declined to add a cumulative remedy. It was suggested in argument that a difficulty might arise as to whether a seaman was "employed or engaged"; and also whether, as the Act adds the words "on board any ship," a seaman would be liable if he committed the alleged illegal act ashore. These objections had no real foundation, as the employment or engagement must be decided as a fact in each case, and a seaman may well be held to be employed or engaged on board a ship, although at the particular point of time he may have been sent on shore on duties connected with the ship. The prisoners here followed the sea "as a calling"; it was not shown when they were last employed on board. It was consistent with this that they had been out of employment for months, and they appear to have had no immediate prospect of a future engagement. It would be strange if such persons were excluded from the legislation of 1875 as well as the Merchant Shipping Acts. On the whole, therefore, it appears that at the date of the passing of the Act of 1875 the Legislature had already in an earlier statute defined what it meant by seamen—that the explanation of their exclusion from the later Act must be sought in the fact that they were already the subject of special enactments giving another remedy for some of the matters included in the later statute; and that no ground of reason or common sense can be found for excluding from the operation of the Act in question the whole class of seafaring men not actually engaged in sea service. Under the circumstances, the Court was of opinion that the view taken by the learned Judge at the trial was correct, and the conviction must be affirmed.

[Solicitors—David and Evans, for the Crown; Pattinson and Brewer, for the prisoner.]

Q.B. Div. (Crown Cases Reserved)
 Lord Russell of Killowen, C.J., 1897.
 Wright, Kennedy, Darling, and Nov. 27.
 Channell, J.J.)

REG. V. WILLIAM JONES.*

Criminal Law—False pretences—Obtaining credit by fraud.

A person went into a restaurant and, knowing he had no means to pay for it, ordered a meal, which he consumed.

Held, that he could not, on the facts, be convicted of false pretences, but that he might properly be convicted of obtaining credit by fraud.

This was a case argued before the Court for Crown Cases Reserved, on November 13. A report of the argument appeared in *The Times* of November 15. Mr. R. Harington represented the prisoner, and Mr. J. B. Matthews appeared for the Crown in support of the conviction of William Jones for obtaining a lunch by false pretences from a

restaurant-keeper, Jones having eaten the lunch, but having no money to pay for it. The facts were these. The prisoner was tried before the Recorder of Worcester at the quarter sessions held on October 21, 1897. The indictment charged William Jones that he did falsely pretend to one Julia Crump that he was then able to pay her for a plate of cold meat and a pint of sherry, which he then ordered, and that he then had and possessed sufficient money to pay for them, by means of which false pretence he did then unlawfully obtain from Julia Crump 6oz. of mutton, 3oz. of bread, and one pint measure of wine, whereas in truth and in fact he did not then have or possess sufficient money to pay. There was also a count for obtaining credit by fraud. The evidence was that Julia Crump's husband kept a restaurant in Worcester, and that on June 30 prisoner came to the restaurant. He asked for some soup, and witness replied they had not got any ready. Prisoner then said, "What have you got?" and witness replied, "Some cold lamb." Prisoner said he would have the cold lamb and half a pint of sherry, and then went upstairs to the dining-room, where the lamb and sherry were supplied to him. There were some salad and bread on the table. Ten minutes later the bell rang, and the witness, going upstairs, found the lamb eaten and the sherry drunk. The prisoner then asked for and was supplied with another half-pint of sherry. A quarter of an hour later the bell rang again, and prisoner asked for his bill, which amounted to 4s., and which was handed to him. He said nothing. Presently the bell rang again, and witness went up, and prisoner then said he had not got any money except one halfpenny, and would like to see Mr. Crump, who was then sent up. Witness further stated that generally customers paid immediately after they had finished their meal, and that she would not have supplied the prisoner with the wine and food if she had known he was not able to pay for it, though customers who were known were sometimes allowed to pay afterwards. In cross-examination, Mrs. Crump stated that the prisoner was shabbily dressed and that she served him the same as any other customer, and made no inquiries about him, as she sometimes did. She also stated that if an intending customer looked as if he were unable to pay she would make some inquiries about him before supplying food. William Crump stated that when he was called upstairs by his wife the prisoner said he had no money beyond a halfpenny and could not pay, but was expecting goods soon. Jones was then arrested by a police-constable. When prisoner was asked to account for having the food and wine and no money to pay for it he replied, "It's all right." He was searched at the police-station, and one halfpenny was found on him. The Recorder directed the jury that before they could convict the prisoner they must be satisfied (1) that he intended to represent that he was of present ability to pay; (2) that he was aware of his want of ability to pay; (3) that the food was supplied in consequence of the false pretence; (4) and that there was an intention to defraud. The jury found the prisoner guilty, on both counts, and he was sentenced to three months' imprisonment with hard labour.

The LORD CHIEF JUSTICE orally delivered the decision of the Court. He said the question was whether the conviction could be supported in respect of one or both counts, the jury having convicted the prisoner on both, and a concurrent sentence having been inflicted. The question, in other words, amounted to this—Was there any evidence on which the jury ought to have been asked to convict? His Lordship referred to the facts, and said it would be observed that all that the prisoner did was to go into the restaurant and order food, and eat it and not pay. No question was asked

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

him as to his ability to pay. No statement was made by him as to whether he had means or not. Could that be regarded as justifying the jury in finding that he had obtained these goods by false pretences? The Court thought not. At the same time, they did not mean to cast the least doubt on the cases deciding that conduct without words could amount to a false pretence, as in the case when a man at Oxford put on a cap and gown in order to make a pretence that he was a member of the University. In this case, however, the prisoner had only ordered and consumed this lunch, and had done nothing else. It was not proper to leave such a case as that to the jury, a charge of false pretences, as there was no evidence on which they could convict the prisoner in such circumstances of false pretences. By section 88 of 24 and 25 Vic., c. 96, it was provided that on a charge of obtaining goods by false pretences, if it were proved that the goods were obtained in such a manner as to amount at law to larceny, the person charged could still be found guilty of the misdemeanour. In this case, however, the prisoner could not be convicted under that section, as he had not committed larceny. For it was perfectly clear that the prosecutor had voluntarily parted with the property in and possession of the food, a fact which prevented the offence from being larceny, as larceny consisted in the taking away goods against the will of the owner. The Court were, therefore, of opinion that the verdict of the jury on the first count could not be supported. The second count was framed under a different statute—namely, section 13 of the Debtors Act, 1869 (32 and 33 Vic., c. 62), which provided that a person was guilty of a misdemeanour and liable to imprisonment for one year “if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud.” There were, therefore, three elements in this offence—first, the incurring a debt or liability; second, obtaining credit; and, third, fraud. The conjunction of these three was essential to the offence. The prisoner in this case had obviously incurred a debt or liability. Had he obtained credit? In the opinion of the Court he had. The prosecutor might have said that he would not furnish the goods unless the money was first paid over, but he did not say so. He relied on the ability of the prisoner to pay, and gave credit. In the opinion of the Court it did not matter the length of the period of credit; at any rate, the prosecutor parted absolutely with the goods without prepayment. Was there, then, fraud? The jury had found that there was, and there was ample evidence to justify them in so finding. The man went into the eating-house, in which the ordinary custom was that people should pay immediately on the consumption of the food. He must be taken to have known this custom, and that it would be observed with regard to him. The jury found that he had no intention of paying. Their verdict, therefore, on the second count and the sentence following thereon must be affirmed.

[Solicitors—Arrowsmith, Maund, and Coombs, for the Crown; John Stallard, Worcester, for the defendant.]

Q.B. Div. }
(Bigham, J.) }

1897.
Nov. 27.

WEIR AND CO. V. E. AND R. ROBINSON.*

Ship—Charterparty—Demurrage—Delay in Discharging.

At Sunderland, where the discharge is carried out on behalf of both shipowner and consignee by the River Wear Commissioners, *semble*, the consignee would not be liable to the shipowner

for delay and negligence on the part of the Commissioners.

This action was brought to recover demurrage of the plaintiffs' sailing ship *Falklandbank*. The defendants were the endorsees of the bills of lading, and the receivers of a cargo of wheat shipped on board the *Falklandbank*, which was to be delivered at Sunderland. By a clause in the charterparty for the voyage in question, which was incorporated in the bills of lading, the vessel was “to discharge afloat with despatch according to the customs at the port of discharge.” The plaintiffs claimed five days' demurrage. They alleged (1) that the defendants failed to take delivery in accordance with the facilities at the port; (2) that they failed to supply bags for removing the cargo. The *Falklandbank* arrived at Sunderland on February 1, 1897, and finished her discharge on February 24. She was discharged partly in the Hudson and partly in the Hendon Dock. The whole work of discharge was, in accordance with the custom of the port, placed in the hands of the River Wear Commissioners, who were paid a certain rate by the shipowners for discharging the cargo and putting it on to quay, and a further rate by the receivers for taking it across the quay to warehouse or rail. The work of discharge was done by stevedores employed and paid by the commissioners. The plaintiffs alleged that, after making due allowance for accidental interference with the work of discharge by bad weather, short days, and such matters, the cargo could have been discharged at the rate of 180 tons per day. If the cargo had been discharged at that rate five days would have been saved.

Mr. Joseph Walton, Q.C., and Mr. D. C. Leck appeared for the plaintiffs; Mr. H. F. Boyd, Q.C., Mr. T. G. Carver, and Mr. R. I. Simey for the defendants. Evidence having been called on both sides,

Mr. BOYD, Q.C., argued that the plaintiffs must fail in this action unless they could establish (1) that the defendants were responsible for delay, if any, on the part of the commissioners; and (2) that, under the circumstances actually existing, there was a failure to give despatch. He contended that under neither head had the plaintiffs made out any case. It was the duty of the shipowner to deliver at the rail, and of the defendants to receive and put the goods on quay. The commissioners were employed to do the work of both parties. If there was delay on the part of the commissioners the plaintiffs were no more ready and willing to deliver than the defendants were to receive the cargo. He cited the following cases:—“*The Jaederen*” ([1892] P. 351), “*Castlegate S. S. Co. v. Dempsey*” ([1892] 1 Q.B., 854).

Mr. JOSEPH WALTON, Q.C., contended for the plaintiffs that, under the contract, it was the duty of the defendants to receive the cargo with reasonable despatch; they must first come to the ship to receive the cargo before they could ask the shipowner to be ready with men to deliver it. The case of “*Castlegate S. S. Co. v. Dempsey*” was not in point and “*The Jaederen*” was distinguishable. In the latter case the ship could not have discharged faster than she did, having regard to the state of things existing at the time.

MR. JUSTICE BIGHAM said that the action was brought by the owners of a steamer called the *Falklandbank* against the charterers to receive five days' demurrage of the ship. The action was based upon an alleged breach of a term in the charterparty, which provided that the vessel should discharge afloat with despatch according to the custom at the port of discharge. The plaintiff alleged that the vessel was not discharged with despatch. No difficulty arose as to the construction of the words of the charterparty. They did not fix any particular time within which the cargo was to be

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law

taken away by the consignees; they simply meant that there must be despatch, having regard to the facilities and circumstances existing at the time. An important question of law had been raised in the course of the case, and although, in the view which his Lordship took of the facts, it was not necessary to decide the question, he thought it better to say a word or two upon it. It was the practice at the port of Sunderland for the work of discharging vessels to be done by the River Wear Commissioners, and when a cargo arrived at the port it was the practice for the shipowner to sign a request to the commissioners requiring them to find the necessary cranes and labour with which to land the cargo; and it was the practice for the consignee to lodge a similar request requiring the commissioners to receive the cargo on the consignee's behalf, and to dispose of it either by depositing it in a warehouse, or by placing it upon the rail. That ordinary course of practice had been followed in the present case. On January 4, a month before the ship arrived, the defendants made their arrangements with the commissioners, and his Lordship was satisfied that the defendants had not in any way interfered with the work of the commissioners. The ship arrived on February 1, and the master then signed a request to the commissioners to provide the labour necessary to take the cargo out of the ship and to put it over the side. The commissioners having had the two requests, one from each party, practically made one operation of the two matters. The important question of law which had arisen in the case was this—supposing that the commissioners were negligent in carrying out the discharge of the cargo, would the shipowner have any right of action against the consignees on a charter-party worded as this one was? His Lordship said, although it was merely an *obiter dictum*, that he did not think the shipowner in such a case would have a right of action against the consignees. As soon as the consignees had, with ordinary diligence, employed the only means at their service—viz., the commissioners, they had done all that they were bound to do under the charterparty. They had used the means of discharge customary at the port, and if they did that, with ordinary diligence, they had fulfilled their obligations. But his Lordship would not have it supposed that the shipowner would have no remedy if the commissioners were negligent and caused delay. In such a case the shipowner would have a remedy against the commissioners. Although his Lordship was, he said, going to decide the facts against the plaintiffs in this case, he did not think any blame attached to them for bringing this action, for they honestly thought that there had been unreasonable delay. Moreover, it behoved the River Wear Commissioners to remember that not only were the interests of the port confided to them, but also the interests of the numerous shipowners who intrusted their valuable property to the commissioners. His Lordship then proceeded to make a detailed examination of the evidence in the case. In the result he came to the conclusion, and found as a fact, that the complaints of delay were ill-founded. He therefore gave judgment for the defendants with costs.

[Solicitors—Lowless and Co., for the plaintiff; Coote and Ball, for Simsey, Son, and Iliff, Sunderland, for the defendants.]

Court of Appeal (Lindley, M.R., } 1897.
Chitty and Vaughan Williams, L.JJ.) } Nov. 29.

LADY BATEMAN V. FAHER AND OTHERS.*

Married Woman—Separate estate—Restraint on anticipation—Mistake.

Decision of Kekewich, J. (13 *The Times* L.R., 470), affirmed.

The fact that a married woman, restrained from anticipating her income, has made an untruthful admission on which another person has acted, does not get rid of the restraint.

This was an appeal against a decision of Mr. Justice Kekewich's, reported in *The Times* of June 25 last and in *The Times* Law Reports, vol. 13, p. 470. By an indenture dated June 26, 1867, Lord Bateman—who was married in 1854, the late Lord Beaconsfield, then Mr. Benjamin Disraeli, being one of the trustees of his settlement—mortgaged his life interest in the Kelmars and Shobdon Court estates to the executors of the will of the late Lady Kerrison to secure a sum of £11,430, representing trust funds under the will advanced to Lord Bateman; and, subject to trusts for repaying the loan, the executors were to pay the surplus rents and profits of the estates to Lady Bateman (the wife of Lord Bateman) during her life for her separate use without power of anticipation, "Provided, nevertheless, that if at any time the said Lady Bateman shall succeed to an income in her own right of £8,000 or more per annum for her separate use, then and in such case the trusts in and by this indenture lastly hereinbefore declared shall absolutely cease and determine, and after the determination of the trust lastly hereinbefore declared (but subject and without prejudice to the trusts hereinbefore declared) upon trust for the said Lord Bateman." In July, 1886, upon the death of her brother, Sir Edward Clarence Kerrison, Lady Bateman became entitled to a life interest in the Kerrison estates in Norfolk, Suffolk, and Middlesex, and a question was soon afterwards raised by Mr. Andrew Montagu (to whom Lord Bateman had subsequently to the above indenture mortgaged such interest as then remained to him as a collateral security for £110,000) whether or not the plaintiff had "succeeded to an income in her own right of £8,000 or more per annum for her separate use," so as to bring into operation the above-mentioned proviso; and Lady Bateman was ultimately advised by her then solicitor (who had since died) that now she was tenant for life of the Kerrison estates she must be considered as having succeeded to an income of £8,000 within the meaning of the proviso. Thereupon, on March 4, 1890, she executed a deed poll by which she expressly admitted that her life interest in the Kelmars and Shobdon Court estates had determined under the proviso, and released that life interest in favour of Lord Bateman. Subsequently, however, Lady Bateman discovered, as she alleged, that her income from the Kerrison estates did not amount to £8,000 a year, inasmuch as she took subject to numerous prior encumbrances, so that the deed of 1890 was executed under a wrong state of facts, and was therefore inoperative to affect the interest secured to her by the deed of 1867. Accordingly she brought this action against the executor of the mortgagee, Mr. Montagu, who had died, the persons to whom Lord Bateman had conveyed his life estate in the Kelmars and Shobdon estates subject to the mortgage, and Lord Bateman himself, claiming a declaration that she, the plaintiff, had not at any time since the execution of the deed of 1867 succeeded to an income in her own right of £8,000 or more per annum for her separate use within the meaning of the proviso; and also a declaration that the admission by the plaintiff in the deed poll of 1890 was not binding upon her in respect of the income to which, under the deed of 1867, she became entitled for her separate use without power of anticipation, and that, notwithstanding the deed poll,

she had always been and still was entitled to that income. Mr. Justice Kekewich held that, by reason of the restraint on anticipation, Lady Bateman could not bind her interest by the admission, and that her right to receive the income continued notwithstanding the deed poll. The defendant Faber appealed.

Sir E. Clarke, Q.C., Mr. Renshaw, Q.C., and Mr. Brabant were for the appellant; Mr. Warrington, Q.C., and Mr. Beaumont, for the plaintiff, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the case was somewhat new. It was of great importance to lawyers, as well as socially. But it was impossible to reverse the decision of Mr. Justice Kekewich, unless the Court were to lay down as a proposition of law that which his Lordship did not believe to be law. The Court would have to lay down that it was possible for a married woman, who was restrained from anticipating her income, to get rid of the restraint by telling an untruth, upon which another person had acted. His Lordship agreed that the question was one of fact. The evidence before the Court was a deed executed by the plaintiff, in which she said that she had succeeded to an income in her own right of £8,000 a year for her separate use. That deed was, no doubt, evidence against her, and it was an admission that she had so succeeded. She said that the admission was a mistake. The answer was, "You are not entitled to say that, because Mr. Montagu has acted on your admission, and you are estopped from denying the truth of your statement." No doubt this would be an answer to any one but a married woman restrained from anticipation. But, if it were held to be a good answer to her, the Court would be enabling her, by telling an untruth, to get rid of the restraint. In his Lordship's opinion that could not be done. The authorities showed that a married woman could not by hook or by crook—even by her own fraud—deprive herself of this protection. His Lordship would say nothing as to the policy of the law, but it had been affirmed by the Married Women's Property Act. The result was that a married woman could play fast and loose to an extent to which no other person could.

LORD JUSTICE CHITTY and LORD JUSTICE VAUGHAN WILLIAMS gave judgment to the same effect.

[Solicitors—Greenfield and Cracknell; Hudson, Matthews, and Co.]

House of Lords (Lord Halsbury, L.C., } 1897.
Lords Herschell, Macnaghten, Morris, } Nov. 30.
Shand, and Davey)

BADISCHE ANILIN UND SODA FABRIK V. BASLE
CHEMICAL WORKS BINDSCHEDLER.*

Patent—Infringement—Posting from abroad.

The respondents abroad posted to a trader in London an article patented in this country by the appellants; held, that the respondents had done nothing which gave the English Courts jurisdiction over them.

Decision of the Court of Appeal (13 *The Times* L.R., 344) affirmed.

This was an appeal against a judgment of the Court of Appeal (13 *The Times* L.R., 344) in an action which the appellants brought to restrain the respondents from importing or bringing into England and from manufacturing or selling in England certain dyes or colouring matters made according to an invention which had been patented by the

appellants in this country. The appellants also sought the usual ancillary relief of damages and an account of profits. The appellants are large manufacturers of dyes and colouring matters, and are the owners of various patents, among them one for an invention of "Improvements in the manufacture of yellow and orange colouring matters suitable for dyeing and printing from dioxy tartaric (carboxy tatrionic) acid." The dye is sold in the market under the name of "Tartrazine." The respondents are chemical manufacturers in Basle, and they sent goods which infringed the appellants' patent to Messrs. Henry Johnson and Co., drysalers in London, through a firm of forwarding agents at Basle, who posted the goods to Messrs. Johnson. The appellants claimed an injunction against both the respondents and Messrs. Johnson, having obtained leave of the Court to issue a concurrent writ in the action, and to serve notice of it on the respondents. The latter appeared, and defended the action, Messrs. Johnson having given an undertaking not to sell the dye in future, or to infringe the appellants' patent, and having submitted to an order for an account of profits or damages and to pay costs. Mr. Justice North, in January last, granted the injunction prayed for, but his decision was reversed last April by a majority of the Court of Appeal, consisting of the present Master of the Rolls, then Lord Justice Lindley, and Lord Justice A. L. Smith; Lord Justice Rigby dissented.

Mr. MOULTON, Q.C., and Mr. CRIPPS, Q.C., with whom was Mr. W. N. Lawson, argued the case for the appellants; Mr. Asquith, Q.C., Mr. Upjohn, Q.C., and Mr. Roskill for the respondents were not heard.

The LORD CHANCELLOR said that it had been ingeniously argued for the appellants that part of what had been done by the appellants had been done in this country so that our Courts acquired jurisdiction over the foreigner who had sent these goods to England. The goods were actually forwarded from Basle, but it was said that the delivery of them for posting at Basle and the handing of them over to the recipient in England was one continuous act part of which was consummated within the jurisdiction. But it was well settled law that when goods were consigned to a named agent for delivery to a purchaser, the agent became the agent of the purchaser and not of the vendor. The fact that the agent in this case was the Post Office made no difference in the principle. The English Courts had no jurisdiction over the respondents, and he agreed with Lord Justice Lindley that if, instead of appearing to the writ, the respondents had applied to the Court to discharge the order which gave leave to serve out of the jurisdiction, the Court would have been bound to discharge such orders. The appeal must be dismissed with costs.

The other noble and learned LORDS concurred.

[Solicitors—J. H. and J. Y. Johnson, for the appellant; Ward, Perks, and McKay, for the respondent.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Nov. 30.

FOURNET V. PEARSON (LIMITED).*

Defamation—Libel—Innuendo—Proof.

This was an application for a new trial of an action tried before Mr. Justice Hawkins and a special jury. The plaintiff was an optician, and the defendants were the proprietors and publishers of *Pearson's Magazine*. The statement of claim alleged that on September 16, 1892, the plaintiff wrote and published for scientific purposes a lithographed facsimile holograph

* Reported by J. ERNE THOMPSON, Esq., Barrister-at-Law.

* Reported by F. G. RUCKER, Esq., Barrister-at-Law.

and transcript thereto, entitled "Un Cliché Ivrogne, by not *Æsop*," and shortly after entered the same as copyright at Stationers'-hall. The plaintiff had been well-known as the author of the said publication, which had been advertised in medical journals, and had been circulated among professional persons and others likely to come into contact with the plaintiff professionally. The defendants had infringed the plaintiff's said copyright by publishing in the September issue of the year 1896 of *Pearson's Magazine*, a reduced copy of the said facsimile holograph, and had entitled the same "No. 3—An extraordinary specimen produced in a condition of alcoholic insanity (reduced size)." The statement of claim further alleged that with the said reproduction of plaintiff's copyright the defendants falsely and maliciously libelled the plaintiff by printing and publishing on or about September 1, 1896, in their said magazine an article entitled "The Hand-writing of Mad People," in which the following sentence appeared in reference to the plaintiff and his said publication:—"I added this No. 3 to my collection some few years ago, and when lately I went to ask some questions about the writer, I found that he and his were all dead. 'Tis a grim specimen, this No. 3, but not without a wholesome meaning, left behind him by the victim of alcohol who wrote it" (meaning thereby that the plaintiff was a drunkard, and had died as a drunkard and that his business was broken up). The plaintiff claimed £50 for infringement of copyright and £500 for libel. The jury at the trial, in answer to questions put to them by the learned Judge, found that the plaintiff's document was not a literary composition, and that the article complained of was not a libel. Mr. Justice Hawkins entered judgment for the defendants. The plaintiff now applied for a new trial on the ground of misdirection.

Mr. SCHULTESS YOUNG, in support of the application, said that the plaintiff, finding himself one evening under the influence of alcohol, took a piece of paper and wrote down the ideas which occurred to him while in that state, and finding next morning that his handwriting and his character, when drunk, appeared to be similar to his ordinary handwriting and his general character, he determined to publish for scientific purposes a facsimile of what he had so written, and he did publish it under the title of "Un Cliché Ivrogne (a drunken negative)." This publication was the subject matter of copyright within the meaning of the Copyright Act, 1842, which granted protection in respect of literary compositions. The learned Judge had misdirected the jury by telling them that a document was not a literary composition within the meaning of the Act unless it was something of enduring benefit to mankind. The true test was whether the publication was original, and the cases "*Maple and Co. v. Junior Army and Navy Stores*" (21 Ch. D., 369); "*Leslie v. Young*" ([1894], A.C., 385) showed that very little originality was sufficient. With regard to the libel, the defendants had paid £5 into Court. They had thereby, under the rules, admitted liability, and the only question on that part of the case was whether the innuendo went beyond the natural defamatory meaning of the words.

Mr. Blake Odgers, Q.C., and Mr. Temple Franks for the defendants were not called upon to argue.

The Court dismissed the application.

LORD JUSTICE A. L. SMITH said this was a remarkable case. The plaintiff, while he was in a state of intoxication, wrote down a drunken scrawl, which was absolutely unintelligible. This drunken scrawl, together with some other printed matter, he afterwards registered for copyright. He did not propose to investigate the direction of Mr. Justice Hawkins on the ques-

tion of copyright; neither would he consider whether this publication could properly be called a book or could be the subject-matter of copyright. He was satisfied that if the case on the question of copyright had been left to the jury, with a direction that the publication was the subject-matter of copyright, they would not have given the plaintiff more than a farthing damages. In those circumstances he thought it would be shameful for the Court of Appeal to send the case down to be tried again. With regard to the question of libel, it was clear that the learned Judge had not misdirected the jury, and had not summed up in a way hostile to the plaintiff. In his opinion, the learned Judge would have been acting well within his province if he had nonsuited the plaintiff. The libel, on the face of it, did not expressly refer to the plaintiff. It referred to a dead man, whereas the plaintiff was alive. It therefore required some outside evidence in order to connect it with the plaintiff. No such evidence was given, and it followed that the plaintiff had failed to prove the innuendo. The application for a new trial therefore failed with regard to both parts of the case.

LORDS JUSTICES RIGBY and COLLINS concurred.

Chan. Div. } 1897,
(Byrne, J.) } Nov. 30.

THE MANCHESTER BREWERY COMPANY (LIMITED) v.
THE NORTH CHESHIRE AND MANCHESTER BREWERY
COMPANY (LIMITED).*

Trade Name—Imitation—Name of company—
Action for an injunction dismissed.

This was an action for an injunction to restrain the defendant company, its agents, and servants, from using or carrying on business under its present name, style, or title, or any other style or name which included the plaintiff company's name, or so nearly resembled the same as to be calculated to deceive the public, or induce the belief that the business carried on by the defendant company was the same as the business carried on by the plaintiff company, or in any way connected therewith.

Mr. Moulton, Q.C., Mr. Astbury, Q.C., and Mr. O. Leigh-Clare were for the plaintiff company; and Mr. Cozens-Hardy, Q.C., and Mr. Stewart Smith for the defendant company.

Mr. JUSTICE BYRNE, in delivering judgment, said the plaintiff company was incorporated early in 1888, and had a large business, principally in and about Manchester, its brewery being in that city. There was in existence in 1888 a company called the North Cheshire Brewery Company (Limited), which carried on business in and about the town of Macclesfield, where its brewery was. It had also some business in Manchester, at one time a good one, but this subsequently declined. This North Cheshire Company sold its business to one, Mr. Rhodes, who got up a new company (the defendant company) to carry on the old business and add to it, and this company was registered in October, 1897. Mr. Rhodes suggested the name complained of, but, in doing so, he had no intention to interfere with the plaintiff company—in fact, he was not aware of that company's existence. Amongst his motives for suggesting it were the belief that there could not be on the register two companies bearing the same name, the intention to purchase houses in Manchester, and the fact that he and another person connected with the new company had already some houses there. He had no intention

*Reported by F. EVANS, Esq., Barrister-at-Law.

to deceive the public, but the plaintiff company said that the inclusion of the words "Manchester Brewery" was intended to induce the public to believe that the defendant company had some connexion with the Manchester district, and possessed a brewery there. It was also said that the assumption of the defendant company's title was calculated to induce the public to believe that the plaintiff company had been amalgamated with the old North Cheshire Company. But his Lordship did not think the name was used with any such intention. It was adopted to show that there was a connexion with Manchester, but if it was legitimately intended to commence business operations in a particular place, it was not unreasonable to use the name of that place, so long as nothing was done to deceive people by inducing them to think the new business was connected with some other establishment. After referring to the case of "Hendricks v. Montagu" (Law Rep., 17 Ch. D., 638), and stating the effect of that decision, his Lordship said the Judge in these cases was not to be guided only by a comparison of the two names, although similarity in the two was a strong ingredient. In the absence of other evidence, he did not think the introduction of the word "Manchester" was at all likely to deceive or to make people think there had been an amalgamation. The catch-word was generally the first word, and if the title had been "Manchester and North Cheshire Brewery Company" different considerations would apply. His Lordship then referred to the other evidence in the case, and concluded by dismissing the action, with costs.

[Solicitors—Chester and Co., for Farrar and Co., Manchester; Frith and Co., for Godfrey, Rhodes, and Evans, Halifax.]

Q.B. Div. }
(Bigham, J.) }

1897.
Nov. 30.

GORMULLY AND JEFFERY MANUFACTURING COMPANY
V. THE MIDLAND RAILWAY COMPANY.*

Railways—Goods—Charges—Commercial travellers' luggage—Bicycles.

A commercial traveller in bicycles who travels with the component parts and with incomplete machines is entitled to the special terms given by railway companies in respect of commercial travellers' luggage, and should not be charged the higher rates for bicycles.

This action was brought to determine questions which had arisen between the parties as to the scale of charges applicable to certain cases belonging to the plaintiffs and containing portions of bicycles which a commercial traveller in the employment of the plaintiffs was taking with him, or intended to take with him, on the defendants' line. The charges of the defendants which were called in question were (a) cloak-room charge (b) charge for conveyance. The facts were shortly as follows:—The plaintiffs were manufacturers of bicycles; Mr. Darke was a commercial traveller in their employment. Mr. Darke was in the habit of taking about with him on his journeys one or more large cases containing portions of bicycles. Each case was large enough to contain two complete bicycles with the seats, pedals, and handle-bars taken off the bicycle and stowed separately. The cases were completely closed, but their shape would indicate that they were meant to contain bicycles. Mr. Darke never took with him in these cases bicycles

intended for sale, but only samples to show to customers. He did not take seats or handle-bars, or more than one pedal. By the regulations of the defendant company, which are to be found on pages 192 and 193 of the company's time-table, bicycles (except bicycles with two large wheels abreast), when conveyed as passenger's luggage at owner's risk, are charged at the rate of 1s. for a distance above 25 miles and not exceeding 50 miles. Ordinary bicycles when left in the care of the company are charged at the rate of 4d. for two days. Commercial travellers when travelling third class are allowed to take with them free of charge 1½wt. of luggage. The cloak-room charge for luggage deposited by commercial travellers is one-half the ordinary charge. During last year a question arose between the plaintiffs and the defendants as to whether the cases taken about by their travellers, and containing samples, should be charged for conveyance and cloak-room accommodation as bicycles or as commercial travellers' luggage. The defendants, having put the matter before the representatives of other railway companies in the usual way, informed the plaintiffs that charges must be paid as for bicycles. On February 27, 1897, Mr. Darke tendered a case such as has been described at the cloak-room at St. Pancras. The defendants demanded the payment of 4d., the proper charge for a bicycle. Mr. Darke refused to pay more than 1d., the proper charge for a commercial traveller's luggage. The stationmaster was sent for, and at his request the case was found to contain a bicycle without a seat, handle-bars, or pedals. The stationmaster insisted on a charge of 4d., whereupon Mr. Darke took the case away. On March 2 Mr. Darke was starting from St. Pancras for Scotland. He brought back the same case, which he intended to take as far as Bedford. If the case was a commercial traveller's luggage he was entitled to have it carried free of charge. The company demanded 1s., the proper charge for a bicycle, which he paid under protest. On the same day he brought a second case, similar in shape to the first, and tendered it at the cloak-room. This case, in fact, contained only tires and rims. A similar discussion arose. Mr. Darke stated that it only contained portions of bicycles. The defendants' servants alleged that Mr. Darke refused to open the case. This he denied. The case was ultimately put in the cloak-room and remained there up to the trial of the action, the defendants refusing to give it up unless the proper charge for a bicycle were paid.

Mr. CRIPPS, Q.C. (Mr. F. Stroud with him), for the plaintiffs, contended—(1) that even if the cases had contained complete bicycles they were not subject to the rates for bicycles. It was the package, not the contents, that was of importance to the carriers. The regulations above referred to bore out this contention, bicycles of shapes occupying more room being charged at higher rates. The regulations were framed with regard to unpacked bicycles. (2) Even if that were not so, these cases did not, in fact, contain bicycles, but only portions of bicycles.

Mr. A. T. LAWRENCE, Q.C., and Mr. LOEHNIS, for the defendants, contended, as to the first case, that it contained a bicycle; a bicycle did not cease to be a bicycle because the pedals and handle-bars had been removed and it had no seat. As to the case containing tires and rims, where a carrier had reasonable grounds for supposing that a package contained goods of a description which would subject it to a higher rate or other special provisions he was entitled to ask that it should be opened. The shape of the case and the circumstances of February 27 gave the defendants such reasonable grounds.

The learned JUDGE, in giving judgment, said that he

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

must give judgment against the defendants. He had no doubt that when a railway company gave to commercial travellers described by that name the right to carry more than the ordinary amount of luggage they did so in order that they might take their samples with them. In this case he found as a fact that Mr. Darke was known to the defendants as a commercial traveller for the plaintiffs. They knew that the plaintiffs were engaged in selling portions of bicycles, or possibly whole bicycles. They also well knew that when Mr. Darke tendered each of the cases they were cases which he was taking with him not as merchandise or ordinary passenger's luggage, but as a commercial traveller's samples. He did not think that in the circumstances the defendants should have refused to take Mr. Darke's word that the case did not contain bicycles or were justified in asking to have the case opened. There might, however, be circumstances which would justify a railway company in asking to have a package opened. Mr. Darke's description of the contents of the case were, in fact, true. The defendants were not entitled to the extra cloak-room fee or the charge for conveyance. As there was no question of damages raised, judgment would be for the plaintiffs for 40s., with costs on the High Court scale.

The learned Judge did not express an opinion as to what his judgment would have been if either of the cases had contained a complete bicycle.

Consistory Court of London (Dr. Tristram,
Q.C., Chancellor of the Diocese of } 1897.
London) Nov. 30.

ST. PAUL, CAMDEN-SQUARE.*

Ecclesiastical Law—Ritual—Lighted candles on the re-table—Faculty granted.

Judgment was delivered by the Chancellor on an application for a faculty to authorize the placing of two lights on the re-table in the church of St. Paul, Camden-square, at early celebrations in order to meet the wishes of those attending the early celebrations.

THE CHANCELLOR OF LONDON, in delivering judgment, said:—In this case the Rev. George Tiley, vicar of St. Paul's, Camden-square, and the churchwardens of the parish on June 10 last applied to the Court for a faculty authorizing their making certain alterations and extensive decorations in the parish church, including the placing of two lights on the re-table in the church. Mr. Frederick Makin, an architect and surveyor resident in the parish, in person opposed the granting of the faculty in certain particulars, and more especially its sanctioning the placing of the lights on the re-table, on the ground that they were intended to be lighted during the celebration of the Holy Communion when not required to give light, in contravention of the ruling of the Judicial Committee in the case of "*Martin v. Mackonochie*." The vicar in his evidence stated that it was his intention to have them lighted at the early celebrations when they were not required to give light, if it was legal to do so, but not at the midday celebrations. As the details of the application to the Court had not been submitted to a vestry duly summoned, I adjourned the further hearing of the case until this should have been done. On June 17 resolutions in favour of the proposed alterations were submitted to a duly-summoned vestry, at which an amendment was proposed by Mr. Makin and seconded, disapproving of the two lights being placed on the re-table on the ground previously mentioned. The amendment was lost, 40 voting against it and 16 for it.

On July 3 last the case again came before the Court, when the vicar deposed that he only proposed to have the candles lighted at the early celebrations in order to meet the wishes of those who attended these celebrations, and who liked to see them lighted there as symbolical that Christ was the true light of the world. He added that the members of his congregation with old-fashioned notions who would object to their being lighted when not required to give light only attended the midday celebrations, when they would not be lighted. I thereupon granted a faculty to enable the general alterations and decorations proposed to be made, but reserved my judgment on the question of the two lights proposed to be placed on the re-table. On this question the decisions are somewhat conflicting. In the case of "*Martin v. Mackonochie*" (L.R., 2 P.C., 365) the Judicial Committee laid it down in general terms that by law lights on a Holy Table or on a re-table ought not to be lighted during the celebration of the Holy Communion unless required to give light. In "*Read v. The Bishop of Lincoln*" the late Archbishop of Canterbury arrived at the conclusion, upon the consideration of new materials brought to light since the decision in "*Martin v. Mackonochie*," "that there was not sufficient warrant for declaring that the law is broken by the mere fact of two lighted candles, when not wanted for the purpose of giving light, standing continuously on the Holy Table through the service, nothing having been performed or done which comes under the definition of ceremony by the presence of two still lights before it begins and after it ends" ([1891] P., at p. 88). The Judicial Committee, in dealing with this question on appeal, held that, it being admitted that two candles, not required for the purpose of giving light, were alight throughout the celebration on the Holy Table without objection on the part of the Bishop, who was officiating as Bishop, but there being no evidence either of a ceremonial use of the lights or that the Bishop had introduced them as unlawful ornaments, he was not responsible for them, and that his making no objection to them did not constitute an ecclesiastical offence. The Board observed:—"If the proof corresponded with the allegation in all respects, it would be matter for grave consideration how far the Archbishop's elaborate exposition of the history of the question and in particular the decision of two learned Judges in 1628 and 1629 have afforded new materials for consideration since the decision of this Board in '*Martin v. Mackonochie*' on the same subject; but their Lordships are unable to see that the charge against the Bishop raises the same question. The charge against Mr. Mackonochie, who was himself responsible for the arrangement of the service and for the ornaments in his church, was presented under two aspects, and this Board dealt with both—the ceremonial lighting and burning of the candles when light was not required, and the placing and keeping the candles as unlawful ornaments on the Lord's Table. The act of lighting candles or keeping them alight, the placing or maintaining ornaments, are all things for which the incumbent of the church is himself responsible, and their Lordships in the case of '*Martin v. Mackonochie*' felt themselves compelled to deal with the questions whether there had been a ceremonial use of the lights and whether unlawful ornaments had been in use. It was on the latter ground that the judgment against the respondent was rested. No such question arises here. If the Bishop had disapproved of the lights he would have had no power to remove them" ("Read v. Bishop of Lincoln" [1892], P., at p. 662). This the Bishop could only do through the process of his Consistorial Court. Having regard to the above decisions and to the facts of the present case, the Court, in the exercise of the discretion vested in it in relation to allowing or disallowing orna-

*Reported by W. J. BOULSBY, Esq., Barrister-at-Law

ments in a church, will sanction by faculty the placing of the two lights on the re-table or on the Holy Table, subject to a proviso that they shall not be lighted during the ordinary morning or midday or afternoon or evening services in the church, except when required for the purpose of giving light.

Court of Appeal (Lindley, M.R.,) 1897.
Chitty and Vaughan Williams, L.J.J. } Dec. 1.

IN RE THE FEVERIL GOLD MINES (LIMITED).*

Company—Winding up—Petition—Who may
present—Companies Act, 1862, sec. 82.

Decision of Byrne, J. (*ante*, p. 25), affirmed.

This was an appeal against a decision of Mr. Justice Byrne's (reported in *The Times* of November 9 and *ante*, p. 25). The case involved an important and somewhat novel point of company law. A petition had been presented by a shareholder, holding 5,000 fully-paid shares, to wind up the company, and a motion was made on behalf of the company and two shareholders, one holding 20 shares on which 16s. 6d. per share had been paid, and the other holding 13,600 fully-paid shares, to stay proceedings upon the petition. All the shares were of the nominal value of £1 each. It was conceded for the purposes of the motion that the petitioner was a contributory who would be entitled to petition but for clause 164 of the articles of association, which was as follows:—“(a) No petition shall be presented or proceeded with by a member to wind up the company except and unless (a) by consent in writing of not less than two of the then board, or (b) in pursuance or by permission of a resolution passed by a majority at a general meeting of the company, or (c) the petitioner or petitioners shall hold or together hold not less than one-fifth of the then issued capital of the company, upon which all calls shall have been paid.” It was admitted that the petitioner had not complied with any one of the conditions mentioned in this clause of the articles. The Companies Act, 1862, provides by section 79:—“(1) A company under this Act may be wound up by the Court, as hereinafter defined, under the following circumstances (that is to say):—(1) Whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (3) whenever the members are reduced in number to less than seven; (4) whenever the Court is of opinion that it is just and equitable that the company should be wound up”; and by section 82:—“(1) Any application to the Court for the winding up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately.” Mr. Justice Byrne held that such a provision or contract as was contained in clause 164 could not, consistently with the Companies Act, be made by the articles of association, and that the clause was therefore invalid. His Lordship accordingly refused the motion to stay proceedings on the petition. The company and the two shareholders appealed.

Mr. Jenkins, Q.C., and Mr. W. H. Cozens-Hardy were heard for the appellants; Mr. Eve, Q.C., and

Mr. Eustace Smith, for the petitioner, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that a very ingenious argument had been addressed to the Court by Mr. Jenkins, and Mr. Cozens-Hardy had elaborated it, and made it (if possible) plainer than his leader had done. But a fallacy lay at the root of it. His Lordship would begin by reading the following passage from the speech of Lord Macnaghten in “*Welton v. Saffery*” ([1897] A.C., at p. 324):—“These companies are the creature of statute, and by the statute to which they owe their being they must be bound, in regard to shareholders as well as in regard to creditors, in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors—perhaps even more—shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern. Their security, in a great measure, depends on the directors adhering to the requirements of the Act.” Any one who was familiar with the Companies Acts must know perfectly well that these registered limited companies were incorporated on certain conditions; they continued to exist on certain conditions; and they were to be dissolved on certain conditions. The important sections of the Act of 1862, with regard to their dissolution, were sections 79 and 82. Section 79 stated the circumstances under which such a company might be dissolved by the Court, and section 82 stated the persons who might petition for a dissolution. Any article which said that the company was formed on the condition that its life should not be terminated when any of the circumstances mentioned in section 79 existed, or to limit the right of a contributory under section 82 to petition for a winding up, would be an attempt to enforce on all the shareholders that which would be at variance with the statutory conditions. It was no answer to say that the right might be waived by any contributory personally. His Lordship did not mean to say that a valid contract might not be made between the company and a shareholder that he should not petition for the winding up of the company. But to say that the company was formed on the condition that its existence should not be terminated under the circumstances or on the application of the persons mentioned in the Act was contrary to the provisions of the Act and was invalid. The view taken by Mr. Justice Byrne was right, and the appeal must be dismissed.

LORD JUSTICE CHITTY was of the same opinion. The Court had not now to consider whether an individual shareholder could or could not bind himself not to petition for the winding up of the company, nor generally how far the provisions of the Act might be modified by the articles of association. In his Lordship's opinion this condition was annexed to the incorporation of a company with limited liability—that the company might be wound up under the circumstances and at the instance of the persons prescribed by the Act, and that the articles of association could not validly provide that the shareholders who were entitled under section 82 to petition for a winding up should not do so except on certain conditions. It was admitted in argument that a provision that no creditor or contributory should petition, or that the company itself should not petition, would be invalid. In his Lordship's opinion, section 82 laid down an essential condition, and the articles could not provide that it should not be fulfilled. In the present case the clause only imposed a limitation, but if the Court were to hold that this limitation was valid they could not stop short of saying that the condition might be dispensed with altogether.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

LORD JUSTICE VAUGHAN WILLIAMS agreed and had nothing to add.

[Solicitors—White and De Buriatte; Robinson and Stannard.]

Chan. Div. } 1897.
(North, J.) } Dec. 1.

PINET V. MAISON LOUIS PINET (LIMITED).*

Trade Name—Imitation—Assumed name—Transfer to a company—Injunction.

A decision of the Court of Appeal is reported *ante*, p. 2, in an action by the present plaintiffs, who carry on business in Paris as manufacturers of boots and shoes under the style of F. Pinet et Cie., against a person who had made boots and shoes under the name of Louis Pinet at 26, Berners-street, and a limited company called Maison Pinet (Limited), formed early this year to take over his business. The defendants said that their business was almost entirely limited to articles of special make, either for the purpose of persons with legs of unequal length, hiding the defect, or for the purpose of giving an appearance of height to the wearers by means of "elevators"—that is, a kind of wedge inside the heel of the boot or shoe. They asserted that their business could in no way compete with the large sale the plaintiffs have in London of their well-known boots and shoes. The Court of Appeal granted an injunction to restrain the defendants to that action from using the name of Pinet in connexion with the sale or manufacture of boots and shoes, without distinguishing these articles from those of the plaintiffs' manufacture. At the date of that injunction, it seemed, steps had been taken to form a new company with larger capital to take over the business. The new company has since been registered under the slightly altered name of Maison Louis Pinet (Limited). Fresh proceedings were taken in two actions (the one supplementing the other as to parties and otherwise) by the same plaintiffs against the new company, its directors (of whom Louis Pinet was one), and the old company, to restrain the companies from using the name of Pinet in connexion with the sale and manufacture of boots and shoes, and also to restrain the sale of the business by the old company to the new company or by either company to any one else. Since the hearing of the motion in the old action, it has been discovered on police evidence that the person who had taken the name of Louis Pinet had at one time been an Irish solicitor under the name of Dunch, and that he had many times changed his name for various supposed purposes, one of the names adopted being Ransome, in some connexion with a money-lending business carried on in the neighbourhood of the business of Messrs. Ransome the bankers. The actions were now brought on on motions for interlocutory injunctions till trial.

Mr. Fletcher Moulton, Q.C., Mr. Swinfen Eady, Q.C., and Mr. Sebastian were for the plaintiffs; Mr. Vernon Smith, Q.C., and Mr. B. B. Cooper for the defendants.

MR. JUSTICE NORTH said,—I think the case is a very clear one. As regards this man who began life as an Irish solicitor under the name of Dunch, and has since changed successively to the trade of money-lender and manufacturer of boots and shoes under various names, then when he wanted to deal in money in Pall-mall takes the name of Ransome, and then changes subsequently to Gower, then again to Forbes Gower, then when he goes into boots he takes the

name of Pinet for reasons which every one knows—as far as he is concerned I think he is utterly wrong. I think that he has been guilty from first till last of a commonplace, clumsy fraud, and I think I should be wasting public time if I were to give any more words to the position he has in the matter. As regards the other defendants there is a little more to be said. In the company which has been called the old company, formed in the beginning of the year 1897, Mr. Eastmead and Mr. Dunch, or Pinet, were directors. In the company which has been formed in 1897 there are four directors, Mr. Potter, Mr. Phillips, Mr. Eastmead, and Mr. Pinet. Mr. Pinet I put aside altogether. [His Lordship, after referring to the affidavit made by Mr. Phillips, proceeded] I see that as to that deponent and as to Mr. Potter they were not, as I said, directors of the old company. Mr. Eastmead was. He has not made any affidavit, but I should be quite willing to accept on behalf of these three the disclaimer of any fraud on their part contained in the paragraphs of the affidavit that I have read if they had given evidence of their *bona fides* in such disclaimer by saying they did not resist for a moment the application made on behalf of the plaintiffs. They have not taken that course, and I am sorry for it. I hope that their justification which they put forward is well founded; but, in my opinion, it is not nearly enough for their purpose in regard to what is proved in this case when the matter was before the Court of Appeal not very long since, which was in what has been called the old action, an action commenced last spring. At that time it was asserted on behalf of Mr. Pinet, and the contrary was apparently not known to or suspected by anybody else—it was believed on the part of all persons and by the Court itself, as appears from the judgment—that Pinet was the real name of the defendant, and the case was dealt with on that footing, a case in which he had a name of his own which he could not be restrained from using. The facts now proved show that it is nothing of the sort, and that basis was entirely wrong. No doubt a man may by law change his surname if he likes. He cannot be prevented from doing it. An Act of Parliament is not necessary for the purpose, but if he wants to have the benefit arising from any such change it must be an honest change, it must not be changed, that is, for the purpose of putting on the semblance of somebody else and passing off his goods as the goods of that other person. It is quite clear to me in this case that the parties cannot get any benefit from the fact that a short time since Mr. Pinet took that name when it was not his own, and they cannot have any advantage from that any more than they would have had if he had never taken that name at all and they were doing now all that has been done, his name of Dunch being retained and nothing else substituted for it. It seems to me quite clear it is a case in which the plaintiffs are entitled to have an order against the defendants to restrain them from interfering with the thoroughly well-known trade of the plaintiffs under the name of Pinet. In the last words that I read of Mr. Phillips's affidavit he referred to the reputation of the plaintiffs, which is thoroughly established as well as any trade reputation could be by an abundance of evidence, and it is quite clear why this name Pinet has been assumed by the defendants. The injunction was granted by the Court of Appeal to restrain the old company from using the name without distinguishing and pointing out that they were not the plaintiffs' company. The fact that such an order has been granted has not deterred the new company from attempting to do the very same thing. Under those circumstances, I think they must have an injunction granted against them to restrain them from using the name Pinet at all in connexion, of course, with the

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

manufacture or selling of boots and shoes. Of course, I do not go beyond that or restrain them from using the name for any other purpose they think fit and which is within their memorandum of association. I must restrain them from using the name Pinet at all in the manufacture or sale of boots or shoes. Then, looking at the notice of motion for the purpose of seeing the exact form, I think the case is very like that of "Brinsmead and Sons" (13 *The Times* L.R., 3), with this element, which makes it worse. In that case of Brinsmead there were two or three (I forget which) persons concerned in the matter who really were Brinsmeads, father and son. In the present case there is nobody who is really Pinet at all, although the defendant has assumed that name and has adopted it recently for a fraudulent purpose. In the result, his Lordship granted an injunction restraining the use of the word Pinet in connexion with the sale or manufacture of boots or shoes and the dealing with the defendants' business.

[Solicitors—Wilson, Bristows. and Carpmal, for the plaintiff; G. Boyd Wickes, for the defendants.]

Q.B. Div. (Lord Russell of Killowen, C.J.,) 1897.
and a Special Jury } Dec. 1.

KLAMBOROWSKI V. COOKE.*

Practice—O. 22, r. 22—Payment into Court—
Communication to jury.

In this action the plaintiff, the Rev. Leonard Klamborowski, rector of Chedburgh, Suffolk, claimed damages for libel from Mr. William Ambrose Cooke, a retired publican, residing at Chedburgh. The defendant admitted that he published the words complained of, but said he did not intend them to bear the construction put upon them by the plaintiff.

Mr. Lawson Walton, Q.C., and Mr. A. H. Poyser were counsel for the plaintiff; and Mr. Boydell Houghton appeared for the defendant.

In opening the pleadings the learned counsel stated to the jury that the defendant had paid money into Court.

Mr. HOUGHTON.—I object to my friend's making that statement to the jury. It is contrary to the O. 22, r. 22.

The LORD CHIEF JUSTICE.—That is so, but in my opinion the rule is a very foolish one and works very inconveniently. I think it would be much better that the jury should know when money is paid into Court. As, however, the learned counsel has now informed the jury, we may as well "go the whole hog" and tell them the amount. (To the jury.)—Gentlemen, the defendant has paid £5 into Court, and he says that is sufficient to satisfy the plaintiff's claim.

Mr. POYSER, in opening the plaintiff's case, said that Mr. Klamborowski had been rector of Chedburgh for the past seven years, and during that time there had been an uncomfortable state of things in the parish, and a good deal of hostility had been shown to the rector, especially by the defendant, who took a considerable interest in parish matters. It appeared that amongst the Chedburgh charities was one called the Stansfield Mill Charity, the funds of which were administered by three trustees, the rector, *ex officio*, and a Mr. Chapman and a Mr. Ransom, for the relief of the poor. In November, 1896, the rector met the miller, who had to pay a sum of ten shillings for the relief of the poor,

and received that sum direct from him. Instead of paying the money on behalf of the trustees into the bank at Bury St. Edmunds he took upon himself, rightly or wrongly, the distribution of the 10s. amongst those who needed it. Afterwards he sent a list of the persons to whom the money was given and the amounts to his co-trustee Mr. Chapman. Then Mr. Cooke, the defendant, who had shown considerable hostility to the rector before February, 1897, went to Mr. Chapman and obtained a list of these distributions. He then caused a parish meeting to be called and on the 8th of February wrote to Mr. Klamborowski giving him notice that he was to pay a sum of 10s., which was due to the Chedburgh Charity, and if it was not paid by a certain time other proceedings would be taken. Neither the parish council nor the defendant Mr. Cooke had anything whatever to do with the Chedburgh charities. Mr. Klamborowski replied that he had paid over the amount to the poor, but he was ready to give an additional 10s. to the fund if Mr. Cooke would do the same. On the 24th of February Mr. Cooke went to the County Court office and issued process against the rector for the recovery of 10s. on behalf of the trustees. It was the statement contained in the particulars of this claim which constituted the libel complained of. The particulars were signed by Mr. Cooke, chairman of the parish council, and set forth "that he (the rector) received ten shillings from Stansfield Mill, money belonging to the Chedburgh trustees, and had misappropriated the same." There had not been the slightest impropriety or dishonesty on the part of Mr. Klamborowski, and his statement of the accounts showing how the sum in question was expended was adopted by the trustees and the parish council. The action in the County Court was withdrawn on account of the death of one of the trustees, Mr. Chapman. On March 23 a parish meeting was held and the accounts were accepted and posted up in the room. That was the first occasion on which the parish council had any right, counsel contended, to interfere in the matter.

The LORD CHIEF JUSTICE.—I am not at all sure of that. If any of the parishioners have reason to believe that charitable funds are being improperly dealt with surely they have a right to call a parish meeting.

Mr. POYSER (continuing).—Mr. Klamborowski endeavoured to obtain a withdrawal of the charge made by Mr. Cooke publicly at the parish meeting, but instead of that he received nothing but abuse. After the commencement of the action, Mr. Cooke wrote to the plaintiff regretting that the word "misappropriate" was used, and saying that he was willing to pay the costs of the action if it was not proceeded with. Mr. Klamborowski was not satisfied with this and so the action proceeded.

Mr. Klamborowski, the plaintiff, was called and gave evidence in support of his case.

Cross-examined by Mr. HOUGHTON. When he first came to the parish Mr. Cooke was people's churchwarden. A difference arose between them and he resigned. Mr. Cooke was a trustee of the charity as churchwarden, and there was a complaint on his part that witness had distributed the funds without consulting him. There was a grave in the churchyard where a friend of Mr. Cooke's was buried, and Mr. Cooke used to keep flowering plants on it. After he ceased to be churchwarden, witness declined to allow him to renew the plants. He objected to the defendant's gardening in the churchyard. A wire fence was put up around this particular grave but he did not know that it was for the purpose of preventing his own fowls from scratching the grave. A

*Reported by E. HARRINGTON, Esq., Barrister-at-Law.

letter appeared in the *East Anglian Times* written by witness on "Churchyard Rights and Wrongs" referring to this incident. In his letter he said that the freehold of the churchyard belonged to the rector and no one had a right of access except for service. He referred to the defendant as swearing and brawling in the churchyard. Witness summoned Mr. Cooke before the magistrates, but the summons was dismissed. He denied that the flowering plants had been torn up and thrown away. They had been put away with the dead flowers from the church. He wrote a letter in 1896 about the Chedburgh charities to a local paper, and referred to his dispute with the defendant as a "little foam in a quart pot." (Laughter.) He denied that he had intended to hold up the defendant to ridicule for dropping his h's, but he did intend to infer that he was not a fit person to be chairman of the parish council. With regard to the 10s., the Charity Commissioners wrote to him on January 16, 1897, conveying in effect Mr. Cooke's complaint about that matter. He did not admit that he had done wrong in distributing the money without consulting his co-trustees. He remembered the parish meeting being convened on February 22 to deal with the question of the distribution by him of the 10s. without the concurrence of the trustees.

THE LORD CHIEF JUSTICE.—You were constituting yourself a judge of who was to receive the money and in what proportion. That was quite wrong, for your co-trustees were equally responsible with yourself. His Lordship inquired whether there was not an assize town near Chedburgh and why this case had not been tried at the Assizes.

MR. HOUGHTON.—We desired to have it tried at the Assizes, but it was resisted.

Cross-examination continued.—When the officer served the County Court summons he remarked to witness, on the word misappropriation, "A strong word to use, Sir, isn't it?" (Laughter.) On the 13th of March, 1897, witness wrote another humorous letter to the local paper giving a description of the "doles" meeting at which the defendant had attempted to be present. The defendant had no right to be present at that meeting and witness objected. At the parish meeting he did make a reference in connexion with Mr. Cooke to curs and kicking out. (Laughter.) Mr. Cooke did not say that all he had done was under the direction of the parish council. Witness suggested he should serve the writ in this action with his own hand. He did not know whether he had instructed his solicitors to write to the defendant and ask for an apology. The defendant did say he was willing to apologize, but his answer was that the matter had passed into legal hands and must go on. He was again approached, and asked to accept an apology to stop this action but he declined.

MR. BOYDELL HOUGHTON proceeded to address the jury on behalf of the defendant, and at the close of the learned counsel's address, the Foreman of the jury intimated to the learned Judge that they had all made up their minds as to the verdict.

THE LORD CHIEF JUSTICE.—You are quite justified, gentlemen, in expressing your opinion now if you are all agreed. What is your verdict?

The Foreman of the Jury.—We find for the plaintiff, damages one farthing.

Judgment was given accordingly, his LORDSHIP directing that £4 19s. 11½d. of the £5 paid into Court should be repaid to the defendant.

Q.B. Div. (Mathew and
Kennedy, JJ.)

1897.
Dec. 1.

REG. V. THE JUSTICES OF THE WEST RIDING OF THE
COUNTY OF YORK—EX PARTE SHAW.*

Licensing Acts—Licence—Refusal to transfer—
Alehouse Act, 1828 (9 Geo. IV., c. 61), sec. 14.

This was a motion for a *mandamus* to the Quarter Sessions of the West Riding of York to hear the appeal of Joseph Howarth Shaw against the refusal of the justices of the county borough of Halifax, sitting at the special sessions for the transfer of licences, to grant him a transfer of his "on" licence in respect of the Peacock Inn, situate in Market-street, Halifax, the said inn having been pulled down for certain public improvements, to another fit and convenient house intended to be opened in Market-street. The case was argued on the 3rd and 5th of April before Mr. Justice Cave and Mr. Justice Lawrance, who disagreed. It was reargued on November 20 before Mr. Justice Mathew and Mr. Justice Kennedy.

In support of the rule appeared Mr. Kershaw, Q.C., Mr. Montgomery, and Mr. Lawson Walton, Q.C.; Mr. T. P. Perks appeared for the respondent, the objector; Mr. Roskill represented the justices.

Judgment was delivered this morning.

MR. JUSTICE MATHEW said this was an application for a *mandamus* to compel the quarter sessions to hear the appeal of Mr. Shaw against the refusal of the justices below to transfer his licence under section 14 of the Alehouse Act, 1828 (9 Geo. IV., c. 61). The quarter sessions had held that the section did not apply, and accordingly refused to go into the case. The facts were shortly these:—Prior to November 30, 1894, a Mrs. Toole was the licensed proprietress of the Peacock Inn, Halifax. The Halifax Corporation took the site of that inn for the purpose of a public improvement, and gave notice to Mrs. Toole to terminate her tenancy. Shaw became tenant, and probably entered to a certain extent into formal occupation, because on November 30, 1894, he applied for authority to carry on the business of licensed victualler at the Peacock, and obtained it. This would remain in force till the following February. On December 7, 1894, he, on behalf of one Naylor, applied for a transfer of the licence to other premises at some distance from the Peacock Inn. This was refused. On December 21 a sale of the effects of the Peacock Inn took place, and in the last week of December the inn was pulled down for the improvement of Albion-street and Market-street. On February 1, 1895, the inn being then pulled down, Shaw applied to the justices for a transfer licence under section 4 of the Act of 1828, and, strange to say, had it granted to him. The licence was a nullity and a fiction, as the inn was then gone. On July 29, 1896, the present application on behalf of Shaw was made—*i.e.*, for a grant of a licence under section 14 of the Act of 1828. That Act, by section 4, provided thus:—"It shall be lawful for the justices . . . to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns as they the said justices shall in the execution of the powers herein contained . . . deem fit and proper persons." That provision did not apply to Shaw under the circumstance, but it was said that he came within section 14. Now section 14 was an extension of section 4 and to be read with it. It provided, "If any house being kept as an inn by any person duly licensed as aforesaid"—that description did not apply to Shaw—"shall be or about to be pulled down or occupied under the provisions of an Act for the improvement of the highways

or for any other public purpose." Shaw sought to bring himself within that section. He was, however, not within it. He never was a "person duly licensed" within the meaning of that section, and was not therefore entitled to the benefit of the section. The justices of quarter sessions were therefore right, and the rule must be discharged.

MR. JUSTICE KENNEDY concurred. The central point of the case was whether there was an application properly made under section 4. The learned Judge in the first place was not satisfied that Shaw ever did in fact occupy the inn, his affidavit only saying that he "became tenant," but even if he did he never occupied as a licensed person licensed under the Act of 1828. The house must be kept as an inn by the person duly licensed until it was pulled down—that was, a person licensed under the Act at the time when it was pulled down. That was the natural construction of the words apart from any question of convenience. Moreover, any other construction would give rise to the possibility of there being a number of conflicting applicants, as, for instance, the landlord, the occupier in whose name the licence did not stand, and the occupier in whose name it did. Shaw had not brought himself within the section.

MR. ROSKILL then asked, on behalf of the justices, that the rule might be discharged with costs.

MR. PERKS, on behalf of the respondent Fowler, also asked for costs. His client had been served with notice of the rule *nisi*.

MR. MONTGOMERY, however, on behalf of the applicant, contended the right of the respondent to costs. The recent case of "Boulter v. Justices of Kent" (13 *The Times* L.R., 538, and 66 *L.J.*, Q.B., 787) in the House of Lords had decided that licensing justices were not a Court of summary jurisdiction. It was true that notice had been given to Fowler, but at that time the case "Reg. v. Glamorgan, Justices of" ([1892] 1 Q.B., 621; 61 *L.J.*, M.C., 169), in the Court of Appeal, was good law. That case made it necessary to treat licensing justices as a Court within the Summary Jurisdiction Act, and therefore made it necessary to give notice to the "other party"; but as that case had now been overruled the Summary Jurisdiction Acts could not be said to apply, and there was no "other party" entitled to notice.

MR. PERKS, in reply, referred to Rule 61 of the Crown Office Rules, which provided as follows:—"Notice shall be given by the order *nisi* for a *mandamus* to every person who by the affidavits on which the order is moved shall appear to be interested in or likely to be affected by the proceedings." He said his client, the objector, was a person interested as shown by the affidavits.

The Court took time to consider the decision in respect of costs.

[Solicitors—John R. Hall, for Keighley Walton, in support of rule; Trevor Edwards, for the Justices; Williamson, Hill, and Co., for Walshaw, for the respondent.]

House of Lords (Lord Halsbury, L.C.,
Lords Watson, Herschell, Macnaghten,
Morris, Shand, and Davey) } 1897.
Dec. 2.

THE MERCANTILE AGENCY COMPANY LIMITED V. FLITWICK CHALYBEATE COMPANY.*

Contract—Agreement in writing—Wrongful admission of parol evidence.

This action was brought by the appellants, publishers of an advertising periodical called the *Colonial Buyers' Guide*, against the respondents,

mineral water proprietors in the Borough, to recover damages for the non-delivery of goods pursuant to an agreement in writing. By the agreement the respondents agreed to pay the appellants for the reservation of an advertising space in the guide by the delivery of certain goods at the respondents' lowest prices and best discounts. The appellants inserted the advertisements and ordered 24 cases of Flitwick water of the respondents. The latter refused to deliver except on the terms that the appellants were not to sell the goods within the United Kingdom. The appellants then brought an action, claiming £200 as damages, or in the alternative £144, the agreed price of the advertisements. In effect, the defence was that the respondents entered into the agreement on the representation made verbally by the appellants' canvasser and representative that the Flitwick water was only required for shipment to the colonies or abroad. The action was tried before Mr. Justice Grantham and a common jury, when the latter returned a verdict in favour of the respondents, and judgment was entered for them. The appellants then moved the Court of Appeal to enter judgment for them, or in the alternative for a new trial on the ground that the learned Judge was wrong in admitting parol evidence to vary the written contract or to support a collateral agreement, but they refused the application. Hence the appeal to the House of Lords.

MR. ROBSON, Q.C., and Mr. Stephen Lynch were for the appellants; and Mr. Atkinson, Q.C., and Mr. E. Morten for the respondents.

THE LORD CHANCELLOR said that the respondents had failed to establish that there was any collateral contract or agreement that the goods supplied should be used exclusively for export. Whatever representations were made by the advertisement canvasser, he had no authority to bind the appellants, and it was not shown that any such representations ever reached the appellants' ears. Thus, in point of fact, there had been a failure to prove the allegations upon which the respondents relied. But if there really had been any such verbal stipulation as that put forward by the respondents, it would have been of no avail. It was a rule of law—and a salutary rule which prevented great inconvenience and troublesome litigation in many instances—that a written contract cannot be varied or modified by word of mouth. The cases cited on behalf of the respondents did not impair the stringency of that principle, as they were not really violations of the rule, but cases in which a perfectly independent parol contract had been made, not abrogating or in any way inconsistent with the original written contract. The decision of the Court of Appeal must be reversed, and judgment would be entered for the appellants for £144.

LORD WATSON concurred.

LORD HERSCHELL said that the present case was a good instance of the usefulness of the principle that no verbal alteration could be recognized or enforced of a written contract, and of the absolute necessity of adhering to that principle.

LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY concurred.

The judgment of the Court of Appeal was accordingly reversed and judgment given for the appellants.

[Solicitors—Sweepstone and Stone, for the appellants; T. A. Jones, for the respondents.]

Q.B. Div. } 1897.
(Kennedy, J.) } Dec. 2.

MACINNON V. CLARK.*

Election Law—Parliament—Return of election expenses—Erroneous return—Failure to trans-

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

*Reported by J. E. ALDCUS, Esq., Barrister-at-Law.

mit within time limited—Action for penalties—Corrupt and Illegal Practices Prevention Act, 1883, sec. 33 (1), (5).

This was an action brought by Mr. Alexander Dugald MacKinnon, of Portree, Isle of Skye, against Dr. Gavin Brown Clark, M.P., of St. Ermin's-mansions, S.W., to recover penalties from him for having sat and voted in the House of Commons as member for Caithness without having duly transmitted a proper return and declaration respecting election expenses.

Mr. A. T. Lawrence, Q.C., and Mr. H. Courthope Munroe appeared for the plaintiff; the Right Hon. H. H. Asquith, Q.C., and Mr. S. T. Evans for the defendant.

The case was heard on November 15 last, when his Lordship reserved judgment.

Mr. LAWRENCE, Q.C., in his opening speech for the plaintiff, said that the action was brought under the Illegal Practices Prevention Act, 1883 (46 and 47 Vic., cap. 51). On July 22, 1895, a Parliamentary election was held for the county of Caithness at which the defendant was the successful candidate. The poll was declared on July 23, and it thereupon became the duty of the defendant to make a return to the returning officer on or before August 27, 1895. Dr. Clark was his own election agent and he did not make any return till August 27, when he put in the letter-box of the House of Commons what purported to be his return of his election expenses. It was too late for the post on August 27, and did not leave the House of Commons for Wick till August 28, where it arrived on August 29. That return was defective in a number of particulars. The defendant sat and voted on August 28 and other days, the number of occasions given in the particulars being 49. The present action was commenced on July 18, 1896. Thereupon, on September 24, he presented a petition to the First Division of the Court of Session in Scotland and on January 14, 1897, an order was made finding that the following errors of omissions in the said return or declaration—viz. :—(a) Failure to enclose as part of the said return the receipt for £2 2s. paid by the defendant to Lybster Temperance-hall committee; (b) failure to enclose as part of the said return the receipt for £5 15s., paid by the defendant to James Nicol, Wick; (c) failure to insert the date of the election in the return which the defendant made; (d) failure to state accurately the Christian name of the said James Nicol, in the said return—arose by reason of inadvertence and not by reason of any want of good faith on the part of the defendant, and that he was entitled to an order for an authorized excuse in the terms of section 34 of the Corrupt and Illegal Practices Prevention Act, 1883, excusing all the said errors or omissions and also excusing the defendant's failure to transmit the return and declaration respecting his election expenses as required by the said Statute in so far as the above-mentioned errors or omissions imported or might be held to import such failure to transmit. A payment of £2 9s. to Henderson's Royal Hotel, Thurso, had, however, not been included in the return and no relief had been granted in respect thereof. By section 33, subsection (1), of the Corrupt and Illegal Practices Prevention Act, 1883, it is provided that, "within 35 days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return (in this Act referred to as a return respecting election expenses) in the form set forth in the second schedule to this Act. . . ."

By section 33, subsection (5) :—"If, in the case of an

election for any county or borough, the said return or declarations are not transmitted before the expiration of the time limited for the purpose, the candidate shall not, after the expiration of such time, sit or vote in the House of Commons as member for that county or borough until either such return and declarations have been transmitted or until the date of the allowance of such an authorized excuse for the failure to transmit the same, as in this Act mentioned, and if he sits or votes in contravention of this enactment he shall forfeit £100 for every day on which he so sits or votes to any person who sues for the same."

MR. JUSTICE KENNEDY read a very elaborate written judgment. The claim of the plaintiff, said his Lordship, rested on two distinct grounds. The plaintiff first claimed in respect of the sitting and voting on August 28 and following 48 days on the ground that, the document sent being erroneous and therefore not a "true return" within section 33, subsection (1), there had been a total "failure to transmit" existing on August 28 and following days claimed for, and indeed up to the present time, because the "return" in the penal subsection (5) meant the "true return" prescribed by subsection (1). He was clearly of opinion that that contention of the plaintiff was unsound. He could not construe the transmission of an incorrect return as a failure to transmit. So to treat it would be to give an unnatural meaning to the words "failure to transmit" in section 33, subsection (5). And that view was confirmed by the language of section 34, by which a plain distinction was drawn between "not transmitting as required" (i.e., the failure to transmit as required) and transmitting some erroneous or false statement. So far as regarded the last 48 days, therefore, the defendant was entitled to succeed. As regarded the sitting and voting by the defendant on August 28, the plaintiff claimed a penalty for that day on the further ground that "transmission" in section 33 meant "completed transmission," and even if the document posted on the 27th could be treated as a "return" within section 33 the defendant incurred the penalty by sitting and voting on August 28, because the document had not then reached Wick and, therefore, had not then been transmitted to the returning officer, and the time limited for its "transmission"—viz., August 27—had expired. The defendant argued, on the other hand, that the statute only required the return to be put into course of transit within the 35 days. Upon the whole, he felt constrained to adopt the plaintiff's view of the interpretation of the expression. It appeared to him to be the *prima facie* natural meaning, and therefore, unless some reason against it was to be found, either in the nature of the subject-matter or in the context, the true meaning. He could find no such countervailing reason. He therefore gave judgment for the plaintiff for £100 out of the £4,900 which he had claimed in his action, without costs. There would be a stay of execution for ten days upon the usual terms. [Solicitors—Leggatt, Rubinstein, and Co., for the plaintiff; Lloyd-George, for the defendant.]

House of Lords (Lord Halsbury, L.C., } 1897.
Lords Watson, Herschell, Mac- }
naghten, Morris, Shand, and Davey) } Dec. 3,

THE DARTFORD RURAL DISTRICT COUNCIL V. THE
BEXLEY HEATH RAILWAY COMPANY.*

Railways—Footpath—Bridge—Railways Clauses
Consolidation Act, 1845, sec. 46.

Decision of Court of Appeal ([1896] 2 Q.B., 74)
affirmed.

This was an appeal from a judgment of the Court of Appeal, discharging an order of the Queen's Bench Division, directing that a writ of *mandamus* should issue commanding the respondents, the Boxley Heath Railway Company, to carry their railway over a certain public footpath or the footpath over the railway by means of a bridge. In 1883 the respondents obtained an Act of Parliament authorizing the construction of the railway, and its powers and provisions were amended and enlarged by subsequent Acts. These Acts incorporated the Railway Clauses Consolidation Act, 1845, and parts 1 and 3 of the Railway Clauses Consolidation Act, 1863. In the construction of the railway the respondents carried the line on an embankment across a public footpath in the parish of Crayford. In February, 1895, the parish council of Crayford passed a resolution calling on the appellants, under the Local Government Act, 1894, to assert the right of the inhabitants in regard to the footpath so obstructed, and they took action accordingly. The Divisional Court directed the writ of *mandamus* in question to issue, but the Court of Appeal reversed their decision and discharged the rule for the writ with costs. The appellants now appealed to this House on the ground that the respondents had neither, under their Acts or the Railway Clauses Consolidation Act, 1845, power or authority to obstruct the footpath.

Mr. Macmorran, Q.C., and Mr. Gerald Hohler appeared for the appellants; Mr. Farwell, Q.C., and Mr. Edward Boyle, for the respondents, were not heard.

The LORD CHANCELLOR moved that the appeal be dismissed with costs. The Railway Clauses Act was by its form and structure not intended to be a final Act applicable to all cases. The Legislature contemplated that provision should be made by the special Act in each case.

LORD WATSON concurred. The Legislature intended that bridges of a certain height and width should, at a future time, be prescribed by the special Act of the company. In this instance the special Act made no such provision, and, therefore, the case of the appellants was necessarily based on the terms of section 46 in the Railway Clauses Act, 1845. But from beginning to end there were no words in that statute imposing on a railway company any obligation except to erect bridges of a height, width, and dimensions, thereafter, either in that Act or in the special Act prescribed. No such provision having been made either by general or special legislation, no such right was conferred as was claimed on behalf of the appellants.

LORD HERSCHELL said that the fallacy which ran through the argument of the appellants' counsel was that they overlooked the fact that the statute of 1845 had not of itself any operation in respect of any road whatever, whether carriage, footpath, or turnpike, until it was brought into operation by particular obligations created by the special Acts when provision was made by the special Act, then the 46th section of the Railway Clauses Act and the special Act together came into operation. That was the scheme of legislation, and the general statute did not profess to provide for every case, but recognized that there might be cases in which the matter would be better dealt with by special legislation. There was no oversight and no such clumsiness as the learned counsel had attributed to the legislation. The whole system was perfectly consistent and intelligible.

The other noble and learned LORDS having concurred, the appeal was dismissed with costs.

[Solicitors—Pyke and Parrott, for the appellants; Dollman and Pritchard, for the respondents.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) } 1897.
Dec. 3.

IN THE MATTER OF ESTATE DUTY PAYABLE ON THE
DEATH OF THE SECOND EARL COWLEY.*

Revenue—Estate duty—Amount payable—Deductions—Mortgage of settled property—Value of property passing on death of tenant for life—Finance Act, 1894 (57 and 58 Vict., c. 30), sec. 2, subs. 1 (b), and sec. 7, subs. 1 (a), subs. 7 (b).

Decision of the Divisional Court (13 *The Times* L.R., 393, and [1897] 2 Q.B., 47) reversed.

This was an appeal from the judgment of a Divisional Court (Mr. Baron Pollock and Mr. Justice Bruce) on a petition under section 10 of the Finance Act, 1894, reported in 13 *The Times* Law Reports, 393. The petitioner was the third Earl Cowley, and the question was with regard to the estate duty payable on the death of his father, the second Earl Cowley. The facts are set out in the judgment of Lord Justice A. L. Smith, and it is only necessary to state here that the second Earl Cowley on July 15, 1884, succeeded to certain estates as tenant for life, and that he and his eldest son, then Viscount Dangan, the present petitioner, as the heir-in-tail, barred the entail and resettled the property to such uses as they should jointly appoint and until such appointment to the use of the second Earl for life, with remainder to the petitioner in tail. The second Earl and the petitioner subsequently mortgaged the life estate of the former and the reversionary interest of the latter to the Prudential Assurance Company to secure the repayment of £230,000. By another deed the second Earl covenanted to pay to the petitioner an annuity of £3,000 during the former's life. The second Earl died on February 28, 1895, and thereupon the petitioner, who became entitled to an estate in possession, delivered to the Commissioners of Inland Revenue an affidavit which showed the aggregate value of the property to be £538,426 11s. 1d. After allowing for certain deductions on annuities valued at £9,140 17s. the Crown claimed estate duty on the whole principal value. The petitioner contended—first, that he was entitled to a deduction from estate duty in respect of the mortgage of £230,000 in so far as the money raised had gone to his father; and, secondly, in the alternative, a deduction in respect of the whole amount of the mortgage of £230,000. He also claimed a deduction of £65,200 as being the capitalized value of the annuity of £3,000 which had been charged on the estate during his father's life. The Divisional Court gave judgment in favour of the petitioner in respect of the whole sum of £230,000 and against him in respect of the sum of £65,200. The Crown appealed, and there was a cross-appeal of the petitioner.

The Attorney-General (Sir Richard Webster, Q.C.), the Solicitor-General (Sir R. B. Finlay, Q.C.), and Mr. Vaughan Hawkins appeared for the Crown; Mr. Haldane, Q.C., and Mr. H. Fellows for the petitioner.

The COURT, having taken time to consider, delivered judgment to-day, allowing the appeal of the Crown and dismissing the cross-appeal.

LORD JUSTICE A. L. SMITH read a judgment, in which he said that the question raised upon the appeal was upon what amount was estate duty, under the Finance Act, 1894, to be assessed upon the estate of the second Earl Cowley, who died upon February 28, 1895—was it to be upon the sum of £538,426 11s. 1d., the then net principal value of what he (the Lord

Justice) would call the settled estates, less only the sum of £9,140 17s., or less also the sum of £230,000, the amount of a mortgage debt, and less also the sum of £65,200, the capitalized value of an annuity of £3,000 a year payable to the third Earl, then Viscount Dangan, by his father, the second Earl, during his lifetime? It appeared that on June 27, 1863, the Earl of Mornington by will devised the settled estates to trustees upon trust for the first Earl Cowley for life, then to the second Earl Cowley for life, and then upon trust for the first and every other son of the second Earl Cowley in tail male. The testator died on July 25, 1863. The first Earl Cowley thereupon entered into possession of the estates, and whilst in possession died on July 15, 1884, and the second Earl Cowley then entered into possession thereof. The second Earl had previously—viz., on April 1, 1865—exercised a power of jointuring granted to him by the will of the Earl of Mornington and appointed a rent-charge of £500 a year in favour of his wife charged upon the settled estates. The second Earl, after he had entered into possession of the settled estates, mortgaged his life interest therein to the London Assurance Corporation to secure the repayment to them of large sums of money then borrowed by him of them, and he further secured the repayment thereof by policies of insurance upon his life. In these circumstances the second Earl Cowley and his eldest son (then Viscount Dangan), who was then of age, being each in need of money, agreed to disentail the settled estates, and for that purpose, upon January 14, 1887, executed a disentailing deed, which was duly enrolled, whereby the father and the son conveyed the settled estates subject to the above-mentioned mortgages and charges to a trustee upon such trusts as the second Earl and his son might thereafter jointly appoint, and in default of such appointment to the use of the second Earl for life and then to the use of Viscount Dangan in tail. The second Earl and his son proceeded to raise money from the Prudential Assurance Company, and, to summarize the figures, they obtained from that company a loan of £210,000, afterwards increased by further advances to the sum of £230,000, of which the father, the second Earl, took £199,987 11s. 8d. and the son, Viscount Dangan, took £30,012 8s. 4d. To secure the repayment of the £210,000 to the Prudential Company, a mortgage, dated June 8, 1888, was executed by the second Earl and his son, with the concurrence of the Countess Cowley, in favour of the Prudential Company, whereby they transferred to that company the mortgages which the second Earl had given to the London Assurance Corporation and which were then existing upon his life estate in the settled estates, which mortgages the London Assurance Corporation by deed of the same date conveyed and assigned to the Prudential Assurance Company. The policies upon the second Earl's life were also assigned to the Prudential Company. This mortgage deed recited that it was part of the arrangement for the loan that the mortgage debts to the London Assurance Corporation should be paid off and that they should be transferred to the Prudential Assurance Company as a further protection and security for their loan; and by this deed the second Earl and his son, as beneficial owners, in the exercise of the power of appointment vested in them by the disentailing deed and in the exercise of any other power in that behalf, with the consent of the Countess, conveyed to the Prudential Company the settled estates in fee subject to an equity of redemption reserved to the second Earl and Viscount Dangan or either of them. In this mortgage deed was contained the express proviso that the mortgage debts transferred to the Prudential Company should continue on foot as subsisting charges on the life estate of the

second Earl for the benefit of the Prudential Company by way of an additional security for the principal sum then borrowed of that company. Subsequent mortgages were executed to secure the further advances above-mentioned. That was the position of matters when the second Earl died upon February 28, 1895. His Lordship could not doubt that in these dealings with the settled estates the life estate of the second Earl therein was expressly kept on foot as security for the moneys borrowed thereon, and that it was not extinguished or merged in an equitable estate in fee in the Prudential Company. The real substance of what was done—and this was what must be looked at apart from the form of the conveyancing—was that the second Earl mortgaged his life estate to the Prudential Company and that his son mortgaged his reversion to that company to secure the repayment of the £230,000. He could not agree with the learned Judges in the Court below that it was one charge on the fee simple of the settled estates—in other words, an overriding charge thereon. It was true that by the conjoint operation of the father and son the Prudential Company obtained an equitable estate in fee, but the charge remained a charge upon the life estate of the second Earl and upon the reversion of Viscount Dangan. The life estate of the second Earl remained extant until his death on February 28, 1895, charged with the mortgage of £230,000, when the life estate and the mortgage thereon each ceased. Coming to the Finance Act, 1894, section 1 would not cover the present case, for the life estate of the second Earl ceased at his death and did not pass to any one. By section 2, subsection 1, however, it was enacted that property passing on the death of the deceased should be deemed to include the following property:—“(a) Property of which the deceased was at the time of his death competent to dispose.” That did not embrace the present case. “(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest.” This subsection, in his judgment, covered the case of the life estate of the second Earl, which ceased upon his death, mortgaged as it was to the Prudential Company, and was intended to embrace such a case; and the extent to which a benefit accrued by the cesser of such interest was the extent of the interest which then ceased. That in the life estate of the second Earl, and consequently his life estate, when he died, became property which by the Act was to be deemed to have passed on his death, and came within section 2, subsection 1 (b). The next consideration was how by the Act property which was to be deemed to pass upon a death was to be valued for estate duty. By section 7, subsection 1, in valuing an estate allowance was to be made for reasonable funeral expenses and for debts or encumbrances, if such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and took effect out of his interest. That, in his opinion, meant debts or encumbrances to take effect out of the estate which passed. This mortgage debt of the second Earl was not a debt or encumbrance upon the estate which passed or was deemed to pass pursuant to the Act, for the mortgage upon the estate of the second Earl came to an end when that estate also came to an end, and was no longer a charge upon the life estate which was deemed to pass, and was not a debt upon the estate which passed, but only upon the reversion. Then by section 7, subsection 7, “the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall (b), if the interest extended to less than the whole income of the property, be the principal value of

an addition to the property equal to the income to which the interest extended." It was under this subsection that the value of the benefit accruing was to be ascertained, because the interest which ceased at the death of the second Earl did not extend to the whole income, but only to the income less the charges represented by the beforementioned sum of £9,140 17s. Whatever might be the true interpretation of the words "of an addition to the property," they did not mean that the value was to be arrived at by making an allowance for a mortgage debt like the mortgage debt of £730,000 in this case. It was the value of the interest which passed or was deemed to pass which was to bear the estate duty, and when this interest passed it was no longer, except by the son's own act, clogged with this mortgage, for when the life estate ceased so did the mortgage thereon. It was not upon the value of what a man succeeded to that estate duty was payable, and how could the act of a reversioner in diminishing the value of his reversion when he got it affect the value of the property which passed upon a death? In his opinion, the value of the benefit accruing upon the death of the second Earl must be ascertained under section 7, subsection 7 (b), without making any allowance for the £230,000 mortgage. As regards the annuity of £3,000 charged upon the life estate of the second Earl and payable thereout during his life to his son, in his opinion the same reasoning applied, and no deduction could be made for that. As before stated, the Finance Act made liable to estate duty the value of the estate which passed, and not the value it might be to any individual successor, and this was the key to the construction of the Act: and consequently the point taken by Mr. Haldane, that the third Earl, when he succeeded to the settled estates, was no better off by the ceasing of this annuity than he was before, was in reality not in point. The appeal of the Crown as to the £230,000 mortgage succeeded, and the cross-appeal of the third Earl failed. Judgment must be entered for the Crown with costs.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS read judgments to the same effect.

[Solicitors—Collyer, Bristow, Russell, and Hill, for the petitioner; The Solicitor for Inland Revenue, for the Crown.]

Chan. Div. } 1897.
(Kekewich, J.) } Dec. 3.

IN RE RIPLEY AND SON'S TRADE MARK.*

Trade Mark—Registration—Capacity for—Invented word—"Pearl" and "Pirle"—Application for registration refused.

This was an application by Messrs. Ripley and Son, of Bradford, dyers and cloth finishers, by way of appeal from the refusal of the Comptroller-General of Patents to register the word "Pirle" as a trade mark for woollen fabrics in Class 34 under the Patents, Designs, and Trade Marks Acts. The ground of the Comptroller's refusal was that "Pirle" was merely a mis-spelling of the word "Pearl," which he held was not registrable. The applicants stated that the word "Pirle" was formed by a transposition of the letters in the name "Ripley," omitting the final "y," and they contended that it was registrable as an "invented word," and was not open to objection as being a "geographical" word, or as a word "descriptive of the character or quality of the goods."

Mr. Moulton, Q.C., and Mr. A. J. Walter appeared for the applicants; the Attorney-General (Sir Richard Webster, Q.C.) and Mr. Ingle Joyce, for the Comptroller-General, were not called upon.

MR. JUSTICE KEKEWICH, in giving judgment, said he thought the present application might be disposed of on extremely short grounds. He was not called upon to consider whether the word "Pearl" was capable of registration or not. He wished to say nothing on that point, because it might be competent for the applicants to bring forward that word again, possibly basing their application upon different evidence from that in the present case, and it was only right that such an application, if made, should be made without its being prejudiced by anything that might be said now. But the word "Pearl" had been brought before the Comptroller, and had been rejected. Therefore his Lordship must hold, for present purposes, that that word could not be registered. To decide whether the word "Pirle" was capable of registration it was not the eye only, but the ear also, that must be consulted; and to an ordinary person the difference in sound between "Pearl" and "Pirle" was not to be perceived. If "Pearl" was wrong, his Lordship thought that "Pirle" was equally wrong; and he agreed with the Comptroller in saying that this was a mere mis-spelling of the word "Pearl," and that if the applicants failed as regarded the one they must fail as regarded the other. It was said that "Pirle" was an invented word, but this transposition of the letters in the word "Ripley" with the final letter left out seemed to his Lordship a poor attempt at humour. He did not, however, decide the case on that ground, but simply on the ground that, "Pearl" not being capable of registration, "Pirle," being the same in tone, was also not capable of registration. On that ground he refused the application, with costs.

[Solicitors—Speechly, Mumford, London, and Rodgers; The Solicitor to the Board of Trade.]

Q.B. Div. } 1897.
(Bigham, J.) } Dec. 4.

SCHENKER, WALFORD, AND CO. V. THE NEDERLANDSCHE BANK EN CREDIT VEREENIGING VOOR ZUID AFRIKA.*

Contract—Agreement—Construction—Advances by bank—Security for advances—Deposit of insurance policies—Moneys becoming payable under policies.

In this case the plaintiffs claimed a declaration that they were entitled as against the defendant bank to £3 2s. 6d. of each £10 payable by the underwriters in respect of each donkey lost under policies of insurance on donkeys shipped by the steamships Maori and Mount Sirion.

Mr. Joseph Walton, Q.C., and Mr. Leck appeared for the plaintiffs; Sir E. T. Reid, Q.C., and Mr. R. M. Bray, Q.C., for the defendant bank.

MR. JOSEPH WALTON, Q.C., in opening the case for the plaintiffs, said that the questions in the case arose out of the insurance of a large number of donkeys. Two gentlemen, named Vorster and Maltzam, had entered into a contract with the Government of the Transvaal to supply 4,000 Irish donkeys at a price of £12 per head, delivered at Pretoria. In order to obtain the donkeys Vorster and Maltzam entered into negotiations with the plaintiffs, who carried on busi-

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

*Reported by E. H. BALLOCH, Esq., Barrister-at-Law.

ness in London and Antwerp, and the plaintiffs agreed to supply the donkeys, part at £10 and part at £10 10s., delivered at Durban. This arrangement was only made by the plaintiffs on condition that Vorster and Maltzam obtained an advance from the defendant bank. Accordingly, on May 29, 1897, an agreement was entered into by Koehorst, the representative of Vorster and Maltzam, and the bank, by which the bank agreed to make an advance of £6 5s. per donkey shipped, with 10 per cent. commission to the bank, making together £6 17s. 6d. per donkey, or £27,500 in all. As a security for this advance the shipping documents, including the policies of insurance on the donkeys, were to be deposited with the bank. These policies had been effected by the plaintiffs on the 4,000 donkeys, valued at £10 each. By reason of the bank's advance, the interest of the plaintiffs under the policies was £3 2s. 6d. per donkey, and that of the bank £6 17s. 6d. per donkey. On the voyage from Ireland to the Cape 1,208 out of the 4,000 donkeys were lost within the terms of the policies, and the plaintiffs claimed that, of the £12,080 payable under the policies in respect of the loss, they were entitled to receive £3 2s. 6d. per donkey, amounting to £3,795. The bank, however, insisted that they were entitled to retain the £3,795, in order to secure the total advance which they had made. This contention was put forward by the bank, because it appeared that a large number of the donkeys, about 75 per cent., had been rejected by the Transvaal Government. The result of that contention would be to leave the plaintiffs entirely uncovered by the insurance. The question was, On what terms had the policies been delivered by the plaintiffs to, and been received by, the defendant bank? Counsel was proceeding to refer to the correspondence between the parties, which was extremely voluminous, when,

Mr. BRAY, Q.C., for the defendant bank, said that it might be convenient to state shortly the way in which they would put the defendants' case. They contended that the application for the advance was, in the first instance, made by the plaintiffs. The application was for a lump sum of £25,000, and the negotiations were carried on between the plaintiffs and the defendant bank. It was not until the contract had been drawn up that Koehorst was, at the request of the plaintiffs, substituted for them as principal. Under the contract an advance of £25,000 was made by the bank to Koehorst (as agent for Vorster and Maltzam), and the contract with the Transvaal Government was assigned to the bank, and the bills of lading and the policies of insurance were deposited with the bank as security for the £25,000. That sum had not been repaid, and therefore the bank claimed to be entitled to retain their securities.

The reading of the correspondence was then proceeded with. The addresses of counsel occupied the greater part of December 1 and 2.

At the close of the arguments the learned Judge reserved judgment.

Yesterday the learned JUDGE gave judgment. Having stated the nature of the action, the arrangements which had been made for the shipment of the 4,000 donkeys, and the relations of the various parties concerned in the transaction, he explained the steps by which the plaintiffs and the defendants had been brought together, and arrangements made for the advance of money by the bank upon the donkeys. In the course of the negotiations great stress was laid by the defendants on the policy of insurance to be taken out for the donkeys, and a policy in the form actually used was submitted to and approved of by them. The policy contained the marginal and other clauses usual in the

case of an insurance of live stock. Each animal was valued at £10, and was deemed to be a separate subject-matter of insurance, so that for every animal lost the underwriter was to pay £10. Those negotiations resulted in a written agreement of May 29 between Mr. Koehorst, representing Messrs. Vorster and Maltzam, and the bank, which recited the arrangements which had been made by Vorster with the Transvaal Government and with the plaintiffs, including the arrangements for an advance of £25,000 by the bank and the assignment to the bank by way of security of the contract with the Transvaal Government. The operative part of the agreement provided that the bank should lend to Vorster and Maltzam the sum of £25,000 on certain conditions—namely, that after the donkeys had been shipped the bills of lading were to be handed over to the bank, also the policies of insurance and the contract with the Transvaal Government; that against delivery of these documents the bank should lend the sum of £6 5s. per animal shipped. £6 5s. represented the rate at which, if the whole 4,000 animals were shipped, the total amount of £25,000 would be arrived at. In the view of the learned Judge the stipulation as to £6 5s. being lent on each animal was introduced into the contract, not for the purpose or with the intention or effect of altering the character of the advance, but merely for the purpose of enabling the parties easily and quickly to ascertain the amount that should be advanced as and when the shipment of each lot of donkeys was made, for it was not anticipated that the whole 4,000 would be shipped in one lot. The contract then went on to provide for the loan of £25,000 or such less sum as might be measured by a smaller number of animals shipped. The plaintiffs urged that the animals were insured at £10 a head in order to cover the amount of their interest, and that the interest of the defendants in the policies only extended to the amount of their advance—namely, £6 5s. per head. The defendants contended that they held all the documents, including the policies, as a security for the repayment of their loan of £25,000. The learned Judge then commented on the correspondence in detail, from which, he said, it was clear that before the second shipment was made the defendants had given notice to the plaintiffs that they took up the position which they now maintained with regard to their rights under the policies, and the plaintiffs had accepted the advance on the second shipment without a word of protest or dissatisfaction. As a result of the action of the Transvaal Government the defendants were out of pocket to a large extent; they wanted to use the full proceeds of the policies to recoup themselves. The plaintiffs asked the Court to restrain them from making that use of those proceeds, although the result would be to leave the bank out of pocket. In the view of the learned Judge the meaning of the contract of May 29 was that the bank were to advance up to £25,000; if a less sum were lent it was by reason of a less number of animals being shipped, the actual amount of the loan being ascertained by deducting £6 5s. for each animal short shipped. The bank were to get the full benefit of the security of the bills of lading, why not of the policies also? The policies were put into the name of the bank so that the bank might collect the moneys under them, which moneys would then stand as security to the bank for the loan in place of the policies themselves, and in order that the bank might have recourse to those proceeds up to the amount they had advanced—namely, £25,000. That was not only his view but the view both parties appeared to have taken before any difficulty arose. The learned Judge gave judgment for the defendants.

[Solicitors—Lowless and Co., for the plaintiffs; Freshfields and Williams, for the defendant Bank.]

Prob., Divorce, and Adm. Div. (The
Right Hon. the President, Sir Francis
Jeune) 1897.
Dec. 6.

KETTLEWELL V. KETTLEWELL.*

Divorce—Alimony—Permanent maintenance—
Amount of allowance—*Dum sola et casta* clause.

This was an application on behalf of the petitioner, Mrs. Edith Kettlewell, to vary the report made by Mr. Registrar Pritchard upon her petition for maintenance.

Mr. Bargrave Deane, Q.C., and Mr. Kisch were for the petitioner; Mr. Marshall Hall and Mr. R. E. Moore for the respondent, Charles Thomas Kettlewell.

Mr. BARGRAVE DEANE, Q.C., said the petitioner obtained a decree absolute for the dissolution of her marriage on May 24 last, and on November 17 the Registrar made his report upon the petition for maintenance. The husband's income had been agreed at £19,000 per annum, and the wife's at £1,400, the joint income being, therefore, £20,400. In the report (which was read) the Registrar concluded in the following words:—"It was contended on behalf of the respondent that whatever further maintenance be given to the wife should be limited *dum sola et casta*, which would seem to depend upon the conduct of the parties, as to which I have no information. It is submitted that a further sum of £1,600 a year be secured to the petitioner for her life and either *dum casta et sola* or otherwise as to the Court shall seem fit." He (the learned counsel) now submitted that the wife's total income should be made up to at least £5,000. At the time of the marriage £25,000 had been settled by the husband on his wife, and she had also received another sum of £25,000, but this had been expended on the joint expenses of the parties. She had no fortune at the time of her marriage, and, therefore, he did not ask for the third of her husband's large income, but he submitted that one-fourth would be reasonable, and not a paltry seventh as given by the Registrar.

The PRESIDENT.—Has not this question been recently discussed in the Court of Appeal in "Sykes v. Sykes" ? (13 *The Times* L.R., 579, and [1897], P. 306.) The Lords Justices there suggested that the test should be what would be considered a handsome jointure.

Mr. DEANE, Q.C.—The chief point of that case was as to the right to cross-examine the husband on his income. The Lords Justices' remarks as to fixing the amount of maintenance are mere *obiter dicta*. If a lady is the wife of a rich man, and is accustomed to enjoy yachting, shooting, &c., surely she is not to be placed in a worse position owing to the husband's cruelty and adultery. The practice of reducing the wife's income was first introduced in the case of "Cox v. Cox and Dyball," where the husband was a man who indulged in racing—a pursuit for which the wife did not care, and for that reason the "one-third" rule was not followed.

The PRESIDENT.—Surely, Mr. Deane, you do not suggest that a lady living alone in *quasi* widowhood can have need of a yacht, or a country house with shooting ?

Mr. DEANE, Q.C.—I do not agree as to the yacht—many well-known ladies are passionately fond of yachting. This is the case of an innocent wife deprived of her rights through the guilt of her husband.

The PRESIDENT.—I confess I can see no better test in these cases than that laid down by the Lords Justices Ludlow and Chitty in "Sykes v. Sykes." If you and I, Mr. Deane, were acting as convenancing counsel

between the parties, would you not consider £3,000 a very handsome jointure ?

Mr. DEANE, Q.C.—That is treating the husband as if he were an innocent man. It is a slur upon a wife to be compelled to divorce her husband.

The PRESIDENT.—You forget that maintenance is not compensation but provision for the wife.

Mr. DEANE, Q.C., continuing, said that it would be a slur upon an innocent wife to insert a *dum casta et sola* clause.

Mr. KISCH, following, said that in "Sykes v. Sykes" the wife was allowed £3,000 *pendente lite* on an admitted income of £17,000. According to that method of calculation, therefore, in the present case the amount must be increased.

Mr. MARSHALL HALL, for the respondent, said that *pendente lite* the respondent had allowed his wife £2,000 without prejudice. He contended that the petitioner was one of those people who, while they could do without the necessities of life, could not do without its luxuries. Every farthing the petitioner now possessed had come from her husband's pocket. She was no doubt entitled to be kept in the position to which she was accustomed, but it was not immaterial to the case that she had been divorced by a Mr. Patterson before Mr. Kettlewell married her. The case was "Patterson v. Patterson and Grant."

Mr. DEANE, Q.C.—Mr. Kettlewell was then Mr. Grant !

The PRESIDENT.—On the *dum sola et casta* clause I think it is material.

Mr. HALL.—I submit that £3,000 a year should place this woman beyond the dreams of avarice. The learned counsel then cited "Wood v. Wood" ([1891], P., 272), and "Gladstone v. Gladstone" (1 P.D., 442). Under the circumstances of the petitioner's past, he submitted that the husband was entitled to a *dum sola et casta* clause being inserted in the deed.

Mr. DEANE, Q.C.—It is against public policy that restraint should be placed upon a woman remarrying.

Mr. HALL.—It might be a slur on a chaste woman to put in a *dum casta* clause, but not to put in a *dum sola* clause. In "Wood v. Wood" the Court of Appeal had held that when the amount of maintenance was small, and the wife had no means, a *dum sola et casta* clause should not be inserted in the deed. In that case the wife was also described as being a woman of spotless character.

Mr. BARGRAVE DEANE, Q.C., in reply, said that Mr. Kettlewell alone was to blame for the petitioner's past. He submitted that the sum of £1,600 should be increased to bring the wife's income up to, at least, £5,000, and that no *dum sola et casta* clause should be inserted in the deed.

The PRESIDENT, in giving judgment, said that he had to determine, first, what amount should be secured by the respondent to the petitioner, and, secondly, whether the *dum sola et casta* clause should be inserted in the deed so securing that amount. After reviewing the facts of the case appearing on the report of the Registrar, the learned Judge said that it was incumbent upon him to remember that the £1,400 income belonging to the wife had come from her husband, and that on the marriage she had brought nothing into settlement. Although no doubt one-third of the joint income of husband and wife was usually the allowance made in permanent alimony, yet in the case of "Sykes v. Sykes" (he did not suggest that the facts in that case were similar to the one now before him), Lord Ludlow suggested that the way to look at the matter was to ask oneself the question what would be an adequate jointure to be allowed to the widow by her husband. He (the learned President) agreed that the allowance should be a liberal one.

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

and he gathered from what had been stated by counsel in Court that in this case the husband had lived in a luxurious way. The fact that he had done so was material in deciding what sum the wife ought to have to maintain the position of widow of her husband. In her early life, no doubt, she had not lived in any luxury, and, taking into consideration the fact that there were no children of the marriage, a fact which could be urged both for and against an increased allowance, he had in exercising his judgment come to the conclusion that £3,000 a year was enough for the petitioner, and that therefore the Registrar's report on that point should be confirmed. Turning to the question as to whether or not the clause *dum sola et casta* should be inserted in the deed, he desired to follow in the most ample way that he could the case of "*Wood v. Wood*" ([1891] P., 272). The circumstances which Lord Justice Lindley pointed out in that case as necessary to be taken into account were:—(1), the conduct of the parties; (2), their position in life, and their ages and respective means; (3), the amount of the provision actually made; (4), the existence or non-existence of children, and who was to have the care and custody of them; (5), any other circumstances which may be important in any particular case. In the present case the petitioner would have £1,400 in any event, and there were no children. He did not agree with Mr. Bargrave Deane's contention that the Court should close its eyes to the fact that the petitioner was a *divorcée*. He considered it material, as in the case of "*Wood v. Wood*" Lord Justice Lindley referred to the petitioner there as a woman of "*spotless character*," and said that it would be an insult to her to insert the *dum sola et casta* clause. The case of "*Gladstone v. Gladstone*" (1 P.D., 442) had been somewhat modified by "*Wood v. Wood*." On the whole, therefore, he considered that the *dum sola* should be inserted. When, however, it was once decided that *dum sola* should be inserted, a long step had been taken in determining whether the *et casta* should supplement it; for it would be most unjust to make the allowance cease on marriage, and not to cease if an illicit intercourse should commence. He, therefore, came to the conclusion that the *dum sola et casta* clause should be inserted in the deed.

[Solicitors—Beyfus and Beyfus; Baker, Holder, and Upperton.]

Prob., Divorce, and Adm. Div. } 1897.
(Gorell Barnes, J.) } Dec. 6.
THE GLENGYLE.*

Ship—Salvage—Award—Principles upon which the Court acts in determining amount.

This was a claim for salvage arising out of the collision between the steamships *Coronet* and *Glengyle* in the Straits of Gibraltar. The facts of the collision were reported in *The Times* of November 27. The facts of the salvage case sufficiently appear in the judgment delivered to-day.

Dr. Raikes and Mr. Dawson Miller appeared for the steamers *Hermes* and *Newa*; Mr. Dawson Miller also appeared for the tugs *Hereules* and *Nellie*; and Mr. Aspinall, Q.C., and Mr. Butler Aspinall for the defendants.

MR. JUSTICE GORELL BARNES said,—This is a salvage case of unusual importance. On August 26 last the

steamship *Glengyle* came into collision with the steamship *Coronet* in the Straits of Gibraltar, and sustained serious damage in the way of the engine-room and commenced to sink. Her passengers and crew got into boats or on board the *Coronet*, which was also seriously damaged. Fortunately for those interested in the *Glengyle*, her cargo, and freight, the *Hermes* and *Newa* were lying at Gibraltar with steam up, and these vessels at once proceeded to the *Glengyle*, and by their timely assistance she was ultimately salvaged. The *Hermes* is a screw steamer of 394 tons register, fitted with engines of 750-horse power indicated, with a pumping capacity of 2,750 tons per hour, and a crew of 23 hands. The *Newa* is a screw steamer of 459 tons register, fitted with engines working up to 750-horse power indicated, with a pumping capacity of 5,000 tons per hour, and a crew of 21 hands. Both these steamers are specially built for and solely employed in rendering salvage services, and are equipped with divers and diving apparatus, and powerful engines and pumps, and other salving appliances. The *Hermes* belongs to the Neptune Salvage Company (Limited), of Stockholm, and the *Newa* belongs to the Nordischer Bergungsverein of Hamburg. About 3 a.m. on the said August 26 in response to signals from the signal station at Gibraltar indicating that there was a vessel in distress to the westward, the *Hermes* and *Newa* at once proceeded to sea and found the *Glengyle* several miles away to the south-west with her engine-room full of water, her fires drowned out, large quantities of water in her holds, and no one on board of her. She was gradually settling down. The account of the manner in which she was safely brought into Gibraltar is fully set forth in the statement of claim, and, as the facts there alleged are admitted, with the exception of the suggestion that she had been abandoned, it is not necessary to refer to them in detail. It is sufficient to notice the following facts. The master of the *Glengyle* from a boat requested that his vessel should be towed to Gibraltar if she would keep afloat long enough. The *Hermes* and *Newa* made fast, the former ahead, and the latter lashed to the starboard side of the *Glengyle*. As it appeared improbable that the *Glengyle* could reach Gibraltar, it was arranged to steer for Getares Bay, the nearest shore with a sandy bottom where the *Glengyle* could be beached. The sheering of the *Glengyle* caused the *Hermes* to break adrift twice, and in order that no time should be lost and as one salving steamer could not save the *Glengyle*, the *Hermes* was made fast along the port side. The *Glengyle* was beached in Getares Bay at 6 a.m. on the 26th, her engine-room and stoke-hole being then full of water and Nos. 3 and 4 holds having 15ft. of water in them. After she was beached the holes in her side were patched by divers, and the pumping gear of the salving steamers was set to work, and at night the *Glengyle* was floated, and on the 27th was taken to Gibraltar Bay, where further work was done by the divers to the damaged places and the pumping was continued till the 28th, when the *Glengyle* was able to keep the water down with her donkey pump. All the allegations in the statement of claim are admitted except that alleging abandonment, and upon that point, from what took place before me at the hearing, I conclude that although the master, crew, and passengers were compelled to leave the ship for their safety, it was not intended to abandon her if assistance could be obtained. In salvage cases it is not uncommon for the defendants to admit the facts alleged by the plaintiffs but not the inferences sought to be drawn therefrom. In this case facts and inferences are both admitted, and it is not suggested that the plaintiffs' statements are exaggerated. The value of the *Glengyle*, her cargo, and freight, as salvaged, has been agreed at £76,596. The Court is now asked by the owners,

masters, and crews of the *Hermes* and *Newa* to award to them salvage remuneration for the services they have rendered. It will be seen from the admissions made in this case that it presents to the admissions made most of the elements which affect the judgment of the Court in estimating the amount of a salvage award. The *Glengyle*, her cargo, and freight were rescued from certain total loss, and were of the very large value above stated. It was only owing to the prompt and skilful assistance of the *Hermes* and *Newa* that the *Glengyle* was or could have been saved. There were no other vessels which could have rendered this assistance, and I may add that if the *Hermes* and *Newa* had not had steam up and been thus enabled to proceed to the *Glengyle* at once, the *Elder Brethren* consider she would in all probability have sunk before they reached her. The values of the *Hermes* and *Newa* were large—viz., £22,000 and £20,000 respectively, and these vessels and the lives of those on board were exposed to grave danger. The salvors, therefore, might have sustained serious loss, and if they had not succeeded in saving the *Glengyle* they would have been without any right to compensation. The time occupied in rendering the services was only about three days, but the skill displayed by the salvors was high and the labour expended obviously severe. There is the further important element in this case—that the *Hermes* and the *Newa* have been built and are maintained solely for the purpose of rendering salvage services. The two foreign companies above mentioned have had the enterprise to establish these two steamers at Gibraltar and to keep them ready to render salvage services at a moment's notice. An immense traffic, principally British, I believe, passes through the Straits of Gibraltar, and the general interests of navigation and commerce are protected by provision being made for the rendering of prompt and efficient assistance to lives and property in danger in that locality and the adjoining seas. Lord Stowell said in the "*William Bakford*" (3 C. Rob., at p. 356):—"The principles upon which the Court of Admiralty proceeds lead to a liberal remuneration in salvage cases; for they look not merely to the exact quantum of service performed in the service itself but to the general interests of the navigation and commerce of the country which are greatly protected by exertions of this nature." These principles have been emphasized in many cases by different Judges of the Admiralty Court. The remarks of Sir Charles Butt in the "*Envoy*" (33 *Shipping Gazette* Weekly Summary, p. 134), in a case of salvage services rendered by steam tugs, are very appropriate to the present case. He said:—"To my mind one of the most important functions of this Court is to encourage the maintenance of powerful and efficient steam tugs around our coasts to be in constant readiness to assist vessels in distress. Not only in the course of the year is a large amount of property saved by these means, but a considerable sacrifice of life is prevented. Therefore, the principle we go upon is not that of a *quantum meruit* but of giving such an award as will encourage people to keep vessels of adequate size and dimensions ready to go out." The maintenance and establishment of salvage steamers such as the *Hermes* and the *Newa* is for the general benefit of owners and underwriters and others interested in sea-going vessels and their cargoes and the crews and passengers of such vessels, and, guided by the principles above stated, the Admiralty Court will be liberal in its awards in respect of services rendered by salvage steamers, even though the awards may fall somewhat heavily on individual owners. The owners of salvage steamers invest a large amount of capital in them, and maintain them and their crews, divers, and appliances at great expense, and they have

no remuneration to look forward to except that which may be earned by occasional salvage services. It remains for me to notice the argument of the plaintiffs' counsel, that his case for a liberal award was better even than those of salvors of derelicts, who, although there is no rule as to the proportion to be awarded in such cases, have been awarded a moiety of the value of the salvaged property in some instances and frequently as much as one-third, because in the present case the loss of the *Glengyle* was certain, unless the plaintiffs had assisted her, whereas in most of the cases of derelicts the vessels, though abandoned, were still floating, and might continue to float, and the danger to them was only of probable loss, varying in degree of probability, but not of certain loss. Probable loss, no doubt, represents a degree of danger to property less than certain loss, but the aforesaid argument did not sufficiently take account of the fact that far less proportions than those above mentioned have been awarded in cases of derelict where the value of the property salvaged was large. An illustration of this is the case of the "*Amerique*" (L.R., 6 P.C., 463). The reason is that a small proportion of a large value may adequately remunerate salvors, whereas it may require a much larger proportion of a small value to do so. The value salvaged is an element—an important element—in considering the amount to be awarded, but the Court must not be induced by it to award a sum which is out of proportion to the services of the salvors. Having carefully considered the circumstances of this case and the elements found to exist in it, and especially that the owners or underwriters of this very valuable property have been protected against the certain loss of their interests by services rendered at the risk of the lives and property of salvors in the peculiar position of the plaintiffs, I have come to the conclusion, with the assistance of the *Elder Brethren* of the Trinity House who have sat with me, that a proper remuneration to award to the plaintiffs, the owners, the masters, and crews of the *Hermes* and *Newa* is the sum of £19,000, and I pronounce accordingly. I was asked to apportion the sum which I should award to the *Hermes* and *Newa*. The Court sees no reason for preferring the one to the other, and therefore I apportion the said sum of £19,000 in equal moieties.

As to the claim of the tugs *Hercules* and *Nellie* his Lordship awarded a sum of £500.

[Solicitors—W. Crump and Sons; Hollams, Sons, Coward, and Hawkey.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) }

1897.
Dec. 7.

KING'S NORTON METAL COMPANY (LIMITED) v. EDWARDS, MERRETT, AND COMPANY (LIMITED)—SAME v. ROBERTS AND ANOTHER.*

Sale of Goods—Contract—Fraud—Goods obtained by fraud—Vesting of property.

A person who obtains goods under a contract of sale by false pretences can, until the contract is disaffirmed, give a good title to the goods to a *bona-fide* purchaser for value.

This was an application by the plaintiffs in both these actions for a new trial. The actions were tried before Mr. Justice Cave and a special jury at Birmingham. The facts were similar in each action, and it is only necessary to state them in one. The question was, which of two innocent parties should suffer on

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

account of the fraud of a third person. The action was brought to recover damages for the conversion of one ton of brass rivet wire. The plaintiffs were metal manufacturers at King's Norton, Worcestershire, and the defendants, in the first action, were metal merchants at Birmingham, and the defendants in the second action were pin manufacturers at Leeds. It appeared that in 1896 the plaintiffs received a letter purporting to come from Hallam and Co., Soho Hackle Pin and Wire Works, Sheffield, at the head of which was a representation of a large factory with a number of chimneys, and in one corner was a printed statement that Hallam and Co. had depôts and agencies at Belfast, Lille, and Ghent. The letter contained a request by Hallam and Co. for a quotation of prices for brass rivet wire. In reply, the plaintiffs quoted prices, and Hallam and Co. then by letter ordered some goods, which were sent off to them. These goods were never paid for. It turned out that a man named Wallis had adopted the name of Hallam and Co., and fraudulently obtained goods by the above means, and that Wallis sold the goods to the defendants, who bought them *bona fide*, and with no notice of any defect of title in Wallis. It appeared that the plaintiffs had been paid for some goods previously ordered by Hallam and Co., by a cheque drawn by "Hallam and Co." The plaintiffs brought this action to recover damages for the conversion of these goods. At the trial, the learned Judge nonsuited the plaintiffs upon the ground that the property in the goods had passed to Wallis, who sold them to the defendants before the plaintiffs had disaffirmed the contract.

Mr. JELF, Q.C., and Mr. H. STUBBINS (Mr. CRACROFT with them), for the plaintiffs, contended that the case ought to have been left to the jury, the question for them being whether the plaintiffs intended to make any contract with Wallis, and intended to pass the property in the goods to him. The jury ought to have been asked whether Wallis was Hallam and Co. The plaintiffs intended to contract with Hallam and Co., who were represented to be a firm with a world-wide trade, but who, in reality, were non-existent, and they never intended to deal with Wallis at all, of whom they had never heard, and never intended to pass the property to him. It was like the cases of "*Cundy v. Lindsay*" (3 App. Cas., 459), "*Higgins v. Burton*" (26 L.J.Ex., 342), "*Hardman v. Booth*" (1 H. and C., 803). It was not like the case of an individual carrying on business under a trade name, who intended to make a contract for the purchase of the goods, because here Wallis never had any intention of entering into contracts, but only wished to get hold of these goods by a trick. It was really larceny by a trick, part of the trick being that the first small parcel of goods should be paid for, and the property never passed. They also referred to "*Rex v. Barnard*" (7 C. and P., 784), "*Reg. v. Middleton*" (L.R., 2 C.C., 38), "*Reg. v. Buckmaster*" (20 Q.B.D., 182), "*Reg. v. Russett*" ([1892], 2 Q.B., 312), "*Henderson v. Williams*" ([1895], 1 Q.B., at p. 531).

Mr. HUGO YOUNG and Mr. M'CARDIE, for the defendants, contended that upon the evidence it was clear that Wallis was for some time carrying on business in Sheffield as Hallam and Co., and the goods in question were delivered to Wallis as Hallam and Co. In "*Cundy v. Lindsay*," where the House of Lords held that there was no contract, there were two persons besides the person defrauded, and the latter intended to sell his goods to one and not to the other. That case was followed in "*Higgins v. Burton*" and "*Hardman v. Booth*." In the present case there was only one person, and the contract was made and intended to be made with him, and the property passed to him. They also referred to "*Clough v. London*

and North Western Railway Company" (7 Ex., 26)

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said that the case was a plain one. The question was whether the plaintiffs, who had been cheated out of their goods by a rogue called Wallis, or the defendants were to bear the loss. The law seemed to him to be well settled. If a person, induced by false pretences, contracted with a rogue to sell goods to him and the goods were delivered the rogue could until the contract was disaffirmed give a good title to the goods to a *bona fide* purchaser for value. The facts here were that Wallis, for the purpose of cheating, set up in business as Hallam and Co., and got note-paper prepared for the purpose, and wrote to the plaintiffs representing that he was carrying on business as Hallam and Co. He got the goods in question and sold them to the defendants, who bought them *bona fide* for value. The question was, With whom, upon this evidence, which was all one way, did the plaintiffs contract to sell the goods? Clearly with the writer of the letters. If it could have been shown that there was a separate entity called Hallam and Co. and another entity called Wallis then the case might have come within the decision in "*Cundy v. Lindsay*." In his opinion there was a contract by the plaintiffs with the person who wrote the letters, by which the property passed to him. There was only one entity, trading it might be under an *alias*, and there was a contract by which the property passed to him. Mr. Justice Cave said that this was nothing more than a long firm fraud. Did any one ever hear of an attempt being made by a person who had delivered his goods to a long firm to get his goods back on the ground that he had made no contract with the long firm? The indictment against a long firm was always for obtaining the goods by false pretences, which presupposed the passing of the property. For these reasons there was no question to go to the jury, and the non-suit was right.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Belfrage and Co., for Reece and Harris, Birmingham, for the plaintiffs; Field, Roscoe, and Co., for Smith, Pincent, and Co., Birmingham, and Speechly, Mumford, and Co., for Rooke and Midgley, Leeds, for the defendants.]

Q.B. Div. (Hawkins and }
Channell, JJ.)

1897.
Dec. 7.

DRISCOLL V. POPLAR BOARD OF WORKS.*

Negligence—Subsidence of road—Gas explosion—Heavy steam roller—Liability for state of road.

This was an appeal from a judgment of a County Court Judge in favour of the plaintiff who had been injured by an explosion of gas last year. The facts were these. A steam roller weighing from 13 to 15 tons belonging to the Poplar Board of Works, passing along Wade's-place, broke a gas main laid under the road. The gas escaped into the drains, and a sanitary inspector who was testing some drains in a house by means of a rocket fired the gas, which exploded and injured the female plaintiff, who was in the street. The husband and wife brought an action in the County Court, claiming alternatively against the gas company and the board of works. However, on a summons being taken out by both defendants, the plaintiffs had to elect which they would proceed against, and they elected to continue against the board of works. The result of the action was that the County Court Judge found for the

plaintiffs. It was stated by one witness, though it did not appear in the Judge's notes, that in his opinion there must have been a subsidence of soil underneath the gas pipe, otherwise it could not have broken.

Mr. Lawson Walton, Q.C., and Mr. Abinger appeared for the appellants, the Poplar Board of Works; Mr. W. Thompson for the plaintiffs.

MR. LAWSON WALTON argued that the board of works were not liable. It was not their duty to know that a subsidence had taken place. They might assume that the gas company had taken all necessary precautions and made all necessary examinations. He cited "The Gas Light and Coke Company v. St. Mary Abbot's" (15 Q.B.D., 1). The roller used would not have been too heavy if the subsoil had not been moved. The gas company must lay their mains in such a way that they could stand ordinary steam rollers.

The COURT upheld the decision of the County Court Judge in favour of the plaintiffs.

MR. JUSTICE HAWKINS said the plaintiffs brought an action to recover damages for a serious injury occasioned by reason of a gas explosion alleged to have been caused by the negligence of the defendant board. The plaintiffs lived in Wade's-place, a road repaired as to the roadway itself by the defendants. It was said that in repairing the road they used a very heavy steam roller and caused one of the mains of gas to break, with the result that there was an escape of gas which ultimately culminated in the explosion which caused the injury. It was said that the defendants were not responsible even if the roller did break the pipe, on the ground that they could not be responsible unless some negligence was shown. The surveyor spoke as to the condition of the road, and suggested that there might have been a subsidence of the soil beneath the gas main. The counsel who was present at the trial had told this to the Court, and he had pressed the point before the County Court Judge. That made it clear that the attention of the County Court Judge had been directed towards that question. The facts were these:—The gas main had been properly laid, and had been in position 40 years without damage. The defendants repaired the road. They did not seem to have inquired as to the depth at which the gas pipes were laid or the condition of the road. The steam roller used by the defendants weighed from 13 to 15 tons, and it was at or very near the *maximum* statutory weight allowed to be used. The County Court Judge had found that the road was perfectly safe for ordinary traffic, and that a roller of less weight might have gone over the road and the gas main. He also found negligence on the part of the defendants, and that the fracture was caused by their steam roller. The County Court Judge had all the matters before him. The sole question for the Court was whether there was any evidence on which he could come to the conclusion he had arrived at. It could not be said there was no evidence. All the real elements of the case were before the County Court Judge, and his decision must be upheld.

MR. JUSTICE CHANNELL concurred. He thought there was ample evidence on which the County Court Judge might find as he had done. Even assuming for the purposes of this case that it was the duty of the gas company to ascertain and to replace any subsidence of soil under the mains—though as to that the learned Judge would express no opinion—the County Court Judge had evidence on which he could find that the use of a heavy roller on roads where there were gas mains which had not been touched for 40 years was negligence. The appeal must be dismissed.

[Solicitors—G. E. Philbrick, for Haynes and Co., for the defendants; Griffith and Gardiner, for the plaintiff, respondent.]

Prob., Divorce, and Adm. Div. (The
Right Hon. the President, Sir } 1897.
Francis Jeune.) Dec. 7.

CADELL AND ANOTHER V. WILCOCKS AND OTHERS.*

Probate—Revocation of will—Partial revocation—Exercise of limited power of appointment—Subsequent wills partially inconsistent—Execution of power not revoked.

This case was argued before the Court on December 1 and 2, and the President delivered judgment.

The plaintiffs, as executors of Mrs. Lucy Biddulph, of Tiverton, claimed probate of three testamentary documents, the first of which had been made by the deceased in exercise of certain powers of appointment contained in the will of her father, Mr. Robert Bickerstaffe, dated December 8, 1838. The three testamentary documents above referred to were dated April 26, 1890, July 5, 1894, and September 5, 1895. The deceased died on August 29, 1896. The defendant, Lucy Biddulph Colclough, the granddaughter of the deceased, set up in her defence through her guardian *ad litem*, she being a minor, that the true last will of the testatrix was the will of September 5, 1895, and alleged that the will of July 5, 1894, revoked the will of April 26, 1890, and was in turn itself revoked by the will of September 5, 1895. The defendants—Mrs. Anne Adela Waller Wilcocks, Mr. Middleton Biddulph, and Mr. Assheton Biddulph—alleged that these three testamentary documents were not properly executed in accordance with the provisions of 1 Vict., c. 26., and alternatively adopted the defence of the other defendant.

Mr. BARGRAVE DEANE, Q.C., and Mr. Barnard appeared for the plaintiffs; Mr. Inderwick, Q.C., and Mr. Priestley appeared for the defendant, Miss Lucy Biddulph Colclough; and Mr. Lambert Bond for Mrs. Anne Adela Waller Wilcocks, Mr. Middleton Biddulph, and Mr. Assheton Biddulph.

MR. BARGRAVE DEANE, Q.C., after opening these facts, said that by the will of April 26, 1890, the testatrix had bequeathed to her daughter Gertrude the sum of £4,000 absolutely for her sole use and benefit, being the sum left to her (the testatrix) by the will of her father, Robert Bickerstaffe. After leaving a legacy to her steward, she provided that the residue should be divided among her children, the defendants. In the will of July 5, 1894, the following words appeared:—"I give to my daughter Gertrude Louisa, now the wife of Nevill Pottow Cadell, the sum of £4,000." By the will of September 5, 1895, she disposed of all her real, freehold, and personal property to Gertrude Louisa Cadell, and, in the event of her predeceasing the testatrix, it was provided that the property should go to Mr. Nevill Cadell. In the first will, therefore, it was clear that a direct reference was made to the fund from which the £4,000 bequeathed should be derived. The testatrix was there obviously executing her power of appointment given her under the will of her father, but neither in the second will nor in the third will was there any reference to this power of appointment whatsoever. Again, the second will did not expressly revoke the first will, nor the third the second. His contention, therefore, was that these two latter wills were not valid exercises of the powers of appointment, and that the fact of executing two later wills did not amount to the revocation of the execution of the power which she had undoubtedly exercised in the first will. The question, therefore, that the Court was asked to determine was what in these circumstances amounted to a revocation of the execution

of this power of appointment. It was necessary to have the question decided whether the last will revoked the earlier wills, as if the will of 1890 was revoked then the power of appointment under her father's will had not been exercised, and the £4,000 would go to the persons entitled under the father's will in default of appointment. The law required that, where a person had a power of appointment relating to a specific fund, a specific revocation of the execution of that power should be made. No general revocation was sufficient. Here there was no clause of revocation in either the second or the third will, and as the wills were not inconsistent in themselves it was submitted that all three should be admitted to probate. The learned counsel, in the course of an elaborate argument, said that the judgment of Sir James Wilde in the case of "Lemage v. Goodban and Others," reported in L.R., 1 P. and D., 57, expressed very plainly the argument he wished to address to the Court. It was there held that if a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both of the papers are entitled to probate. Where there are two testamentary papers, each professing in form to be the last will of the deceased, the Court in determining whether one or both are entitled to probate must be guided by the consideration, not whether the testator intended them both together to form his will, but what disposition of his property he designed to revoke or retain. In deciding upon the effect of a subsequent will on a former disposition this Court has to exercise the functions of a Court of construction. The principle applicable is well expressed in Mr. Justice Williams's book on Executors. He says the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former, as to those parts only, where they are inconsistent. The will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing duly executed according to statute. And, as a will if contained in one document may be of several sheets, so it may consist of several independent papers each so executed. This Court has been in the habit of admitting to probate such and as many papers (all properly executed) as are necessary to effect the testator's full wishes and of solving the question of revocation by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain. Again, in the eighth edition of Williams on Executors, at page 179, these words appear:—"In 'Richardson v. Barry,' 3 Hagg, 249 (a case before the new Statute of Wills), the deceased had power under a trust deed to dispose of certain effects by a will attested by two witnesses. And it was held that a will executed accordingly was revoked by a subsequent will directly referring to the trust deed and containing an express revocatory clause duly executed, but attested by one witness only." "In the goods of Merritt" (1 S. and T., 112), "E.H., a married woman, in 1846 duly made a will in execution of a general power of appointment, disposing of certain stock and appointing executors thereof. In

1855 she made another will without the consent of her husband, disposing of certain other property under her marriage settlement, and of other articles. It did not refer to the general power under which the will of 1846 was made, nor to the stock thereby appointed; but it contained a general revocatory clause and named a different executor. It was held that the 27th section of the Wills Act was intended to enlarge the dispositive power of testators, and has no bearing on questions of revocation, that the revocatory clause in the will of 1855 being in general terms and containing no reference to the general power in execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will."

Mr. Inderwick, Q.C., said that he appeared in the interest of the infant, Miss Lucy Biddulph Coldclough, the grand-daughter of the testatrix. The argument, which he hoped to be able to sustain by authorities, shortly came to this. If a woman has power to appoint with reference to a special fund that appointment must be a special appointment. Secondly, if a special appointment was made it was necessary that it should be revoked by special revocation. With regard to the cases cited by the other side, what he had to say about them was this, that they did not appear to coincide with the view that the Court of Appeal took upon the point. If the will of 1890 had simply left the sum of £4,000 to the daughter without reference to the power of appointment, then the will of 1894 which gave a legacy of £4,000 would have revoked the will of 1890, no matter whether the £4,000 was left as a legacy or under the power of appointment.

The PRESIDENT.—Do you say that the second will is an execution of the power?

Mr. Inderwick, Q.C.—No. In the case of "Jones v. Tucker" (2 Mer., 533), a case of Sir William Grant's, the words in the will there, "I will and bequeath the sum of £100, &c.," were held not to be an execution of the appointment. In the will of 1895 the residue was to go solely to the testatrix's child Gertrude, who was the mother of the infant defendant whom he (the learned counsel) was representing, but if the Court held that the execution of the power of appointment had been revoked and admitted the three documents to probate she would only take half the residue. There were several cases to show that a gift of the residue does not execute a power of appointment. This was fully borne out by Lord Thurlow's judgment in the case of "Andrews v. Emmot" (2 Brown, 297). Lord Eldon in 1802 approved of this in the case of "Narrock v. Horton" (7 Ves., 390). In the case of "Sotharan v. Dening" (L.R., 20 Ch. D., 99), which was taken up to the Court of Appeal, there was a general clause in the will revoking all former wills, and it was held to revoke a prior testamentary appointment. In that case also there were three wills as in the present case. In the case of "In re Kingdon, Wilkins v. Pryer" (L.R., 32 Ch. D., 604), a testamentary appointment was revoked by a clause of revocation and by the gift of the residue. And again in "Foulkes v. Williams" (L.R., 42 Ch. D., 98), where the will contained no reference to the special power, or to the property comprised therein, the Court of Appeal held that the general gift did not execute a special power of appointment. The fallacy of the argument urged by the other side lay in assuming that the power of appointment by deed was the same as a power of appointment by will. It was not the same thing, but a totally different thing altogether. If the appointment was by deed and was revocable it could be revoked by deed, but if the appointment was made by will the appointor could revoke it as often as he liked. The case of "In the

goods of Merritt" showed clearly that even if a will is destroyed it does not thereby necessarily destroy the power of appointment. This view was also borne out by Sir Creswell Creswell in the case of "In the goods of Hannah Joys" (4 S. and T., 214).

Mr. BARGEAVE DEANE, Q.C., in reply, argued that in the case now before the consideration of the Court there was no revocatory clause in the wills, whereas in the cases cited by his friend Mr. Inderwick there were. Further, it was enacted by section 27 of the Wills Act (1 Vict., c. 26) that a general gift shall include estates over which the testator has a general power of appointment, and section 18 of the same Act expressly states that wills shall be revoked by marriage, except wills made in exercise of a power of appointment. In "Hughes v. Turner" (4 Hagg., Ecc., 52) the residuary clause in the latter will in that case, it would seem, was not a due execution of the power, and the revocatory clause there would not have revoked the prior will unless the intention had been clear.

The PRESIDENT, in delivering a considered judgment, said,—The question in this case is, Which of the three wills, made respectively on April 26, 1890, July 5, 1894, and September 5, 1895, by the testatrix, Mrs. Lucy Biddulph, should be admitted to probate? The father of the testatrix, Robert Bickerstaffe, left £16,000 among his four daughters in equal shares for life, with power of appointment to each of them by will amongst her children, and in default of appointment to her children equally. At the time of the will of 1890 the testatrix had two daughters, Anne, then married, and Gertrude, then single, and three sons, Middleton, Assheton, and Franc. By the will of 1890 the testatrix, after revoking all previous wills, gave her daughter Gertrude the sum of £4,000 absolutely for her sole use and benefit, describing it as "being the sum left to me by the will of my father the late Robert Bickerstaffe." She then bequeathed £50 to her steward Finton M'Donald and the residue of her property to her five children equally, and appointed her sons Middleton and Assheton executors. It was agreed in argument before me that this was a good execution by the testatrix of the limited power of appointment vested in her by the will of her father. Between the wills of 1890 and 1894 the daughter Gertrude married Mr. Nevill Cadell and I understand that the sons Middleton and Assheton received a benefit under the will of an uncle, the testatrix's brother. By her will of 1894 the testatrix bequeathed to her daughter Gertrude "the sum of £4,000 for her own absolute use and benefit and to dispose of as she may think fit." She then gave £50 to her steward Finton M'Donald and the residue of her property to her children Franc and Gertrude equally, and appointed Franc, Gertrude, and the said Nevill Cadell executors. Between the wills of 1894 and 1895 Franc, the son of the testatrix, and also the steward died. A letter of the testatrix containing her instructions for the will of 1895 was produced to me, but I do not think it material. By the will of 1895 the testatrix made a bequest to her daughter Gertrude in these terms—"All the property, real, freehold, or personal, wheresoever situate of which I may die seized or possessed for her own absolute use and benefit and to dispose of as she may think fit"; and gave the same in case of her daughter predeceasing her to her daughter's husband, Nevill Cadell, and appointed her daughter and Mr. Cadell executrix and executor. Neither the will of 1894 nor the will of 1895 contained any words of revocation; and it was admitted, for the purposes of the argument before me, that neither the terms of the will of 1894 nor those of the will of 1895 were sufficient to effect a valid execution of the limited power of appointment vested in the testatrix. I think that this case is

governed by the familiar principle of law stated in "Williams on Executors" (9th ed., p. 138), and approved by Lord Penzance in "Lemage v. Goodban" (L.R., 1 P. and D., 87), that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one unless the latter expressly or in effect revoked the former, or the two be incapable of standing together; and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent. In this case there was clearly no express revocation, in whole or in part, of the will of 1890 by either the will of 1894 or the will of 1895. I assent to Mr. Inderwick's contention that had there been a general clause of revocation in either the will of 1894 or that of 1895 it would have revoked the whole will of 1890, including the execution of the power contained in it. The opinion, indeed, of the delegates in the case of "Hughes v. Turner" (4 Hagg., Ecc., 50), if correctly reported, would appear to be to the effect that a clause of revocation *per se* does not revoke the portion of an earlier will which has executed a power; and "In the Goods of Elizabeth Merritt" (1 S. and T., 112) and "In the Goods of Hannah Joys" (4 S. and T., 214) Sir Creswell Creswell expressed a similar opinion. It might be considered doubtful whether the case of "Sotheran v. Denning" (L.R., 20 Ch.D., 99) in the Court of Appeal overruled those authorities because weight was given to the consideration which arose in that case that by virtue of the 27th section of the Wills Act a general bequest operated on the subject matter of the power of appointment, and so strengthened the evidence in favour of an intention to revoke its previous execution. But in "In re Kingston" (L.R., 32 Ch.D., 604) the question of revocation by a general revocatory clause arose simpliciter, there being no subsequent provision relating to the subject matter of the power in question, and Mr. Justice Kay, acting on the authority of "Sotheran v. Denning," held that a will executing a power was revoked *in toto* by general words of revocation in a subsequent will. The effect of Mr. Justice Kay's decision is, I venture to think, that, on this point of law, common sense at last prevailed. I cannot understand why express words revoking all previous wills should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents. But in the present instance there are no express words to revoke the will of 1890. Next, is there anything in the wills of 1894 or 1895 inconsistent with the execution of the power in the will of 1890, or, in other words, is there anything that by implication effects a revocation of that execution? It is not necessary to consider whether if the power of appointment in this case had been general, and not as it was, limited, the general bequest in the wills of 1894 and 1895 would have been not only by virtue of the 27th section of the Wills Act effectual to execute the power, but also sufficient to revoke a previous execution of it. It is, I think, clear that these general words of bequest, which do not execute the limited power, as the 27th section of the Wills Act has no application, cannot revoke or affect its previous execution. The wills of 1890 and 1895 can, therefore, stand together, and, subject to proof in common form, there should be probate of both of them. The will of 1894 I regard as revoked by that of 1895, as both wills profess to deal with the whole of the testatrix's own property.

On the application of Mr. Inderwick, Q.C., and Mr. Bond, the PRESIDENT directed that defendants' costs should come out of the appointed fund.

[Solicitors—Boxall and Boxall; Clarke and Blundell.]

Consistory Court of London (Dr. Tristram, } 1897.
Q.C., Chancellor of London) } Dec. 7.

ST. MARK'S, MARYLEBONE—FULLER (CLERK) AND
JOHNSTON V. BISHOP AND OTHERS.*

Ecclesiastical Law—Parish church—Removal ordered of ritualistic alterations erected without faculty—Confirmatory faculty of others—Platform of Holy Table.

In this suit the CHANCELLOR now gave judgment. He said on June 5 last Mr. Thomas Bishop, the people's churchwarden of St. Mark's, Marylebone, and other parishioners, filed a petition alleging that the Rev. Morris Fuller, B.D., the vicar, had made the following alterations in the church without a faculty—viz., the taking down and removal of the Communion rails from the chancel, the erection of a side chapel with a re-table (the same in defiance of a warning sent to him by the Archdeacon of Middlesex), the erection of "Stations of the Cross," and using the same, covering portions of the east chancel walls with curtains so as to hide the Ten Commandments, the Apostles' Creed, and the Lord's Prayer engraved thereon; the removal of two gas standards from the chancel; permanently covering the stained glass window at the east end of the chancel and a side window with outside blinds, thereby obstructing the lights in the church; placing a large crucifix over the pulpit and, in opposition to a resolution of the vestry, removing the Holy Table belonging to the church and erecting another in its place, with a reredos, in the centre of which, on a box, was placed a cold brass crucifix. They prayed the Court to decree a faculty requiring the vicar to restore the church to its former state, and to condemn him in the expenses and costs incidental to the faculty. Before a citation at the suit of the petitioners had issued the vicar and his churchwardens filed a counter-petition praying the Court to decree a faculty confirmatory of those alterations, and for convenience the suits were consolidated. The case was heard on August 20 and 23, when he (the Chancellor) reserved judgment until he should have had an opportunity of inspecting the church, which he had since had. At the hearing Mr. Shearman-Turner appeared as counsel for the vicar, and Mr. Bishop conducted the case of the parishioners in person. The district was formerly included in the parishes of St. Mary, Bryanston-square, and St. Luke's, Nutford-place. Twenty-seven years ago, at the instance of Dr. Fremantle, now Dean of Ripon, who was then rector of St. Mary's, Bryanston-square, it was by an Order of Council separated from these parishes and constituted a separate parish for ecclesiastical purposes, having a new church and parsonage erected for the purpose, with an endowment of £200 a year assigned to the vicar by the Ecclesiastical Commissioners. The population of the parish, which consisted exclusively of small tradesmen, artisans and working men, and the inmates of a Church of England Servants' Home and of a Christian Union almshouse, amounted to 4,500, and the church had accommodation for between 500 and 600 persons. Mr. Bellewes was the first incumbent of the parish, and he remained so for 23 years. During his incumbency the services were non-ritualistic, and during the greater part of his time the attendance at the morning services averaged from 250 to 300, mostly parishioners, and the church at the Sunday evening services, when there was a curate who was popular as a preacher, was nearly full. In the summer of 1893 Mr. Bellewes effected an exchange of his living with Mr.

Fuller. During the first few months of his incumbency Mr. Fuller made no changes in the service and gave general satisfaction to the parishioners, and the congregation was increasing Sunday after Sunday up to Christmas, 1893, when he introduced a new ritual, and had a procession during which incense was burned and the Holy Table was censured. Many of the parishioners then left off attending the church, and the attendance of the parishioners gradually fell off until the congregation, which now averaged from 200 to 250, with four or five exceptions, was composed of non-parishioners. The reasons assigned to Mr. Bishop by the parishioners for having ceased to attend their parish church were the introduction of the new ritual and of the ornaments objected to in the present suit. The introduction of the Stations of the Cross and of five crucifixes into the church were the additions which had given the greatest offence to the parishioners. The question of the legality of introducing Stations of the Cross into an English church came under the consideration of Lord Penzance in the Court of Arches in "*Clifton v. Ridsdale*" (L.R., 1 Prob. Div., 359). In that case his Lordship made an order (from which there was no appeal) for their removal on two grounds—first, that they had been set up in St. Peter's Church, Folkestone, without a faculty; and, secondly, that it had been clearly established by two authoritative devotional books of the Roman Catholic Church that these representations were to the present day authorized objects of adoration in that Church, and yet Mr. Ridsdale had put them up in a church of the Church of England and asked the Court to say that they were architectural decorations only and of a lawful character. His Lordship added:—"I think they are neither. Some of them, if they stood alone, may be unobjectionable in themselves, but the entire set of 14, viewed as a whole and in relation to their well-known history, must be regarded, I think, as likely (if not intended) to be used for the purposes for which they always have been used, and not for the mere purpose of decorating the church." In the case before the Court it was suggested for the vicar that they were placed against the north and south walls of the church merely for decorative purposes. But it was established in evidence that they were used on special services on Wednesday evenings in Lent for superstitious purposes. Mr. Searfe, who had attended the church for 27 years, in his evidence said:—"I have witnessed the services at the Stations of the Cross. On last Ash Wednesday evening I was present at this service. On entering the church a book was handed to me and to the majority of the congregation containing the whole service of the Stations of the Cross, the same as the one put in evidence in Court. A procession was formed by an acolyte bearing the crucifix, and two acolytes with lighted candles, and eight of the choir-boys holding this book, and several little girls, and three grown-up persons. The two boys held, as they went round to the stations, the candles one on each side of each picture, all the rest kneeling down before it, and by their attitude they appeared to me to be in superstitious adoration of the picture. After saying a few prayers before each picture and singing a few lines they proceeded to another picture and did the same thing. The curate (Mr. H. Ley) led them. There were from 20 to 30 persons there, besides those who formed the procession. I heard the prayer to the Virgin Mary read by the curate before the station containing a representation of the Virgin Mary. It is as follows:—
'O Mary, Blessed Mother of my God, thou bearest in thine arms thine only Son now dead, who often rested His Head asleep on thy breast. Pray for us that as thou holdest Him lifeless in death He may bear us up in the hour of our death in His everlasting arms.' I

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

also heard the boys give the response, 'Hail, Mary,' after the reading of the prayer from the book (third edition), which is entitled, 'Catholic Prayers for Church of England People,' and is bound up with the Prayer-book. In the preface to the second edition the compiler says:—'In this there are many additions most of which have been asked for or suggested to him. They are nearly all in the Catholic direction and from Catholic books. There is in our midst such a plethora of Protestant piety that we felt enlargement in this little book must be on these lines. It is not for a moment maintained that all the prayers are in accordance with the Book of Common Prayer; by the very terms of their issue they are an addition to it.' In his preface to the third edition he says:—'This edition has resulted in several little alterations, but the main matter is the same as before, the principal additions being the vespers for the dead and of our Blessed Lady and the Prayer of the Pope for the unity of Christendom.' " Mr. Scarfe's evidence of these Stations of the Cross having been used superstitiously was confirmed by that of Mr. Bishop. In the case of St. Peter's, Folkestone, there was no evidence of the Stations of the Cross placed in that church ever having been so used, but Lord Penzance nevertheless ordered their removal on the ground that if they were not intended they were likely to be so used. In the present case, as there was clear evidence of their having been so used, it was imperative on the Court to make an order for their removal. As to the crucifixes, on inspecting the church he observed that four had been placed there—one on a box on the centre of the chancel reredos, another on the wall above and immediately behind the pulpit, another on the north wall of the church, and a fourth on the reredos in the side chapel. There was no judicial decision binding on the Court to the effect that a crucifix might be set up or placed in a church as a lawful church ornament. The figure of Our Saviour on the Cross as forming the central figure of the historical representation of the momentous scene of the crucifixion of Our Lord was held by the Judicial Committee of the Privy Council in the Exeter reredos case to be lawful as a church decoration. The judgment in the case of "Westerton v. Liddell" stated:—"Upon the whole, their Lordships, after the most anxious consideration, have come to the conclusion that crosses as distinguished from crucifixes have been in use as ornaments of churches from the earliest periods of Christianity; that when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, they may still lawfully be erected as architectural decorations of churches; that the wooden cross erected on the chancel screen of St. Barnabas is to be considered as a mere architectural ornament, and that, as to this article, they must advise her Majesty to reverse the judgment complained of. Their Lordships hope and believe that the laws in force respecting the consecration of any building for a church which also forbid any subsequent alteration without a faculty from the ordinary will be sufficient to prevent any abuse in this respect." But, for the purpose of the order which the Court was about to make in respect of the crucifixes placed by the vicar in the church, it was sufficient to observe that crucifixes at the time of the Reformation were enjoined to be removed from all churches as tending to superstition; that their introduction as ornaments into our churches had not the sanction of the Rubrics or the Canons; that their exclusion from our churches as ornaments had been ratified by the practice of nearly three centuries and a half; that the people's churchwardens and the parishioners of this parish who were members of the Church of England conscientiously objected to their being retained in their church, and assumed their introduction as a reason

for their refusal to attend Divine service. He took it that an ecclesiastical Judge, in the exercise of the discretionary power intrusted to him in relation to allowing or disallowing unprescribed ornaments in a church, should have regard to the fact that in our national Church there always had been and always would be large numbers of its members whose views on ornaments as well as on questions of doctrine within certain limits were not in harmony, and that he should make such orders in reference to the introduction of unprescribed ornaments into a parish church as would not be likely to give fresh cause of offence to any of the parishioners, to whatever party in the Church they might belong. There were three minor alterations which had been made by the vicar to which the parishioners with reason objected.

(1) The covering with curtains of the Ten Commandments, the Lord's Prayer, and the Apostles' Creed, which were carved on the east wall of the chancel on either side of the Holy Table. These curtains should be removed. (2) The removal of two gas standards which had been fixed on the chancel floor for the purpose of assisting to lighten the body of the church. (3) The placing of permanently fixed blinds over the east window and over a side window in the chancel. Both these alterations obstructed the lighting up of the body of the church. The reason assigned for the removal of the two gas standards was that they overheated the chancel, and that they had been replaced by new or loftier gas lights. But black shades had been inserted at the back of these new lights, so that the whole of their light was reflected on to the Holy Table or reredos, but none into the body of the church. The reason assigned for placing external blinds over the stained glass chancel windows was that the rays of the sun sometimes penetrated into the chancel to the inconvenience of the clergy and choir. But any such inconvenience might be remedied by the substitution of inside blinds fitted up to be drawn down whenever there might be occasion for doing so. There would also be an order for the replacement of the two gas standards in their former or in some equally convenient site in the chancel, to be lighted when required for the better lighting of the body of the church, and for the removal of the outside blinds at present fixed over the chancel windows. There remained for consideration two other alterations made by the vicar without a faculty, the first of which was the removal of the Communion rails and the Holy Table into the vestry and the substitution of a new movable Holy Table made of wood with a handsome reredos above it. That last alteration was made by the vicar within a week of the vestry having passed a unanimous resolution in disapproval of the change. On inspecting the church Mr. Bishop directed his attention to a box in the centre of the reredos which he stated, when first erected, was constructed to open on hinges, and his impression was that it had been so constructed with a view to placing in it the Reserved Sacrament; but at that time the hinges had been removed, and it was closed. He also directed his attention to the platform on which the officiating minister stood when officiating at the Communion Service not having been extended round the north end of the Holy Table, so as to preclude a minister from officiating there. His attention had been previously directed by the Archbishop of Canterbury (when Bishop of London) to that omission in the restoration of some chancels in the diocese and to the importance of seeing that it was rectified, so as to give every minister the option of officiating at the north end. The removal of the Communion rails and the Holy Table and the substitution of a new one without a faculty was done in contravention of ecclesiastical law. But on inspecting the church he came to the conclusion that the new Holy Table and reredos were artisti-

cally an improvement to the chancel, and the old Communion rails were not in harmony with them, and that, subject to the box in the reredos remaining closed and the platform being extended round the north end of the Holy Table, there was no reasonable objection to their remaining. In 1866, in the case of "Sieveking and Evans v. Kingsford" (36 L.J., Eccl. Div., p. 1), which was very similar to the present, Dr. Lushington, in the Archdeacon Court, allowed by a confirmatory faculty a Holy Table which had been introduced by the clergyman of the parish into the chancel, in opposition to a vote of the vestry, to remain as an improvement to the church, which was a precedent for his doing so in the present case. The erection of a side chapel with a Holy Table in it in the north aisle of the church by the vicar without a faculty, notwithstanding his being warned by the Archdeacon of Middlesex that in so doing he was violating the law, was also objected to by Mr. Bishop. It had been the practice in the diocese for some time past for the Court to grant faculties for the erection of a side chapel in a church with a Holy Table in it, for the celebration of early Communion to small congregations, when the Court was satisfied on evidence that it would be a convenience to the congregation and minister, and a saving of expense, subject to the chapel being separated from the church by trellis work or otherwise, so that it should have the appearance of being a chapel and not a side altar, such as was usual in Roman Catholic churches. It appeared in evidence that the average attendance at early Communion was about 12, and that it was of convenience that there should be a side chapel for that purpose in the church. The Court would be prepared to grant a faculty confirmatory of retention of the present side chapel with the Holy Table in it subject to its being further separated from the church by trellis work on a plan to be approved of by the Court. There would be an order on the vicar to remove the "Stations of the Cross," the crucifixes, the outside blinds from the chancel windows, and the curtains covering the Ten Commandments, the Lord's Prayer, and the Apostles' Creed, and directing him to make a return to the Court of what he had done in the matter within six weeks from this date: and a confirmatory faculty would issue to him in respect of the new Holy Table, reredos, and side chapel, subject to his making the alterations in them already mentioned. The vicar would have to pay all the costs incidental to the above orders and the faculty hereby decreed.

Mr. SHEARMAN TURNER, who appeared for the vicar and the vicar's churchwarden, gave notice of appeal.

[Solicitors—Brooks, Jenkins, and Co., for Vicar and Vicar's Churchwarden.]

Q.B. Div. (Wright and } 1897.
Kennedy, J.J.) } Nov. 2.

GALLAGHER V. RUDD AND OTHERS, STOCKTON-ON-TEES JJ.

Licensing Acts—Closing Hours—Theatres—
Licensing Act, 1872 (35 & 36 Vict., c. 94), s. 72
(4)—Licensing Act, 1874 (37 & 38 Vict., c. 49),
ss. 3, 9.

This was a case stated by the quarter sessions of the county of Durham. Upon the hearing of an appeal to quarter sessions by John Gallagher, the appellant, against a conviction made on the 28th day of January, 1897, by the respondents, Justices of the Peace for the borough of Stockton-on-Tees, for that the appellant on the 23rd day of January, 1897, at the borough of Stockton-on-Tees aforesaid, during a certain time, to wit, at 11 20 in

the evening of the said day, at which time premises for the sale of intoxicating liquors elsewhere than in the metropolitan district, or a town as defined by the Licensing Act, 1874, are directed to be closed in pursuance of the said Act, unlawfully did open certain premises, called the Theatre Royal, licensed for the sale of intoxicating liquors by retail, for the sale of intoxicating liquors contrary to the statute in such case made and provided, by which conviction the appellant was fined, and which said appeal came on for hearing at the general quarter sessions of the peace held in and for the county of Durham on the 7th day of April, 1897. The Court dismissed the said appeal subject to a case. The appellant was the manager of the Theatre Royal, at Stockton-on-Tees. The respondents are Justices of the Peace of Stockton-on-Tees. On the 2nd of September, 1896, the appellant was granted a licence to keep open the theatre for the public performance of stage plays therein, pursuant to the Theatre Act, 1843 (6 and 7 Vict., c. 68). The licence allowed him to keep open a certain building called the Theatre Royal, situate at Stockton-on-Tees, as and for a house and place of public resort for the public performance of stage plays, under the provisions of the statute aforesaid, for the space of 12 calendar months from the date hereof; provided that the said John Gallagher do observe and keep the rules for insuring order and decency at and in the said theatre, so licensed by us, the justices; and for regulating the times during which the said theatre shall be open. The material rules were as follows:—1. The theatre shall be closed every Sunday (Christmas Day, Good Friday) and days appointed for a public fast and thanksgiving. 2. The theatre shall be closed every Saturday night at the hour of half-past 11. On 11th of October, 1896, the appellant was granted a theatre excise licence under 5 and 6 Will. IV., c. 39, and 43 and 44 Vict., c. 20, to sell intoxicating liquors by retail in the said theatre. The licence was to sell by retail in the Theatre Royal spirits, wines, sweets, made wines, mead, metheglin, beer, cider, and perry, from the day of the date hereof until the 10th day of October next ensuing in accordance with the terms of the licence granted. . . . On the evening of Saturday, 23rd of January, 1897, the theatrical performance concluded at the said theatre at 10 55 p.m., but the appellant kept one of the said theatre bars open for the sale of intoxicating liquors until 11 20 p.m., at which time two police officers entered the theatre by a door at the back (the public entrance being closed) and found between 30 and 40 people at the bar behind the dress circle. All the persons present in the said bar were either persons who were employed in the performance or had been *bona fide* attending the performance as spectators at the said theatre that evening. The appellant was convicted as aforesaid by the respondent justices and fined in the nominal penalty of 3s. 6d. and costs. The borough of Stockton-on-Tees aforesaid is a town within the meaning of the Licensing Act, 1874. The question for the opinion of the Court is whether, under the circumstances, the appellant was guilty of an offence against section 9 of the Licensing Act, 1874.

Mr. R. Luck, for the appellant, said the Justices were wrong; the conviction was under the Licensing Act, 1874, ss. 3 and 9, but that Act had by section 1 to be read as one with the Licensing Act, 1872, and, therefore, the exemption given by section 72 of the Act of 1872 applied to the provisions of the Act of 1874. There was no implied repeal of that section. [He referred to *Seward v. Vera Cruz*, 10 App. Cas. 59; 49 J. P. 324.]

Mr. Simley appeared for the respondent.—The theatre licence granted to the appellant contained no restriction

as to the closing of the theatre except on Sundays. If the contention of the appellant was correct, the theatre might be kept open for the sale of intoxicating liquors at times when the publichouses were shut. The exemption given by the Licensing Act, 1872, s. 72, only exempted the proprietor of a theatre from obtaining a licence from the justices, and it referred only to the sale of beer. If not, it exempted him from the necessity to sell by imperial measure or from the penalties for adulteration. [He referred to "Tassell v. Oven-den," 3 Q.B.D. 383; 41 J.P. 710.] Section 25 of the Licensing Act, 1872, did not come within the exemption.

[MR. JUSTICE WRIGHT suggested that the exemption was put in to save the power of the Lord Chamberlain.]

Mr. Luck replied and referred to "Reg. v. Commissioners of Inland Revenue, 21 Q.B.D. 369; 52 J.P. 390.

MR. JUSTICE KENNEDY said, I have been asked by my brother Wright to state my views first upon the case. My opinion on the whole is that the conviction was right. We have to deal in this case with what construction ought to be put on section 72 (4) of the Licensing Act, 1872 (35 and 36 Vict. c. 94), which is an exemption clause. The clause itself is simple, "Nothing in this Act shall affect or apply to the sale of intoxicating liquors by the proprietors of theatres in pursuance of the Acts on that behalf." The question is, whether that ought to be construed in its widest sense—viz., that nothing in the Act is to affect the sale of intoxicating liquors by the proprietor of a theatre, or whether it should be limited to the special rights and privileges given to theatre proprietors by Act of Parliament in that behalf. There are a number of other exemptions given by this same section 72, with regard to the sale of beer and intoxicating liquors on packet boats and at canteens; but, without referring to any other exemptions, the correct view seems to me to be that theatre proprietors are affected by this exemption to this extent, that they are not bound to go to the justices for a licence. The question in this case arose as follows. The learned Judge stated the facts, and continued:—I think, on the whole, there is nothing to protect the proprietor under these circumstances. I see no balance of convenience on either side of the question, but I think that the construction I place on the section is wiser than leaving the sale of drink in theatres free from any restrictions whatever imposed by the Licensing Acts. I think, therefore, the first interpretation I mentioned of the section is the right one, and the conviction must be affirmed.

MR. JUSTICE WRIGHT said, I think the whole question is surrounded with much difficulty, but on the whole I think my brother Kennedy's interpretation is the right one. By the Licensing Acts, 1872 and 1874, many restrictions are placed on the sale of intoxicating liquors. Those Acts are to be read together, and, therefore, any exemption given by one Act must apply equally to the provisions of the other. There are three possible meanings to the exemption clause—(1) that theatres are to be absolutely free from all restrictions; (2) that they are to be exempted from all restrictions concerned with the sale of intoxicating liquors; (3) the construction suggested by my brother which is an exemption from interference with the provisions of Acts regulating theatres, and the words might, therefore, have run—nothing in this Act shall affect or apply to Acts affecting or regulating the sale of intoxicating liquors in theatres. Our decision only applies to this exemption, and not to the others given by the Act in the same section.

[Solicitors—Hackard and Morris, for T. Malkin, Stockton-on-Tees, for the appellants; Archer and Parkin, Stockton-on-Tees, for the respondent.]

Judicial Committee of the Privy Council } 1897.
(Lords Watson, Hobhouse, Mac- } Dec. 8.
naghten, Davey, and Sir R. Couch)

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA V. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO.*

Privy Council Appeals—Canada—Provincial bar of Ontario—Lieutenant-Governor—Right to appoint Queen's Counsel and grant patents of precedence.

This was an appeal from a judgment of the Court of Appeal of Ontario of November 10, 1896, which answered, adversely to the claim of the Dominion of Canada, certain questions referred to it by the Lieutenant-Governor of Ontario for hearing and consideration.

Mr. Haldane, Q.C., Mr. M'Tavish, Q.C. (of the Canadian Bar), and the Hon. Frank Russell were counsel for the appellant; Hon. Edward Blake, Q.C. (of the Canadian Bar), and Mr. Irving, Q.C. (of the Canadian Bar), for the respondent.

The arguments were heard in July last before a Board consisting of the Lord Chancellor, Lord Watson, Lord Macnaghten, Lord Morris, Lord Davey, Sir Henry De Villiers, and Sir Henry Strong, when judgment was reserved.

LORD WATSON, in now delivering their Lordships' judgment, said on March 29, 1873, the Legislature of the Province of Ontario passed two Acts, entitled respectively, "An Act respecting the appointment of Queen's Counsel" and "An Act to regulate the precedence of the Bar of Ontario." Those statutes were consolidated and their provisions re-enacted by cap. 139 of the Revised Statutes of Ontario passed on December 31, 1877. The Act of 1877 made regulation for the qualification of barristers-at-law and their admission to practise at the Bar in her Majesty's Courts of law and equity in Ontario. It declares that it "was and is lawful for the Lieutenant-Governor, by letters patent under the Great Seal of the Province of Ontario, to appoint from among the members of the Bar of Ontario such persons as he may deem right to be, during pleasure, provincial officers under the names of her Majesty's Counsel learned in the law for the Province of Ontario." It also enacted that the Lieutenant-Governor, by letters patent under the Great Seal of Ontario, might grant to any member of the Bar a patent of precedence in the Courts of Ontario. In virtue of the authority thus conferred upon him, the Lieutenant-Governor had, from time to time, exercised the right of issuing letters patent, in her Majesty's name, to members of the provincial Bar. By the Canadian Act, 28 Vict., cap. 11, which established a Supreme Court, and a Court of Exchequer for the Dominion, all persons who were barristers or advocates in any of the provinces were permitted to practise as barristers, advocates, or counsel in the Supreme Court; and the same enactment had been repeated in section 16 of cap. 135 of the Revised Statutes of Canada. The Governor-General of Canada had, on various occasions between May, 1879, and January, 1890, issued letters patent, in her Majesty's name, under the Great Seal of Canada, by which he appointed certain members of the provincial Bar of Ontario to be Queen's Counsel; and, on those occasions, the letters patent did not specify any territory or Court for which the appointment was made, or in which it was to receive effect. The Government of Ontario did not appear to have at any time disputed that it was within the exclusive competency of the Governor-General of Canada to

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

appoint members of the Bar to the rank of Queen's Counsel in the Courts of the Dominion; but it had carefully refrained from making the concession that the Governor-General had any right to appoint Queen's Counsel for the province from the provincial Bar. On the other hand, the Dominion Government had persistently maintained that the appointment of Queen's Counsel to represent her Majesty, whether in the Canadian or in the provincial Courts, involved an exercise of the Royal prerogative, which belonged to the Governor-General of the Dominion. The main reason put forward in the appeal by the Attorney-General of the Dominion was to the effect that "the Lieutenant-Governor of Ontario does not entirely represent the Crown in respect of the prerogative rights of the Crown, and, in particular, does not represent the Crown in respect of the prerogative right or power of appointing Queen's Counsel for Ontario or granting patents of precedence in the Courts of Ontario." In order to ascertain whether he was legally justified in issuing those patents the Lieutenant-Governor, availing himself of the provision of the Provincial Act, 53 Vict., cap. 13, referred five separate questions to the Court of Appeal for Ontario for hearing and consideration. The Attorney-General for the Dominion appeared and took part in the discussion, and the Court, consisting of Chief Justice Hagarty, with Justices Burton, MacLennan, and Street, answered four of the queries in the affirmative, with the effect of sustaining the legality of the action of the Lieutenant-Governor. No answer was made to the fifth query, which was framed upon the assumption of the other queries being answered in the negative. In order to explain the issue raised by the appeal it was sufficient to refer to the first query—viz., whether since March 29, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario, by "Letters Patent under the Great Seal of Ontario, (a) to appoint from among the members of the Bar of Ontario such persons as he deems right to be during pleasure her Majesty's Counsel for Ontario; (b) to grant to any member or members of the Bar of Ontario a patent or patents of precedence in the Courts of Ontario." The second and third queries related to the validity of the rights conferred upon the patentees, and presented the same questions in a different aspect. The fourth query related to the question of precedence, in the Courts of Ontario, between those members of the Bar who were the holders of patents of precedence and those who were not. The points thus referred to the determination of the Court of Appeal did not directly raise any controversy in regard to the jurisdiction and power of the Governor-General of Canada; they were strictly limited to the rights of the Lieutenant-Governor of Ontario to appoint Queen's Counsel from the provincial Bar, whose functions were limited to the province, and to grant patents entitling the holder to take precedence at the Bar of the provincial Courts. The appointment of Counsel for the Crown and the granting of precedence at the Bar to certain of its members were matters which did not appear to their Lordships to stand upon precisely the same footing. In England the first of those rights had always been matter of prerogative in this sense—that it had been personally exercised by the Sovereign, with the advice of the Lord Chancellor, the appointment being made by letters patent under the sign manual. In early times the appointment was accompanied with a fee or retainer of moderate amount, but that formality had long since fallen into abeyance. The terms of the patent had been limited to appointing the grantees to be of counsel for the Sovereign, subject to the condition that they were to take precedence *inter se* according to the priority of their appointment. Royal patents of precedence *inter se* were in use to be granted to serjeants-at-law

who did not derive their position from the Crown (see Note 16, C.B., N.S., 1). Beyond those limits the Sovereign had never, in modern times, professed to confer upon Crown Counsel, or other members of the Bar, a right of precedence or pre-audience in the Courts of England. These were matters which were regulated by practice, either by the discretion of the Bench, or by the courtesy of the profession. The effect of an appointment as Queen's Counsel was that the holder could not appear in Court as counsel for any party litigating with the Crown, unless he had obtained a licence from her Majesty. The exact position occupied by a Queen's Counsel duly appointed was a subject which might admit of a good deal of discussion. It was in the nature of an office under the Crown, although any duties which it entailed were almost as unsubstantial as its emoluments, and it was also in the nature of an honour or dignity to this extent, that it was a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it was conferred. But it did not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the Bar to the rank of Queen's Counsel could not be delegated by the Crown, and could only be effected by the direct personal act of the Sovereign. Even in the case of titles of honour, it did not appear to be doubtful that the Sovereign might, with the assistance of an Act of the Legislature, exercise the prerogative in a manner which would, but for its provisions, be unconstitutional. It was adjudged by the House of Lords, in the case of the Wensleydale peerage, that it was beyond the constitutional right of the monarch to confer upon a life-peer of any rank whom her Majesty might chose to create the privilege of sitting and voting in Parliament. But life peerages carrying that privilege had since then been created by the Crown, under the authority of, and to the extent permitted by, the Appellate Jurisdiction Act, 1876. In the Province of Ontario the right of appointing Queen's Counsel had been committed to the Lieutenant-Governor by an Act passed by the Provincial Parliament, with the sanction of the Crown. Assuming it to have been within the competency of the Provincial Legislature to vest that power in some authority other than the Sovereign, the Lieutenant-Governor appeared to have been very properly selected as its depositary; seeing that, by section 65 of the British North America Act, he was intrusted with the whole executive powers, authorities, and functions which before the Union had been vested in or were exercisable by the Governor or Lieutenant-Governor of the Province of Canada, in so far as those powers, authorities, and functions might be necessary for the government and administration of the new Province of Ontario. The next and only other point requiring to be considered was whether the Legislature of Ontario had jurisdiction to confer upon the Lieutenant-Governor those powers which were now embodied in the revised statute of December, 1877. That was a question which could only be solved by reference to the provisions of the Imperial Act of 1867; and there were three of the enactments of section 92 which appeared to their Lordships to have an immediate bearing upon it. The first head of that clause gave to the Legislature of each province exclusive authority to make laws from time to time for the amendment of the constitution of the province, "except as regards the office of Lieutenant-Governor," and by (4) of the same clause "the establishment and tenure of provincial offices and the payment of provincial offices." Again, by the 14th head, the Legislature was empowered to make laws in relation to the administration of justice in the province, "including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal

jurisdiction, and including procedure in civil matters in these Courts." By the combined effect of those enactments it was entirely within the discretion of the provincial Legislature to determine by what officers the Crown, or, in other words, the executive Government of the province, should be represented in its Courts of law or elsewhere, and to define by Act of Parliament the duties, whether substantial or honorary, which were to be incumbent upon those officers, and the rights and privileges which they were to enjoy. The revised statute of 1877, in so far as it related to the appointment of Queen's Counsel, was, in the opinion of their Lordships, within the limits of that legislative authority; and, that being so, there appeared to them to be no ground for the suggestion that its provisions, when given effect to by the Lieutenant-Governor, would constitute an encroachment upon the prerogative of the Crown or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing counsel to represent the Sovereign may have been delegated. On the other hand, the enactments of section 92 (14) conferred upon the provincial Legislature, in wide and general terms, power to regulate the constitution and organization of all Courts of law in the province, civil or criminal. It was no doubt true that with two exceptions—those being the Courts of Probate in Nova Scotia and New Brunswick—the appointment of the Judges of the Superior, District, and County Courts in each province was committed to the Governor-General of Canada by section 96, subject to the condition that until the laws of the provinces were made uniform these Judges must be selected from the Bar of the province in which the appointment was made; and, by section 100, the right to fix the salaries, allowances, and pensions of those Judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, was vested in the Parliament of Canada, upon which there was also imposed the duty of providing the salaries, allowances, and pensions so fixed. But in all other respects the Courts of each province, including the Judges and officials of the Court, together with those persons who practised before them, were subject to the jurisdiction and control of the provincial Legislature. That Legislature, and no other, had the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors. Their Lordships, in these circumstances, did not entertain any doubt that the Parliament of Ontario had ample authority to give the Lieutenant-Governor power to confer precedence by patent upon such members of the Bar of the province as he might think fit to select. For those reasons their Lordships would humbly advise Her Majesty to affirm the decision appealed from. Following the rule which had been hitherto adopted in similar cases, they would make no order as to costs.

[Solicitors—Barrow and Rogers, for the appellant; Pyke and Parrott, for the respondent.]

Court of Appeal (Lindley, M.R., } 1897.
Chitty and Vaughan Williams, L.JJ.) } Dec. 8.

IN RE THE MASKELYNE BRITISH TYPE WRITER
(LIMITED)—STUART V. THE SAME COMPANY.*
Company—Debenture-holder's action—Receiver
—Appointment of a receiver not in the interest
of the debenture-holders—New appointment by
the Court.

This was an appeal against an order made by Mr. Justice Ridley (as vacation Judge) on October 14 last,

and a subsequent order made by Mr. Justice North on November 13 last, in Chambers, consequential on the first order. The action is brought by a holder of some of a series of debentures, to the amount in the whole of £8,578, issued by the above company, the plaintiff suing on behalf of himself and the other holders of those debentures (except the London and Northern Debenture Corporation) against the company, to enforce their security. The Maskelyne Company were incorporated in June, 1896. Mr. J. M. Maclean, M.P., was the chairman of the company, and also of the London and Northern Corporation. In July, 1897, the company were in want of money, and they applied to the corporation for an advance, which the corporation agreed to make on the terms of having debentures of the company issued to them for the amount of their advance, the bargain being that the debentures should contain certain special conditions, among which were the following:—(4) "The principal moneys hereby secured shall become payable immediately on the happening of any of the events hereinafter specified, and on demand of payment by the registered holder hereof—viz. (*inter alia*) (c) If a distress is levied upon any of the property of the company, and it is not satisfied or secured within two days, or if any of the property of the company is sold under any distress." (5) "At any time after the principal moneys hereby secured shall have become payable according to the tenure of this debenture or under these conditions, the London and Northern Debenture Corporation (Limited) or (if that corporation is not then a debenture-holder) the registered holder as within defined of this debenture may by writing appoint one or more persons to be a receiver or receivers of all or any part of the property hereby charged in like manner in every respect as if such corporation or registered holder were a mortgagee within the meaning of the Conveyancing Act, 1881, and had become entitled under that Act to exercise the power of sale thereby conferred, and every receiver so appointed shall have and be entitled to exercise all powers conferred by the Act, as if such receiver had been duly appointed thereunder, and in particular, by way of addition to, but without hereby limiting, any general powers hereinafter referred to, every such receiver so appointed shall have power to do the following things—viz. (*inter alia*) (a) Take immediate possession of the property or any part thereof; (b) carry on any business or businesses of the company." These conditions were inserted in the debentures (for £1,174) issued to the corporation, as well as in all the other debentures issued by the company, of which debentures to the amount of £1,870 were issued to the plaintiff Stuart in respect of advances which he had made to the company. In this way all the debenture-holders had notice of the special condition as to the appointment of a receiver on which the corporation had insisted. On September 30 last a petition to wind up the company was presented by the corporation as shareholders in the company. This petition was afterwards withdrawn. In October a creditor recovered judgment against the company and levied a distress on the company's property. This distress was not satisfied or secured within two days. On October 4 the company passed a resolution to wind up voluntarily, and this resolution was afterwards confirmed on October 20, and Mr. Akers, the secretary of the company, was then appointed voluntary liquidator. On October 6 the plaintiff, Stuart, demanded payment by the company of his debentures, and payment not being made, on the same day he issued the writ in this action. On October 14 the corporation demanded payment of their debentures, and payment not being made they, on the same day, in exercise of the power conferred on them by the debentures, appointed Mr.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

Akers receiver. He went into possession, and so remained until he was displaced by the order of Mr. Justice North, as will presently appear. At a later hour on October 14 a motion by the plaintiff, Stuart, for the appointment of a receiver was heard by Mr. Justice Ridley. The motion had been in the Court list for the previous day, but had not then been reached. The motion was opposed (though the corporation were not then parties to the action) on the ground that a receiver had been already appointed under the power. The learned Judge said that under these circumstances he could not appoint a receiver. It was then suggested that he should appoint Mr. Akers receiver, which he accordingly did, the order appointing him in the usual form on his giving security. Akers did not consent to this order, but insisted that he was receiver under the appointment made by the corporation. He did not give security as required by the order, but nevertheless he remained in possession. On October 16 Mr. Maclean wrote to the solicitor of the Maskelyne Company as follows:—"I am glad to find that you approved of the appointment of Mr. Akers as receiver. We were reluctant to use our authority as debenture-holders until we were forced to do so by Mr. Stuart, and have only intervened in order to protect our interests as the largest shareholders in the company. These interests are the same as those of the whole body of shareholders. I hope it may still be possible for us to save the concern." On November 1 an order was made by Mr. Justice Vaughan Williams to continue the winding up of the company under the supervision of the Court, and Mr. C. F. Kemp was appointed liquidator, Mr. Akers retiring in his favour. On November 15 Mr. Justice North, upon a summons issued by the plaintiff, Stuart, on the ground that Akers had not complied with the order of the Court that he should give security, made an order appointing Mr. Walter Freire Marreco receiver and manager upon his giving security. This having been done Mr. Akers went out of possession. The corporation appealed from both the orders of October 14 and November 15.

Mr. VERNON SMITH, Q.C., and Mr. W. F. HAMILTON, for the corporation, insisted on their right under the power to appoint a receiver.

Mr. SWINFEN EADY, Q.C., and Mr. F. WHINNEY, for the plaintiff, argued that, in appointing Mr. Akers, the corporation and Mr. Maclean, then chairman, had been really acting in the interest of the shareholders of the company and not in that of the debenture-holders, and that, under the circumstances, Mr. Akers was not a proper person to be appointed, and the Court was justified in making another appointment.

Mr. HAMILTON replied on behalf of the corporation.

The Court dismissed the appeals.

The MASTER of the ROLLS said that the whole case turned on the admissibility in evidence of Mr. Maclean's letter of October 16 and the inference to be drawn from that letter if it was admissible. The bargain between the company and the debenture-holders, and the bargain between the debenture-holders themselves, was that, if the money secured by the debentures became payable, the corporation should have power to appoint a receiver. As between the company and the corporation there was nothing to be said. But on whose behalf was this power conferred? All the debentures were to rank *pari passu*, and the power was one which, as between themselves and the other debenture-holders, the corporation were bound to exercise for the benefit of all the debenture-holders. They could not do as they liked with it. They were trustees of the power for the other debenture-holders. There was a quarrel between the debenture-holders. If it was true, as the plaintiff alleged, that the corporation were using the power

not in the interest of the debenture-holders, but in that of the mortgagees and of themselves as shareholders, the case was unanswerable in law and in principle. The Court had jurisdiction to interfere, not adversely to the power of appointing a receiver, but in order to carry out the bargain with the debenture-holders. This was the case alleged on behalf of the plaintiff, and it was unanswerable if it was made out. It was alleged that Mr. Maclean was acting in the matter as the agent of the corporation, and his own affidavits showed that this was so. His letter was, therefore, admissible in evidence against the corporation. The meaning of that letter was, "We have appointed Mr. Akers receiver, not to protect the interests of our fellow debenture-holders, but to protect the interests of the shareholders in the company." The letter showed that the appointment was not made in the interest of the debenture-holders at all. His Lordship regretted that Mr. Maclean was now out of England, and could not, therefore, be heard to explain his letter. But the Court must act on the evidence as it stood. This being so, the case alleged by the plaintiff was made out, and it was not only within the jurisdiction of the Court, but it was fit and proper for the Court to exercise its jurisdiction, to protect the plaintiff from such an exercise of the power of appointing a receiver. The appeals must be dismissed with costs.

LORD JUSTICE CHITTY agreed. He thought that the jurisdiction of the Court to appoint its own officer to protect the assets was clear. It was said that if it exercised this power it would be setting aside the bargain between the parties. But the power was clearly not one which was to be exercised for the benefit of the donee. Generally, such a power as this was to be found in a trust deed of some kind. In the present case it was clear on the face of the debenture itself that the power was the subject of agreement not only with the mortgagees, but with all the mortgagees. It was a fiduciary power, and must be exercised *bona fide* for the benefit of all the debenture-holders and for their protection. His Lordship was of opinion that Mr. Maclean's letter was admissible in evidence against the corporation, and that it was found that the power had not been properly exercised. The power did not oust the jurisdiction of the Court, though the Court would pay great attention to it.

LORD JUSTICE VAUGHAN WILLIAMS expressed his concurrence.

[Solicitors—Baker, Blaker, and Hawes; Chester, Mayhew, and Co.]

Q.B. Div. (Hawkins and }
Channell, JJ.) }

1897.
Dec. 8.

MOULT V. HALLIDAY.*

Master and Servant—Domestic servant—Termination of service at end of first month—Notice—Custom—Reasonableness—Return of written character.

This was an appeal from the Westminster County Court raising the question whether a servant is entitled to give notice at any time in the first fortnight of her service so as to enable her to leave at the end of the first month. The County Court Judge held that there was no such custom. He also held that it was unreasonable, and therefore gave judgment for the defendant.

Mr. Tyrrell Paine appeared for the servant, the appellant; Mr. Boydell Houghton for the defendant.

The facts were these. On March 12 the plaintiff,

* Reported by H. RUSSELL, Esq., Barrister-at-Law.

Julia Moulton, who had entered the service of Mrs. Halliday as upper housemaid on March 1, gave notice to leave on April 1. Mrs. Halliday claimed one month's notice and refused to pay the plaintiff's wages, though she offered her six weeks' wages if she would stay ten days later. The plaintiff then brought the action, claiming £2 6s. 8d. for her month's wages. The plaintiff at the trial said that she had been a servant for 14 years, and gave evidence of the custom set up. She called several people experienced in managing servants and in carrying on servants' registries to corroborate it. She was supported in the action by Hunt's Registry Office.

MR. TYRRELL PAINE, on behalf of the plaintiff, admitted that there was no such custom as he was trying to enforce laid down in the text books or authorities, but it was a long time before the Courts took cognizance even of the custom of giving the month's notice or a month's wages. The case of "*Williams v. Byrne*" (7 A. and E., 177) showed that it was not quite settled in 1837, but by 1845 it was established, as "*Turner v. Mason*" (14 M. and W., 112) proved. Such a custom, however, did not exclude the custom for which he contended. The matter had frequently come before County Court Judges and they had taken different views. County Court decisions, however, would not appear in the Law Reports. The custom for which he contended was this—A right either in the master or servant, in the absence of a special contract, to determine the service at the end of the first calendar month by notice given at or before the expiration of the first fortnight of service.

MR. JUSTICE HAWKINS asked whether, if the master, on the first day of the service, gave a fortnight's notice to go the servant would be entitled to stay to the end of the month?

MR. TYRRELL PAINE said his contention was that that would be so. He referred to "*Wigglesworth v. Dallison*" (9th ed. Smith's Leading Cases at p. 582). The custom was reasonable. Where a master and servant as soon as they began to know each other thought they were unsuitable to each other this custom enabled them to separate at an early date after finding it out.

MR. BOYDELL HOUGHTON contended that there was no such custom in existence. It probably came from the idea that the first month was always one of trial. The suggestion as to the fortnight's notice was put on in order to make it appear reasonable, probably by Hunt's Registry, which was really fighting this case. As early as 1800 the custom of one month's notice was established. He cited "*Metzner v. Bolton*" (9 Ex., 518). If the custom in question had existed as suggested there would have been some notice of it in the books. The ascertainment of what the contract was was a question of fact for the County Court Judge.

MR. JUSTICE HAWKINS asked whether it was not reasonable that in the first month a fortnight's notice should be given? On the arrival at a new place it might almost at once be found out whether the place was likely to suit the servant or the servant the master.

MR. BOYDELL HOUGHTON submitted that from the master's point of view a month was a more reasonable time for notice in any event. The demand for good servants exceeded the supply; a master might well require a month to fill up the place of the servant who had left, even though a fortnight might be enough to enable a servant to get a situation. The way out of the difficulty would be for the agency to put on a card the terms of this custom. The servant might show it to the master, and then both would know what they were agreeing to.

MR. TYRRELL PAINE, in reply, cited "*Ex parte Powell—In re Matthews*" (1 Ch. D., 501) and "*Crawcour v. Salter*" (18 Ch. D., 30, at p. 53).

The Court dismissed the appeal as being a decision on a question of fact.

MR. JUSTICE HAWKINS said he regretted that the judgment of the Court on the case would not settle the law on the question which the parties desired to have settled. The question was one of fact, and they had no power to say that the custom set up by the plaintiff had been recognized enough to enable the Court to take notice of it. The learned Judge for himself did not say that it did not exist; he would have been glad to have heard the whole of the evidence, with additional evidence if necessary, on the matter, but the law had made the County Court Judge the sole judge of fact. If he found as a fact that there was no such custom this Court could not reverse his finding. On that ground, therefore, and on that alone the appeal must be dismissed. There was evidence before the County Court Judge which would have justified him in coming to the conclusion that the custom prevailed. But there was no obligation on him to come to that conclusion, and his decision could not be upset. Some mode might easily be devised whereby this little settled question might be settled between the actual parties in each case. As to the reasonableness of the question and with the view to dispose of one point, he had no hesitation in saying that the custom would not be unreasonable if it existed. He could see certain advantages in it. He would add one word as to the custom which had been suggested before the County Court by the servants' registry—namely, that if a servant left at the end of the first month she had a right to have the character with which she came handed over. That was not a reasonable custom. There was no legal obligation to hand over the character. But there was an obligation on a master who gave a servant's character that the character should be true. Supposing, then, that during the month for which the servant who had come with a good character stayed circumstances occurred which showed that the servant was not of good character, it would be deceitful and improper to hand over the old good character.

MR. JUSTICE CHANNELL concurred. He only added a judgment because the case raised points of considerable general interest. A custom was alleged. Now what was the nature of it. To be any good it must be a custom which was so notorious and so well understood that it was unnecessary for people doing business together to mention it, as it would be taken to be included in the contract unless expressly excluded. Thus in the engagement of a servant the well-known custom of a month's wages or a month's warning was an instance. It was always a question of fact, however, whether it was such a general custom that it must be taken to be incorporated in the particular contract. If it were sufficiently notorious the Judge would take judicial notice of it. The supposed custom set up in this case was thought to be inconsistent with the custom of terminating the service by a month's notice or a month's wages. But, even if that were the case, it would not matter, inasmuch as a custom grew up from an accumulation of instances, and a custom might therefore change in certain particulars from time to time. Then when the change became sufficiently notorious it would be taken as being included in contracts of service unless it was excluded. But still the custom would have to be proved in each case. Going a stage further the time would come when it would become so universal and so well known that it would not require proof. The custom set up by the plaintiff had gone some way towards being established, but it still remained a question of fact for the County Court Judge, and his finding on it would not be interfered with by the Court. The learned Judge agreed with Mr. Justice Hawkins that the custom set up on behalf of the plaintiff would not be unreason-

able in itself, and also agreed with him in thinking that the fact of a servant leaving within the first month created no obligation on the master to hand over the character of the servant which she brought with her.

[Solicitors—Budd, Johnsons, and Jecks, for the defendant; Dodd and Longstaffe, for the plaintiff.]

Q.B. Div. (Northern Circuit) } 1897.
(Bruce, J.) } Dec. 8.

DOXFORD AND SONS (LIMITED) V. THE SEA SHIPPING COMPANY (LIMITED).*

Solicitor—Audience—High Court—Absence of counsel instructed—Audience of in High Court by leave of Judge.

Mr. Pickford, Q.C., and Mr. Horridge appeared for the plaintiffs in this case; Mr. Shee, Q.C., and Mr. J. Rutherford appeared for the defendants.

The case was commenced on Friday afternoon, the 3rd Dec., and on the Associate's mentioning the cases that were fixed for Saturday's list, Mr. Shee, Q.C., informed his Lordship that his learned junior was obliged to appear in London on that day, and that he himself would be obliged to leave the case for a case in the Crown Court, and asked that the adjourned hearing of the case might be postponed. His Lordship said the case must proceed in the morning, and that if there was any risk of Mr. Shee's having to leave the case another junior should be briefed. After the case had proceeded some short time on Saturday morning, Mr. Shee, who appeared alone without any junior, was obliged to leave. His Lordship, after commenting on the fact that no junior counsel had been briefed, and on being informed by the defendants' solicitor that he had been assured of Mr. Shee's presence, gave leave to the defendants' solicitor to appear for the defendants for the purpose of cross-examination. Mr. Miller, of Miller and Williamson, the defendants' solicitors, cross-examined accordingly. The action was brought for the rescission of an agreement, dated November 12, 1896, entered into between the plaintiffs and defendants whereby the plaintiffs undertook to build a turret deck steamer for the defendants for the sum of £36,500, to be launched and delivered complete by October 31, 1897, or, alternatively, for a declaration that the agreement had not been regularly or validly executed, and in either case for an order for delivery up thereof to be cancelled. The plaintiffs are the well-known firm of shipbuilders at Sunderland, and the defendant company was promoted by or in connexion with William Western Tapscott, trading as W. Tapscott and Co., the manager of numerous single-ship companies, who was recently adjudged bankrupt. The plaintiffs alleged that they were induced to enter into the contract by misrepresentation, or, alternatively, fraudulent misrepresentations, made by W. W. Tapscott, and by one F. J. Pilcher, both acting as agents for and on behalf of the defendant company, to the effect (1) that the defendant company was formed for the purpose of taking over the business of Tapscott and Co., whereas, in fact, at the time the representation was made it was not formed for such purpose, as the firm of Tapscott and Co. had ceased to exist, its business having passed under a deed of assignment for benefit of creditors; (2) that the defendant company, or, alternatively, Tapscott and Co., had had contracts for half a million, which they had never failed to carry out, and that they were fully justified in con-

tracting for the steamer, and were equal to the undertaking of doing so, whereas, in fact, Tapscott and Co. had at that date failed to carry out contracts with Palmers' Shipbuilding Company and with Sir William Gray and Co., and by executing the deed of assignment had made default with their creditors generally. The defendants denied the representations, but did not deny the facts, which were alleged by the plaintiffs as the true facts, and his Lordship refused to admit evidence to prove that the facts were other than those alleged by the plaintiffs. The defendants' case was that, so far as any misrepresentations were made, the plaintiffs were not deceived by them, as they knew the real facts, and that what in fact induced the plaintiffs to contract was the price offered. The defendants having called no evidence, Mr. Pickford replied, and then Mr. Miller, by further leave of his Lordship, addressed the jury. His Lordship left the following questions to the jury. (1) Were the representations made? (2) If so, were those representations material? (3) Were the plaintiffs induced to enter into the contract by those representations? The jury answered all three questions in the affirmative, and his Lordship gave judgment for rescission of the contract.

Court of Appeal (Lindley, M.R., } 1897.
Chitty and Vaughan Williams, L.JJ.) } Dec. 9.

IN RE STEVENS—COOKE V. STEVENS.*

Executor—Administration—Account—"Wilful default."

The Court directed the ordinary accounts to be taken against two executors, but refused to give any relief on the footing of wilful default.

This was an appeal against a decision of Mr. Justice North's, the question being whether an account against executors ought to be taken on the footing of what is technically called "wilful default"—i.e., whether the executors should be ordered to account not only for moneys actually received by them but also for moneys which, but for their wilful default, they might have received on behalf of their testator's estate. The action was brought for the administration of the estate of Mr. G. C. Stevens, who died on December 23, 1882. By his will he appointed three executors—C. F. Stevens, John Sewell, and M. S. Emerson. John Sewell never acted. The will was not proved till October 15, 1889, when probate was granted to C. F. Stevens alone. Emerson did not renounce probate or disclaim the trusts of the will until after the commencement of the action in April, 1894. For some years Emerson took an active part in the administration of the estate. He was a solicitor, and he alleged that he had acted only as the solicitor of his co-executor, C. F. Stevens. Mr. Justice North, however, held that Emerson had really acted as executor, and had made himself liable as such. The plaintiff in the action was a residuary legatee under the will; the defendants were C. F. Stevens and Emerson. Several instances of wilful default were alleged, but only one of them need be noticed. It arose as follows:—Part of the testator's estate was a sum of £676, payable under a policy on his own life. The testator had mortgaged the policy to his bankers, Messrs. Gurney, in whose possession it was at the time of his death. The insurance company declined to pay the policy money without the production of the probate of the will, and it was not, in fact, paid until November 21, 1889, when it was paid, with interest thereon at 1 per cent. from March, 1883. Mean-

*Reported by LESLIE F. SCOTT, Esq., Barrister-at-Law.

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

while the executors had to pay out of the estate interest at the rate of 5 per cent. upon the mortgage debt secured by the policy. The difference between the interest thus paid and the interest received amounted to £157 14s. 8d. The plaintiff sought to make the defendants liable for this sum on the ground that it had been lost to the estate by reason of their wilful default or neglect. Mr. Justice North directed the ordinary accounts to be taken against both the defendants as executors, but he refused to give any relief on the footing of wilful default. The plaintiff appealed.

Mr. Butcher, Q.C., and Mr. Methold were for the appellant; Mr. Swinfen Eady, Q.C., and Mr. Christopher James were for the respondents.

At the conclusion of the arguments on the 11th ult. their Lordships reserved judgment, which was delivered this morning, affirming the decision of Mr. Justice North's, and dismissing the appeal with costs.

The MASTER of the ROLLS said:—In this case a residuary legatee has brought an action against his testator's executors seeking not only the ordinary accounts of their receipts and payments, but also an account against them on the footing of wilful default. So far as the plaintiff seeks to charge them with wilful default the action has been dismissed with costs, and from this decision the plaintiff has appealed. The testator's assets got in by the executors are said not to be sufficient to pay his debts. Hence the importance of the case to the plaintiff. Two acts of wilful default are relied upon and have to be considered. The first is that the executors omitted to get in a debt alleged to have been due to the testator at his death from a person named Clarke. The facts as to this are complicated and the pleadings are somewhat embarrassing. But having regard to the mode in which this part of the case was dealt with in the Court below it would be unjust to the defendants to treat the pleadings as admitting that there was such a debt, and so far as evidence goes no such debt was proved either before Mr. Justice North or before us. The next act of wilful default charged was the omission on the part of the executors to enable a secured creditor of the testator to realize his security sooner than he did. The consequence of this omission was that the testator's estate has been diminished by the amount of interest which would have been saved if the security had been realized sooner. The security was a policy for £375 on the testator's life; he had deposited it with other documents of value with his bankers, and at his death there was due to them on those securities £1,700 odd. The policy was pledged for much more than it was worth. If the executors had in their hands assets sufficient to pay the debts of the deceased, including the debt due to the bankers, the executors ought to have paid the bankers off; and if, instead of doing this, they kept assets in their hands and allowed interest to run up against the estate, and ultimately had to pay more than they would have had to pay if they had not delayed paying the bankers the amount due to them, the executors would have been guilty of a *devastavit*, and would be disallowed the interest thus unnecessarily paid by them. The policy was not assigned to the bankers and they could not give a valid receipt for the policy moneys without the concurrence of the executors. Moreover, the insurance office which had to pay the policy would not pay the bankers, even with the concurrence of the executors, until the testator's will had been proved. For some reason or other the executors did not wish to prove it, and although eventually one of them did prove the will, the other has not proved it yet. As soon as the will was proved the bankers, or, rather, a person to whom they had assigned their debt and their policy, obtained the policy moneys, with the assistance of the executor who had proved, and the debt was reduced by the

amount received from the insurance office. It must not be overlooked that although the executors' accounts have not yet been certified, they have been fully investigated, and there is no proof even now that the executors did wrong in not paying off the bankers and so reducing the policy and getting in the asset which it represented. In the absence, however, of such evidence I am unable to see how a case of wilful default can be established. If debts are paid in the wrong order to the detriment of the creditor the executor is of course answerable. The payment would be disallowed in taking the account of the receipts and payments. But the payment of debts even in a wrong order is not a wrong entitling a legatee to relief, nor does such payment amount to wilful default; and it is wilful default which we have to consider here. It is urged that it is the duty of an executor to prevent any loss to his testator's estate which it is in his power to prevent. But this proposition is far too wide, as is shown *inter alia* by "*Turner v. Turner*" (1 Jac. and W., 39), in which it was held that an executor's right of paying one creditor before another justified him as against a legatee in paying even a simple contract debt not bearing interest in preference to a specialty debt bearing interest, although the estate was diminished by the additional interest which had ultimately to be borne. A wrongful payment is one thing, and can be set right by disallowing it when the executor brings in his account. But if it is sought to charge him with loss attributable to some other breach of duty, call it wilful default or by any other name, such breach of duty must be proved, and if no sufficient proof or even *prima facie* evidence of it is given it is not right to insert in the judgment any declaration of liability or even an inquiry as to liability based upon such supposed breach of duty. In the present case no evidence of any such breach of duty has been given, and the attempt to charge the executors with more than they have received has failed. Whether any payment, by which the executors seek to discharge themselves, ought or ought not to be disallowed must be decided hereafter. That question is not before us now. This appeal fails, and must be dismissed with costs. I have preferred to base my judgment on the above ground rather than to investigate the question whether executors who delay proving their testator's will can be rendered liable for losses which they could have avoided if they had proved it earlier. In the present case the will has been proved by one of the defendants, and the Court, therefore, has the probate before it. The probate shows that both defendants are appointed executors by the will, and it is proved that both of them have accepted the office of executor by acting in the administration of the testator's estate. Under these circumstances I fail to see upon what principle they can derive any benefit from delaying to obtain probate. It appears to me that, having accepted office, they ought to be treated as executors as from that time, and not simply as executors *de son tort*, as their counsel contended. It is unnecessary, however, to pursue this inquiry. The appeal must be dismissed with costs.

LORDS JUSTICES CHITTY and VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—S. S. Seal, for F. T. Stevenson, Dartington; Whites and Co., for M. S. Emerson, Norwich.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.JJ.) }

1897.
Dec. 9.

CROCKER AND OTHERS V. GENERAL INSURANCE COMPANY (LIMITED).*

Insurance—Marine—Voyage—Description in

policy—Construction—Loss, whether covered. Decision of Mathew, J. (2 Com. Cas., 233), affirmed.

This was an appeal by the defendants from the judgment of Mr. Justice Mathew at the trial of the action without a jury (reported in 2 Com. Cas., 233).^{*} The action was brought by underwriters upon a policy of reinsurance upon the ship *Talavera*. The policy was expressed to be on "bull valued as per original policy or policies," "being a reinsurance of policy or policies with Crocker and others subject to the same forms, conditions, and clauses as original policy or policies, whether reinsurance or otherwise, and to pay as may be paid thereon." The risk was described as follows:—"At and from Newcastle (N.S.W.) to any port or ports, place or places, in any order, on the west coast of South America, and for 30 days in port after arrival, however employed, or until sailing on next voyage, whichever may first occur." In the original policy the risk was described as follows:—"At and from Sydney to Newcastle (N.S.W.), while there and thence to any port or ports, place or places, on the west coast of South America and (or) islands adjacent, in any order, once or oftener, while there and thence to any port or ports of call and (or) discharge in the United Kingdom and (or) Continent of Europe between Bordeaux and Hamburg, both included, and for 30 days in port after final arrival, however employed." The ship was totally lost, and the plaintiffs, having paid for a total loss under the original policy, claimed a total loss under the defendants' policy of reinsurance. The defendants denied that the loss was covered by the policy. The *Talavera* sailed on January 5, 1896, from Newcastle (N.S.W.) to Valparaiso with a cargo of coals. The cargo was shipped in the ordinary course of trade, and was intended to be discharged at the vessel's port of destination. The *Talavera* arrived at Valparaiso on February 12, 1896, discharged the whole of her cargo, and remained there for more than 30 days. She loaded at Valparaiso 600 tons of ballast and 150 tons of sugar for Talcahuano, a port on the west coast of South America, where she was to load her cargo for the United Kingdom. While on her way to Talcahuano she became a total loss. Vessels making the voyage from Newcastle to the west coast of South America sometimes discharge their Newcastle cargo at more than one port on the coast. Mr. Justice Mathew held that the loss was covered by the policy and gave judgment for the plaintiffs.

Mr. Robson, Q.C., and Mr. Joseph Hurst appeared for the defendants; Mr. Joseph Walton, Q.C., and Mr. Percy Morris for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether the policy of reinsurances covered the risk on the ship to Talcahuano or only to Valparaiso. The original policy covered a round voyage from Sydney to Newcastle in New South Wales, from there to any port or ports on the west coast of South America, and from there home to the United Kingdom. The policy of reinsurance was intended to cover part of that round voyage, and the question was, How much of it did it cover? There was no doubt as to the *terminus a quo* of the voyage covered by the reinsurance. The point in dispute was as to the *terminus ad quem*. The words of the policy were—"At and from Newcastle, New South Wales, to any port or ports, place or places, in any order, on the west coast of South America." The plaintiffs said that the meaning of this was that the vessel was to be insured up to the last

port on the west coast of South America which she might visit before she started on her homeward voyage. In his opinion that contention was right. Looking at the original policy, at what appeared to be the object of the reinsurance, and at the nature of the voyage, he thought that the *terminus ad quem* was Talcahuano, the port on the west coast of South America from which she was to load a cargo for the United Kingdom. The loss happened before the vessel arrived at Talcahuano, and therefore the underwriters were liable. But the policy did not end there; it continued "and for 30 days in port after arrival, however employed, or until sailing on next voyage, whichever may first occur." That meant for 30 days after arrival at the port of Talcahuano. It was said that Mr. Justice Mathew had transposed the words "however employed" from the clause in which they occurred to the previous clause. He thought it was not necessary to transpose them, but that according to their true construction they applied to both clauses. The plaintiffs therefore in his opinion were entitled to recover.

LORD JUSTICE RIGBY was of the same opinion. It was necessary to observe that this was not the case of an ordinary insurance for a voyage, but that a portion was picked out from a round voyage and made the subject of reinsurance. Authorities had been cited to show that the words "port or ports" used in a policy of insurance as they were used here meant ports of discharge. But in his opinion they ought to be careful not to extend rules of construction to cases in which they were clearly intended not to apply. The words, as used here, must have been intended to apply to ports of loading as well as ports of discharge. With regard to the words "however employed," Mr. Justice Mathew did not transpose them, he merely construed them so as to make them apply to the whole sentence.

LORD JUSTICE COLLINS concurred.

Q.B. Div. (Hawkins and }
Channell, JJ.)

1897.
Dec. 9.

LONDON COUNTY COUNCIL V. DAVIS—LONDON COUNTY COUNCIL V. ROWTON HOUSES.*

Metropolis.—Building.—Consent of County Council—London Building Act, 1894 (57 and 58 Vict., c. cxxiii.).

Certain buildings held not to be dwelling-houses "to be inhabited or adapted to be inhabited by persons of the working classes."

These were two special cases stated by two metropolitan magistrates raising a question as to whether certain buildings were dwelling-houses "to be inhabited or adapted to be inhabited by persons of the working classes" under the London Building Act, 1894, because if they were the owners were affected by the provisions of that Act. The two cases were heard together by consent.

Mr. Avory and Mr. Daldy appeared for the London County Council; Mr. Macmerran, Q.C., and Mr. Roskill appeared for the Rowton Houses (Limited); Mr. Cripps, Q.C., and Mr. Marshall Hall for Davis.

The facts as to the Rowton Houses were as follows:—A summons was taken out charging the company with failure to comply with a notice served by the London County Council under sections 14 and 200 (2) of the London Building Act, 1894, requiring them to set back a building known as Rowton-house, situate at Churchyard-road, Newington Butts, so that every part of the

[*See similar decision in "Crocker and Others v. Sturge and Another," in 13 *The Times L.R.*, 96.—ED.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

external walls should be at a distance in every direction of not less than 20ft. from the centre of the roadway. The respondents had not complied with the said notice, and at the date of the hearing of the summons the building had been erected, and it was nearer to the centre of the road than was permitted. The building in question is erected on the site of 13 old dwelling-houses with gardens at the rear of them which were existing at the date of the commencement of the London Building Act, 1894. The plan of the building had been duly certified by the district surveyor under 13 (5) of the Act, and no land within the prescribed distance of 20ft. was occupied by the new building which was not occupied by the previously existing buildings. The building in question was adapted to provide lodging for single men, at a cheap rate, by the night or by the week, with recreation rooms and convenience for the use of the inhabitants, and has sleeping accommodation for about 800 persons. The cubical contents of the building exceed 25,000 cubic feet. The appellants, the London County Council, contended that the building in question, though a public building within the definition in section 5 (27), was a "dwelling-house to be inhabited or adapted to be inhabited by persons of the working class," within the meaning of section 13 (5), and could not, therefore, legally be erected without their consent. The respondents contended that the building was, in fact, a poor man's hotel, and a public building within the definition in section 5 (28), and was not a dwelling-house within section 13 (5); and they cited the definitions of "dwelling-house," "domestic building," and "public building," in section 5 (25), (26), and (27), in support of that view. The magistrate found as a fact that the building was "adapted to be inhabited by persons of the working class," although it was not exclusively reserved or used by persons of that class, and he held that it was properly described as a poor man's hotel, and that it was a public building, and not a dwelling-house within the meaning of the last proviso but one to section 13 (5), and that such proviso was intended to prevent the construction of narrow alleys and courts and of small dwelling-houses higher than the courts are wide, and had no such application to such a case as the buildings in question, and he dismissed the summons. The case against Davis was stated by the magistrate at Worship-street on an information for non-compliance with a notice from the London County Council in respect of No. 105, Brick-lane. The respondent is the owner of a plot of land fronting Brick-lane, upon which there formerly stood a row of buildings, consisting of ten shops with living rooms behind and above. The respondent, being desirous of pulling down the old buildings and of erecting new ones, sent in a plan of a new building, which was duly certified by the district surveyor. Brick-lane is a highway for carriage traffic, and opposite No. 105 is of the width of 25ft. The new house, No. 105, was built as a shop, with rooms above, and was let to a Mr. Cohen, who sublet most of it to separate families of the working classes. It was contended by the appellants, the County Council, that, because the dwelling-house was occupied by persons engaged in manual labour, it came within the proviso in section 13 (5) of the Act of 1894, and was a "dwelling-house inhabited or adapted to be inhabited by persons of the working class," and therefore could not be erected or re-erected within the prescribed distance—which would in this case be 20ft. from the centre of the roadway—to a height exceeding the distance of the front wall of such building from the opposite side of the street, without the consent of the appellants. The magistrate dismissed the information, on the ground that the words "to be inhabited by persons of the

working class" meant for the purpose of being or intended to be inhabited by persons of the working class, and that the words "adapted to be inhabited by persons of the working class" meant specially constructed or arranged for that purpose, such as flats or artisans' model dwellings. There was no evidence that No. 105 was intended to be inhabited or adapted to be inhabited by any particular class of persons. He also held that the fact of its being inhabited by persons who were engaged in manual labour as subtenants of the original tenant, Cohen, was no evidence that the house was erected for the purpose of being so inhabited.

The Court dismissed the appeal in both cases.

MR. JUSTICE HAWKINS, referring to the facts in Davis's case, said Davis was owner before the Act of 1894 of ten shops. He was desirous, after the passing of the Act, of putting up fresh buildings. He accordingly sent in his plans and description of the proposed buildings, and, as a fact, his new building, No. 105, was erected on the precise site of the old building. No. 105 was let to a man named Cohen, a working clockmaker, at £2 per week, as a shop and a dwelling-house. The construction of the house was that of a shop in front, upon the ground floor, with living rooms behind it, which were occupied by Cohen and his wife. On the upper floors were rooms used as sleeping and dwelling-rooms, and let out to certain cabinet makers, with their wives and families. Cohen's son lived on the top floor. The house was not built with the intention that it should be the residence of persons of the working classes. It was intended to be a shop and dwelling-house, and was so let to Cohen, who sublet part of it. After the house was built notice was given by the London County Council to Davis to set back the house, and a summons was taken out on his failure to comply with the notice. His Lordship referred to the terms of the Building Act, 1894, and said, that in his opinion, it was meant by section 13 (5) of the statute that in order to bring a building within it as being "a dwelling-house to be inhabited by persons of the working classes" it must be a building that the person re-erecting intended should be a dwelling place for people of that class. As to the second part dealing with a dwelling-house "adapted to be inhabited by persons of the working classes," that meant a building structurally adapted for the purpose—i.e., adapted to it in its construction. There was nothing to show here that anything more than a shop and dwelling-house was intended, or that the house in its construction was specially adapted for the dwelling of persons of the working classes. The magistrate was right in his findings and must be supported. As to Rowton House, the circumstances were different. Rowton House was used as a sort of poor man's club, or hotel for single men. There was no provision for any wives or families. It was not a house adapted for persons of the working class in the sense of the statute. True, it might be adapted for working class people to live in, but any house might be said to be adapted for that; in this house there was general provision for any one of any class who might come to it. As to its being a "public building" within the Act, that probably was the case, but it could be none the less a dwelling-house. Looking at the facts of this case, the learned Judge could not think that this was a house intended to be a dwelling-house for persons of the working class. The appeal in this case also must be dismissed.

MR. JUSTICE CHANNELL concurred. He dealt with the provisions of the Act as to the re-erection of new buildings on the site of old ones. The point in them was that the owner was not to lose his rights if he erected the new buildings on the precise sites of the old. That proviso was an exception to the general

rule that no erection of new buildings should take place within a certain distance of the centre of the highway. In both the present cases re-erection on old sites had taken place, but there was a proviso on the proviso in the Act. If the owner re-erecting was going to build dwelling-houses for persons of the working classes he was restricted in his rights. The point of that provision was the erection of the buildings and not their use. If they were converted after their erection other provisions came into effect. The words "to be inhabited" meant with the intention that they should be inhabited. The words "adapted" &c., meant to be structurally fit for dwellings for the working classes. What was meant by the working classes in this connexion was that class of persons among which overcrowding was likely to take place. That was the mischief provided against. When a building was intended for their use, or was structurally specially suitable for that purpose, air space had to be provided and the provisions of this section applied. There was no evidence on which the magistrates were bound to find that either of these houses were either structurally fit or intended to be occupied by persons of the working classes. The fact that No. 105 was actually let by Cohen to members of the working class might be some evidence of intention, but not conclusive. The learned Judge then, with regard to Rowton House, referred to the definitions in the Act of "dwelling-house," "domestic building," and "public building." The magistrate had thought it could not be a "dwelling-house" because it came within the definition of "public building." In that he was wrong, but in other respects he was right.

[Solicitors—Ashurst, Morris, Crisp, and Co., for Rowton Houses: Hanbury, Whitting, and Nicholson, for Davis; W. A. Blaxland, for the London County Council.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Dec. 10.

IN RE 1202—EX PARTE OFFICIAL RECEIVER.*

Bankruptcy—Receiving order—Rescission—Jurisdiction—Discretion—Bankruptcy Act, 1883, sec. 104—Bankruptcy Act, 1890, sec. 3, subsec. (6).

The Court has unlimited discretion as to reviewing, rescinding, or varying any order made by it under its bankruptcy jurisdiction (Rigby, L.J., dissenting).

This was an appeal by the Official Receiver against an order of Mr. Registrar Hepe's rescinding the receiving order. On July 22, 1897, a receiving order was made against the debtor on his own petition, and at the first meeting of the creditors it was agreed that, in order to avoid the expense and delay of bankruptcy, it was for the benefit of the creditors that they should be paid 10s. in the pound on the amount of their debts, and that the creditors should withdraw their proofs. The debtor's father paid all the creditors 10s. in the pound, and by deed the creditors assigned their debts to the father and released the debtor therefrom, and thereupon the creditors withdrew their proofs. The debtor's father then released his claim against the estate. It appeared that soon after the making of the receiving order, and prior to the above-mentioned meeting of the creditors, three of the debtor's principal creditors had been appointed at a private meeting of the creditors to inquire and report as to the position of the debtor's affairs, and generally to act in the interests of the

creditors, and they came to the conclusion that it would be for the benefit of the creditors to receive an immediate cash dividend of 10s. in the pound, and that the debtor's assets would not pay so large a dividend in bankruptcy. The debtor attended his preliminary examination by the Official Receiver, and an order was made on certain firms with the consent of the Official Receiver staying all proceedings until November 5, 1897, to enable the debtor to make such application as he might be advised. The debtor thereupon applied to have the receiving order rescinded, and the Registrar rescinded it, stating that the case was a most exceptional one, and that in his opinion the receiving order should be rescinded. The Official Receiver appealed.

The ATTORNEY-GENERAL (Sir Richard Webster, Q.C.) and Mr. MUIR MACKENZIE, for the Official Receiver, contended that the Court had no jurisdiction to rescind the receiving order, or, at any rate, the Registrar had exercised his discretion wrongly. A receiving order ought only to be rescinded upon the ground that the debts had been paid in full, or that the receiving order ought never to have been made. Unless one or other of those circumstances existed, where less than 20s. in the pound was paid, a scheme must be carried through under section 3 of the Bankruptcy Act, 1890, which provided that the scheme should be accepted at a meeting of the creditors, and that no application for the approval of the scheme by the Court should be heard until after the conclusion of the public examination of the debtor. The object of the Act was to protect the creditors, and to have the conduct of the debtor investigated. In this case there had been no public examination of the debtor. If the Registrar's judgment was right, there would be a great inducement to a debtor who had committed offences against the Act to go round to his creditors and get their consent to accept a composition, and then get the receiving order rescinded. They referred to "*In re Leslie*" (18 Q.B.D., 619), "*In re Dixon and Cardus*" (5 Morrell's Bank. Rep., 291), "*In re Hester*" (22 Q.B.D., 632), and "*In re Flatau* (1893, 2 Q.B., 219).

Mr. H. REED, Q.C., and Mr. CARRINGTON (Mr. H. S. CAUTLEY with them) for the debtor contended that there was jurisdiction to rescind the receiving order under the general power to rescind any order conferred by section 104 of the Bankruptcy Act, 1883. Every case that had been referred to showed that the Court had a discretion to rescind the receiving order, and besides those cases "*In re Davidson*" (W. N. [1894], p. 210) and "*Ex parte Carr*" (35 W. R., 150) were to the same effect. Secondly, the Registrar exercised his discretion rightly. The debtor was a young man who had been in business about two years, a hosier, and after he had filed his petition three of his principal creditors investigated his affairs and came to the conclusion that a payment of 10s. in the pound was advantageous to the creditors. There was also the preliminary examination of the debtor by the Official Receiver, and no suggestion was made against the debtor's conduct or acts, and the Official Receiver consented to the order staying proceedings for the purpose of enabling the debtor to make an application to the Court, clearly referring to an application to rescind the receiving order. Now the Board of Trade, in the name of the Official Receiver, appealed against the order rescinding the receiving order. All the circumstances showed that in this case, which the Registrar treated as a very special case, the discretion was rightly exercised.

The COURT dismissed the appeal, Lord Justice Rigby dissenting.

LORD JUSTICE A. L. SMITH said that the first question was whether there was jurisdiction to rescind the receiving order. The circumstances lay in a narrow compass. It was a very special case. The debtor was

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

a hosier, and not wishing to apply to his father for assistance, he filed his own petition, and a receiving order was made. Then he got his father to come forward and pay his creditors 10s. in the pound. The Official Receiver, who was superintending the proceedings and who stood between the debtor and the creditors, knowing well the position of this young man and knowing that he had committed no delinquency, agreed that 10s. in the pound was an advantageous offer and did not want—at least that was the inference which his Lordship drew—to have the debtor publicly examined, and consented to the receiving order being rescinded. Those facts differentiated this case from all the others, inasmuch as this public official came forward and said that he knew nothing against the debtor in any shape or way, and that he did not want any public examination. The Board of Trade now asked that the order of the Registrar should be discharged. The Attorney-General argued at first that the Court had no discretion to rescind the receiving order, but he soon left that, and contended that the discretion had been wrongly exercised. When he (the Lord Justice) first read section 3, subsection 6, of the Bankruptcy Act, 1890, he thought that it was a direct legislative enactment prohibiting this being done until after the public examination had been concluded. It was, however, pointed out that by section 104 of the Bankruptcy Act, 1883, the Court had jurisdiction to rescind any order made by it. In none of the authorities cited from first to last was there any doubt expressed that there existed a discretion in that respect. The last case, "*In re Davidson*," plainly showed that the discretion existed. It was then said that the discretion to rescind a receiving order ought only to be exercised where 20s. in the pound had been paid to the creditors, or where the receiving order had been wrongly made. In "*In re Hester*" and "*In re Flatau*" this Court said that the matter was discretionary and did not limit the exercise of the discretion to the two grounds now suggested. The Court there pointed out what circumstances should be taken into consideration in exercising the discretion. Those circumstances had all been considered in the present case by the Registrar, who came to the conclusion that no further investigation was required, and rescinded the receiving order. This case was a most exceptional case, and he could not say that the Registrar had not exercised his discretion rightly. The appeal must be dismissed.

LORD JUSTICE RIGBY regretted that he was compelled to differ from the rest of the Court. He did not wish to say that the Registrar had not a discretion on some grounds to rescind the receiving order; but the discretion was limited. One great evil which the Bankruptcy Acts were intended to aim at was a private arrangement made with creditors. If a general discretion existed as to rescinding receiving orders, it would detract from that beneficial provision. Under the Bankruptcy Act, 1883, a number of cases were decided upon this point, among them "*In re Hester*," which showed that the leading consideration which ought to guide the Court in all these matters was whether the debtor was proposing a scheme within the Act. The Judges refused to determine whether a discretion existed or not; but, as they were affirming the order refusing to rescind the receiving order, they expressly refused to decide whether a debtor, as regards an arrangement with his creditors, was or was not bound to proceed under section 18 of the Act of 1883, which had been repealed and replaced by section 3 of the Act of 1890. They left it open. Then came section 3 of the Act of 1890, under which no application to the Court to approve a scheme was to be heard until after the conclusion of the public examination of the debtor. That, in his

opinion, was enacted to put an end to the doubt whether, as regards schemes of arrangement with creditors, there was a general discretion to rescind the receiving order or not. He (the Lord Justice) did not decide that there was no jurisdiction to rescind, but it was plain that it was never intended that the main or only ground of the application to rescind should be founded on a private arrangement with the creditors. There was nothing special in the present case. The debtor filed his own petition, and thus brought himself under the bankruptcy laws, and he then got a private arrangement made with his creditors. That seemed to be entirely against the provisions and object of the Act, and, in his Lordship's opinion, the exercise of the Registrar's discretion, if the discretion existed, ought to be overruled. The only ground suggested for the exercise of the discretion was the private arrangement with the creditors, and that was no ground at all. He could not see any distinction in principle between rescinding a receiving order and annulling an adjudication under section 35 of the Bankruptcy Act, 1883, and he thought that the Court was entitled to look at section 35 to see upon what grounds an adjudication could be annulled. One ground was payment of the debts in full, and the other ground was that the debtor ought not to have been adjudged bankrupt. In the present case there was nothing to show that the receiving order ought not to have been made, nor were the debts paid in full. He could not take the view that even if the Official Receiver had consented to the order in this case, which he did not seem to have done, that would affect the case. The Official Receiver only consented to a stay of proceedings on certain terms. That was a natural order when the Official Receiver knew nothing against the debtor, but it did not show that nothing could be ascertained against the debtor, because all the means of ascertainment had not been exhausted. It was said that the appeal was really by the Board of Trade, but there was nothing wrong in the Board of Trade, if upon consideration they thought it right to do so, directing the Official Receiver, who was to a great extent their officer, to take the opinion of this Court upon the question. There was nothing special in this case, and in his opinion the order ought to be discharged.

LORD JUSTICE COLLINS concurred with Lord Justice A. L. Smith.

The COURT refused leave to appeal to the House of Lords.

[Solicitors—Solicitor to the Board of Trade, for the appellant; P. C. Ray, for the respondent.]

Chan. Div. }
(North, J.) }

1897.
Dec. 10.

BOARD V. THE AFRICAN CONSOLIDATED LAND AND TRADING COMPANY.*

Company—Register—Inspection—Shareholders—
Right to take notes or extracts from register
free of charge.

This was an application on the part of the two plaintiffs, one of whom was a shareholder whose shares were alleged to be forfeited, the other an admitted shareholder, for an order on the defendant company to allow them to inspect and take notes or extracts from the register of shareholders. The plaintiffs grounded their application on section 32 of the Companies Act, 1862, which gives members a right of inspection free of the register of shareholders, and other persons a right of inspection on payment of a

fee, and also confers a right to copies on both members and other persons on payment at the rate of 6d. per 100 words.

MR. SWINFEN EADY, Q.C., and Mr. STEWART SMITH supported the application on behalf of the plaintiffs.

MR. VERNON SMITH, Q.C., and Mr. W. HIGGINS, for the company, defended, partly on grounds personal to the plaintiffs, of no general interest, and they also argued that the statutory right to receive copies from the company on payment by implication took away the right to take notes or extracts that otherwise would have followed as an incident to the right to inspect.

MR. JUSTICE NORTH said the case seemed to him to be completely covered by authority but for one point. The cases said that where there was power to inspect, if there was nothing to negative the proposition, power was also given by implication to take notes or copies of any part or the whole of the document to inspect which there was a power. The two cases cited, "*Holland v. Dixon*" (4 *The Times* L.R., 285) and "*Mutter v. Eastern and Midland Railway Company*" (4 *The Times* L.R., 377), were sufficient to establish that. That was a matter of general law, whether relating to a common law right of inspection or a statutory right. The present case seemed to him clearly within the principle, unless it could be distinguished by this; that the 32nd section of the Companies Act, 1862, gave not only a right to inspect, but also a right to have copies at the rate of 6d. per every 100 words. His Lordship did not think that in any way cut down the right that members had to inspection and to take copies or notes free of charge, and that other persons had on payment of a fee of 1s., but was an additional privilege. His Lordship made the order asked for, with costs.

[Solicitors—Wyatt Digby and Co., for the plaintiffs; Burgoyne Watts and Co., for the defendants.]

Chan. Div. }
(Kekewich, J.) }

1897.
Dec. 10.

LEEDS AND HANLEY THEATRE OF VARIETIES (LIMITED)
V. BROADBENT.*

Contract—Mortgage deed—Construction—Payment of interest—"Punctually," meaning of.

A mortgage deed stipulated that the half-yearly payments of interest should be "punctually" made.

Held, that a delay of nine days in payment did not contravene this stipulation.

A question of construction of some novelty and interest arose in this case. The defendants, who were the owners of a theatre, in February, 1897, sold the theatre to the plaintiffs for £10,500, out of which sum it was agreed that £7,000 should remain on mortgage. A mortgage to secure payment of that amount, with interest payable half-yearly, was accordingly executed by the plaintiffs in favour of the defendants. The deed contained a provision that payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years, computed from the date of the deed, if in the meantime every half-yearly payment of interest should be "punctually" paid. The deed contained no express power of sale, and accordingly the provisions of section 20 of the Conveyancing Act, 1881 (44 and 45 Vict., c. 41) were applicable. The first half-year's interest on the £7,000 became due on August 15, 1897, and on

August 16 one of the defendants, Broadbent, by whom the matter was transacted, not having received a cheque, wrote to the secretary of the company asking for immediate payment. In reply, the secretary stated that the letter should be submitted to the directors at their meeting on the Friday following. Mr. Broadbent, being dissatisfied with this reply, gave notice calling in the mortgage at the end of three months. The letter was acknowledged, but no cheque sent, and on August 24 Mr. Broadbent wired threatening to issue a writ unless the interest was remitted that day, and the result was that a cheque was then sent, not by the company, but by a gentleman who had an interest in the company's property. The defendants having expressed their intention of holding by the notice and requiring payment accordingly, the plaintiffs brought this action and now moved for an injunction to restrain the defendants from selling or advertising for sale the premises comprised in the mortgage, and from otherwise in any manner enforcing the same.

MR. WARRINGTON, Q.C., and Mr. CHURCH, for the plaintiffs, contended that the payment of interest only nine days after it became due was a "punctual" payment within the meaning of the mortgage, and that the notice calling in the mortgage money was therefore invalid.

MR. BRAMWELL DAVIS, Q.C., and Mr. A. J. ALLEN, for the defendants, insisted that the word "punctually" ought to be construed according to its natural meaning, and referred to "*Hicks v. Gardner*" (1 *Jurist*, p. 541) as an authority in their favour.

MR. JUSTICE KEKEWICH said that the question as to the meaning of the word "punctually" was one of considerable nicety. It was said that time was of the essence of the contract, but the question was, what time; or, in other words, what was the meaning of the word "punctually"? When that was ascertained there was no difficulty in applying the clause in the deed. The question was one of the meaning of language. No doubt the word "punctually," if construed literally, meant "on the point"—i.e., actually at the exact time specified. In that sense a man was just as unpunctual if he came one minute too early for an appointment as if he came one minute too late; but in ordinary business transactions a man was considered to keep an appointment and to pay money punctually if he came within a short time after the exact time mentioned. This was an unusual clause. In ordinary clauses a period of as much as 30 days was limited within which payment might be made. His Lordship was not disposed to say that "punctually" meant necessarily on the particular day mentioned in the covenant. He certainly could not say that it meant 30 days or two or three days after the specified day. The question was whether the delay of nine days which had occurred in this case was a reasonable delay. Subject to one case which had been cited, the point was an entirely novel one. It would be pedantic to lay hold of the phrase *punctum temporis* and make that the test of the meaning of the word "punctually" in an English document with reference to the payment of half-yearly interest on a mortgage debt. It was said that the point was concluded by authority, and a case in the *Jurist* had been referred to. The report of that case was very short. The authorities which were there cited in argument, and to which his Lordship had particularly referred, did not appear to have any direct bearing on the point before the Court. The case was very unlike the present one, and nothing was decided in it as between mortgagor and mortgagee. His Lordship thought that he was entitled to put it aside and, following the bent of his own mind, to construe the word "punctually" as not meaning on the very day specified—i.e., within the 24 hours of that day—but as a matter of business and

according to the understanding of business men. In that view his Lordship held that, the delay of nine days not being unreasonable, there had been no default in punctual payment, and consequently that the notice given by the defendants was bad, and there must be an injunction to restrain them from acting on it.

[Solicitors—Geo. B. W. Digby; Goodale and Holson, agents for Butterworth, Rose, and Morrison, Swindon.]

Chan. Div. }
(Wright, J.) }

1897.
Dec. 10.

BARTLETT V. MAYFAIR PROPERTY COMPANY
(LIMITED).*

Company—Borrowing powers—Debentures—Uncalled capital—Companies Act, 1879, sec. 5.

First mortgage debentures issued by a company subsequent to a special resolution passed by it under sec. 5 of the Companies Act, 1879, do not extend to any portion of its uncalled capital dealt with by the resolution.

This case raised an important question of company law which has not previously been the subject of decision. The last paragraph of section 5 of the Companies Act, 1879, is as follows:—"A limited company may by a special resolution declare that any portion of its capital which has not already been called up shall not be capable of being called up, except in the event and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up." The opinions of experts in company law differed as to what the actual effect of this curiously worded enactment was. It is quite clear on the authorities that when such a special resolution has not been passed a company may, if its articles so empower it, and there is no prohibition in its memorandum of association, give a valid charge on its uncalled capital for the time being. This was decided by Sir George Jessel, Master of the Rolls, in 1875 in "*In re Phoenix Bessemer Steel Company*" (32 L. T., N. S., 854), and Lord Justice (then Mr. Justice) Kay came to the same conclusion in "*Howard v. Patent Ivory Manufacturing Company*" (Law Rep., 33 Ch. D., 156), although Sir George Jessel's decision was apparently not brought to his attention. These decisions were followed by the Court of Appeal in 1890 in "*In re Pyle Works*" (Law Rep., 44 Ch. D., 534), a case which was approved of by the Judicial Committee of the Privy Council in "*Newton v. Anglo-Australian Investment Company*" (Law Rep. [1895], A. C., 244). These cases have been largely acted on, and most modern debentures purport to charge the company's uncalled capital for the time being. When the debenture-holders wish to realize this portion of their security, and no winding up of the company has taken place, the Court will give liberty to the receiver in a debenture-holder's action to take proceedings to get in the calls which are charged by the debentures (see "*2 Palmer's Company Precedents*," 6th ed., p. 400, and Form 483). If a winding up has commenced the charge on uncalled capital remains valid even as against the creditors of the company (see "*In re Pyle Works*"). If the winding up is voluntary a general meeting of the company may sanction the exercise by the directors of their power to make and enforce calls—"Ladd's Case" (Law Rep. [1893], 3 Ch., 450); but if the winding up is under a compulsory order the directors' powers as to calls come to an end,

and the only power to make calls is in the liquidator acting in the winding up—"Fowler v. Broad's Company" (Law Rep. [1893], 1 Ch., 724). In such a case, therefore, even if a debenture-holder's action is pending, the calls must be got in by or, at any rate, in the name of the liquidator (*ibid.*). Nevertheless, the validity of the charge on uncalled capital is not affected, although the charge has to be realized in a different way. Under such a charge the capital is not often called up at once, and if the words of the Act of 1879 were read very strictly it might be contended that a company could, after giving such a charge, render it a nullity by passing such a special resolution as is referred to in section 5. This point, however, did not arise in the present case. The Mayfair Property Company was registered in August, 1892, with a capital of £50,000, in 5,000 shares of £10 each, and both the memorandum of association and the articles authorized the creation of a charge on the unpaid capital for the time being. By a special resolution passed on September 21, 1892, and confirmed on October 12, 1892, it was declared "That such portion of the company's capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purposes of the company being wound up in accordance with the provisions of the Companies Act, 1879." In June, 1894, the company issued first mortgage debentures for an aggregate of £50,000, purporting to be a charge on all its property whatsoever and whosoever, both present and future, including its uncalled capital for the time being. On August 8, 1896, the present action was commenced on behalf of all the debenture-holders, and a receiver was appointed on August 12. On August 8, 1896, a compulsory winding-up order was made against the company. At this time only £5 per share remained uncalled, and the question was now raised whether the debentures were a first charge on £5 per share which had been called up by the official receiver and liquidator in the winding up. For the debenture-holders it was contended that the Act of 1879 did not affect the validity of the charge as regarded the £5 per share mentioned in the special resolution, reliance being placed on certain observations made by Lord Macnaghten when delivering the judgment in "*Newton v. Anglo-Australian Investment Company*." In that case the Act of 1879 did not apply and was not considered; but a clause in the articles of the company (which was registered in New South Wales) provided that the total amount to be called up should not exceed £5 per share unless and until it should be determined by special resolution that the paid-up capital had become insufficient to meet its liabilities, and that it was therefore necessary to call up the whole or a portion of the balance of £5 per share. When the debentures in that case (charging uncalled capital) were issued, the limit of £5 per share had not been reached, but it was held that the charge covered all the uncalled capital, and not merely that portion which remained under the directors' control. On behalf of the official receiver and liquidator in the present case, reliance was placed on the dicta of the present Master of the Rolls in "*In re Pyle Works*," and it was contended that the uncalled capital covered by the special resolution was not subject to the charge.

Mr. R. F. Norton (Mr. Swinfen Eady, Q.C., with him) was for the debenture-holders; and Mr. Farwell, Q.C., and Mr. George Henderson were for the official receiver and liquidator.

Mr. JUSTICE WRIGHT, in delivering judgment, said the question was whether the rights of the mortgagees extended to the capital mentioned in the special resolution. Looking at the language of the section, it seemed to his Lordship that one ought to hold that

*Reported by F. EVANS, Esq., Barrister-at-Law.

it meant what *prima facie* it said. It created a statutory inability in a certain event to call up capital for any purpose except winding-up. His Lordship assented to Mr. Farwell's statement that the uncalled capital mentioned in a special resolution passed under Section 5 of the Act of 1879 was to be preserved intact for the purposes of the liquidation. It was impossible to doubt that that was the meaning of the clause, and that view was fortified by the observations, coming from one of the highest authorities—the present Master of the Rolls—in the case of “*In re Pyle Works*.” At first sight Lord Macnaghten's remarks in “*Newton v. Anglo-Australian Investment Company*,” seemed to raise a difficulty, but when carefully looked at, that case appeared to have no application here. The principal point in that case was not a question in the present case, and the decision on the subsidiary point was not applicable in the present case because the articles of the New South Wales Company did not contemplate a winding-up of the company. His Lordship did not think a similar question arose in that case; but if it did what had then to be considered was an arrangement between the shareholders and not a statutory disability as in the present case. The application of the debenture-holders must therefore be dismissed with costs.

[Solicitors—Munns and Longden; Mackrell, Maton, and Quincey.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Dec. 11.

THE ATTORNEY-GENERAL V. NEW YORK BREWERIES
COMPANY (LIMITED).*

Revenue—Probate duty—Executor *de son tort*—
Intermeddling with estate—Acts done under
direction of foreign executor—Shares in Eng-
lish company.

Probate duty is payable in respect of all the assets of a deceased person, whether domiciled or resident here or not, which are locally situate in this country, and such duty is recoverable from any one who, by dealing with English assets of a deceased person under the direction of a foreign executor, has constituted himself executor *de son tort*.

This was an appeal from a decision of the Queen's Bench Division (Mr. Justice Wills and Mr. Justice Grantham), reported in 13 *The Times Law Reports*, 349. The question involved was a most important one—namely (as stated by the Solicitor-General), how far English assets could be dealt with in this country by or under the direction of a foreign executor without taking out probate here. It was an information by the Attorney-General, from which it appeared that the defendant company was an English company, having its share capital divided into preference and ordinary shares, and also having mortgage debentures. The registered office was in London. The company was formed for the purpose (*inter alia*) of acquiring the businesses of H. Clausen and Son Brewing Company, and of Flanagan, Nay, and Co., both of New York, and by an agreement made in August, 1888, both these businesses were acquired by the company. By Article 43 of the articles of association of the company, “In the case of the death of a shareholder the survivor . . . and the executors or administrators of the deceased . . . shall be the only persons recognized by the company as having any title to the shares.” By Article 44, any person becoming entitled to a share in consequence of the death of a member may, on producing such evidence of

title as the directors shall require, be registered himself as a shareholder. By Article 47, “a person entitled to a share by transmission shall be entitled to receive and may give a discharge for any dividends, bonuses, or other moneys payable in respect of the share.” By a condition endorsed on the debentures it was provided that the principal moneys and interest secured by the debentures would be paid at the registered office of the company, or at some bank in London or Westminster to be from time to time appointed by the company. It was stated by the defendants that the interest on the debentures and the dividends on the shares were in fact paid in America to the American share and debenture-holders out of the profits made in that country. Henry Clausen, a person domiciled and resident in New York, died on December 28, 1893, and by his will appointed H. W. Schmidt and P. V. Stocky, of New York, his executors, and on January 19, 1894, letters testamentary of Clausen's estate were granted by the Surrogates Court of New York to the executors. At the date of his death Clausen was the registered holder in the books of the company in London of preference shares, ordinary shares, and debentures of the nominal value of £42,210. There was not, and never had been, any register of shares or debentures of the company elsewhere than in London. The defendant company at the request of the foreign executors and by arrangement with the Commissioners of Inland Revenue transferred one ordinary share and one debenture in the books of the company in London into the names of Schmidt and Stocky so as to raise the question in this case, and paid them the dividends on the shares which had become due after Clausen's death, and the interest on the debentures which had become due before his death. The company, at the times when they so transferred the share and debenture and paid the dividends and interest, knew that the foreign executors had not obtained probate in this country, and did not intend to do so. The Crown contended that the company by so acting had taken possession and administered the share, debenture, and dividends and interest so transferred and paid, and had become an executor *de son tort* thereof and liable to the penalties and duties imposed by 55 Geo. III., c. 184, s. 37, and 44 and 45 Vict., c. 12, s. 40; and that the company became liable to account to the Commissioners of Inland Revenue for the personal estate of Clausen in this country, and to pay such duty as would have been payable if probate or administration to Clausen's estate had been duly granted. The Divisional Court gave judgment for the defendant company. The Crown appealed, and it was stated on their behalf that as this was a test case they did not claim the penalties, but only the duty.

The Solicitor-General (Sir R. B. Finlay, Q.C.) and Mr. Vaughan Hawkins (the Attorney-General, Sir Richard Webster, Q.C., with them) appeared for the Crown; Mr. Moulton, Q.C., and Mr. Asquith, Q.C. (Mr. A. M. Bremner and Mr. Gore-Brown with them), appeared for the defendant company.

The COURT, having taken time to consider, delivered judgment allowing the appeal.

LORD JUSTICE A. L. SMITH read a judgment, in the course of which he said that this was a test case, brought to determine whether an English company limited by shares could, upon the death of a foreign shareholder, with impunity transfer into the names of his foreign executors shares and debentures standing in the name of the deceased shareholder in the books of the company and pay to such executors the arrears of interest and dividends due thereon at the date of his death without such executors taking out, or being about to take out, representation to the deceased in this country. That this was the real question which the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

parties wished to have decided would be seen from the letter of the defendants' solicitors to the Comptroller of Inland Revenue. The Divisional Court held that the company could legally and with impunity do this, the case before them having been specially argued as to whether the company by so doing would bring themselves within section 37 of 55 Geo. III., c. 184, and become liable to the penalties therein named. The case had been developed in this Court into one very different from what it was in the Court below, the Solicitor-General stating here that he did not ask for penalties. It must be taken that the interest and dividends were paid to the foreign executors in this country. First, what would have been the position of these foreign executors had they come over to this country and obtained from the defendant company in London payment of the interest and dividends due to their testator at the date of his death, and a transfer of the shares and debentures from his name into their names without having taken out or intending to take out representation in this country to their testator. He could not doubt that, upon receipt in this country of their testator's English assets, they would have constituted themselves executors *de son tort*. They never intended to be executors in this country, and yet they intermeddled as executors with the testator's goods in this country in such a way as to constitute themselves executors *de son tort*. The point was so stated in "Williams on Executors" (9th ed., 1827). That this would have been the position of these foreign executors when they obtained the English assets of the deceased from the defendant company he had no doubt, and this was so, although they did not personally come to this country. These foreign executors being executors *de son tort*, how could the defendant company, when called upon in a Court of law, justify what they did at the request of these executors in administering the English assets of the deceased? Mr. Justice Wills, in the Court below, based his judgment upon the ground that, as an executor derived his power from the will, and could do many acts before taking out probate, and could even sue, the defendant company could, therefore, justify administering the English assets of the deceased, as they had acted upon the request of an executor, and had handed over to him the assets of his testator, although he had not at that time taken out probate. If the executor were an English executor about to take out probate, this ordinarily would be so, but he (the Lord Justice) must point out that, when either an executor had to justify what he had done as executor, or another had to justify what he had done at the request of an executor, each must prove that the executor was in fact the executor of the deceased, and this could only be done by production of the probate, or, as Chief Justice Jarvis pithily put it in "Johnson v. Warwick" (17 C.B., at p. 522), "When that will was proved, as here it has been, the Court has the legal optics through which to look at it"; and that this was so was not in reality disputed at the Bar. The American will, as regards these English assets, had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation here to their testator in this country they were pure strangers to the English assets. This was not the case, as put in argument, of a debtor of a testator paying to the executor named in the English will a debt due from him to that testator before that executor had proved the will, but it was a case in which the payment was made to a person who had no legal right to receive it, well knowing that that person would never become legally entitled to receive it. The judgment of Vice-Chancellor Wigram in "Sharland v. Milden" (5 Hare, 469), and that of Vice-Chancellor Wood

in "Hill v. Curtis" (L.R., 1 Eq., 80), showed that, even if there was not such knowledge, the defendant company by what they did were executors *de son tort*. It could not be successfully contended that an executor *de son tort* was not liable to pay probate duty upon the assets of a testator which he had administered. Without being an executor he intermeddled with the deceased's estate as if he were an executor so as to constitute himself executor *de son tort*, and, as Mr. Justice Wightman said in "Paul v. Simpson" (9 Q.B., at p. 370), a person who is executor *de son tort* was executor generally. Those who received and administered the property of a deceased as executors *de son tort* were primarily liable to account for and pay the duty. The defendant company's case really came to this—that one executor *de son tort*, when challenged in a Court in this country to justify what he had done, could justify by showing that he acted under the directions of another executor *de son tort*. That could not be. The defendant company having constituted themselves executors *de son tort*, it was argued that there was no way by which the Crown could obtain from them the duty payable upon the English assets administered by them. The Solicitor-General did not now ask for penalties under section 37 of 55 Geo. III., c. 184, so the only question was whether by any proceedings by the Crown the defendants could be made to pay the duty. In his opinion it was open to the Attorney-General to file an information against the defendant company, asking that it might be declared that a debt arose and became payable to her Majesty in respect of the duty upon the amount of the English assets in this country at the date of the death of the deceased which the defendants had administered (see "Attorney-General v. Dimond," 1 Cr. and J., 356; "Attorney-General v. Hope," 1 Cr. M. and R., 530; and "Attorney-General v. Brunning," 8 H.L.C., 243), and it was no answer to such an information to say that the defendant company were only executors *de son tort*. The defendant company were therefore liable to pay the duty claimed upon the assets which they had administered in this country. If it was to be taken that the interest and dividends were paid in America and not here, the same result would follow, and the reason for this would be found in the judgments about to be delivered by Lords Justices Rigby and Collins. It was unnecessary to decide whether the penalties imposed by section 37 of 55 Geo. III., c. 184, could be recovered, but if that point had to be decided he would agree with the judgment of Lord Justice Giffard in *Fernandes's Executors' case* (L.R., 5 Ch. App., 314), which had an important bearing upon the case in favour of the Crown; nor had he to decide whether the Crown Suits Act (28 and 29 Vict., c. 57) or sections 39 and 40 of 44 and 45 Vict., c. 12, could in the circumstances be resorted to. For these reasons the Crown succeeded, and the appeal must be allowed, with costs here and below.

LORD JUSTICE RIGBY read a judgment in which he said that by English law duty was payable in respect of all the assets of a deceased person, whether domiciled or resident within this country or not, which were, within the meaning of the authorities, locally situate in England. Local assets included the shares and debentures standing in the name of the deceased in the defendant company and the dividends on the shares and interest on the debentures of the company due to the deceased. If it were possible to evade the duty by omitting to take out representation here to the deceased, the imposition of the duty would in many cases be a vain thing. Accordingly it was plain upon authority that the duty was payable by a person who took upon himself to deal with assets as an executor *de son tort*, and any person intermeddling with the assets

under the direction of an executor *de son tort*, whether he was a foreign representative or not, was himself chargeable as an executor *de son tort*. It made no difference that the foreign representative was named as executor in the will by virtue of which he was made representative abroad. That will could not be looked at or given in evidence until representation was taken out here. They were asked to decide here that the defendant company might, without becoming liable to pay duty, lawfully concur in transferring here the shares and debentures and pay the dividends and interest to persons who could not be recognized by English law as representatives of the deceased and who never intended to be representatives here. In his opinion the defendant company could do none of those things. It was suggested that by paying the dividends and interest abroad the company might evade liability. Whether the payments were made abroad out of money transmitted for the purpose or out of money of the company which happened to be abroad made no difference. They were equally payable by the order and direction of the company, and the payment was the act of the company whereby a chose in action of the company locally situate here was dealt with so as to constitute the company executors *de son tort*. It was further suggested that the Courts in New York would enforce payment there of the full amount of the dividends and interest regardless of the fact that they were chargeable and that the payment of them would make the company chargeable with duty in England. He (the Lord Justice) was very far from being satisfied that this would be so, but if it were the case, however much to be regretted, he did not think that it would affect the Crown's right to duty. It was not desirable to decide anything more than was necessary for determining the real point submitted, but, without deciding any abstract question as to penalties, he might say that it would require very different grounds from anything which had been brought before them to lead him to the conclusion that the decision of Lord Justice Giffard in *Fernandes's Executors' case* would not be applicable. If the arguments of the defendant company were to prevail, he did not see why foreign executors who did not wish to sue here should ever pay duty on assets here. They would only have to get some one here to collect and transmit to them all the assets here, and that would be an end to the matter.

LORD JUSTICE COLLINS read a judgment, in which he said that what the defendants had done amounted to such an intermeddling with the English assets of the deceased as to constitute them executors *de son tort*, unless the fact that these acts were done under the authority of the executors named in the American will could make a difference. He agreed that there was a broad distinction between acts done by or under the authority of a mere intruder not named in the will and acts done by or under the authority of a named executor. The latter taking under the will was not in fact a *tortfeasor*, neither was any one acting under him, and for certain purposes this distinction might be material. But if the acts of the persons who had dealt with the assets were challenged, as they now were by the Crown, and their rights had to be determined in a Court of law before probate was taken out—and *a fortiori* if it was never intended to be taken out—there was no material difference between the position of the mere intruder and his agents and the executor and his agents. They were each estopped by their acts, whether tortious or innocent, from denying that they were executors, and as they could not prove probate they made themselves liable to probate duty in respect of the assets which they had administered. The distinction was pointed out in "*Sykes v. Sykes*" (L.R., 5 C.P., at p. 118). It was immaterial in this view whether they were named in the will or not, as the Court could

not be informed upon that fact except through the medium of probate. If he was right in holding that the defendant company did intermeddle with the English assets of the testator, the case of "*Fernandes's Executors*" was exactly in point. He agreed that, as the Crown were not claiming a penalty under section 37 of 55 George III., c. 184, the real question was whether the defendant company were liable to pay duty, and he had no doubt an information would lie against them for not doing so. This point did not seem to have been argued in the Court below. But he was further of opinion that the processes of transferring the title to the share and debenture in the register from the deceased to the executors and paying the interest and dividends did involve a "taking possession" of these assets within the meaning of the statute. If the operation had been carried out in the ordinary way, there must have been a physical taking possession of the documents of title, and even though this step was advisedly omitted in this case, in his opinion there was a constructive taking possession involved in the alteration of the register and the payment of interest and dividends. The interest and dividends, as well as the shares and debentures, formed part of the estate of the deceased in England, being debts due from an English company and payable in England (see "*Attorney-General v. Higgins*," 2 H. and N., 339; "*Attorney-General v. Bouwens*," 4 M. and W., 171; "*Attorney-General v. Hope*," 1 Cr. M. and R., 530). In his opinion the company could not, by paying them in America, escape from the position of having appropriated in their hands, and therefore taken possession of, English assets of the deceased when they paid these sums for interest and dividends.

The COURT refused to grant a stay of execution pending an appeal to the House of Lords.

[Solicitors—Solicitor of Inland Revenue, for the Crown; Burn and Berridge, for the defendants.]

Q.B. Div. (Crown Cases Reserved)
(Lord Russell of Killowen, C.J.,
Hawkins, Mathew, Grantham,
and Darling, JJ.)

1897.
Dec. 11.

REG. V. THOMAS WEST.*

Criminal Law—Criminal Law Amendment Act, 1885, sec. 5—Commitment and indictment.

Prisoner was committed for trial on July 27 for a rape on July 19. More than three months after the alleged offence the bill presented to and found by the grand jury was for unlawful carnal knowledge.

Held, that the prosecution had been commenced within three months within the meaning of the proviso to sec. 5 of the Criminal Law Amendment Act, 1885.

This was a case reserved by Mr. Justice Phillimore for the Court of Crown Cases Reserved at the Durham Assizes on November 25 last, on an indictment charging Thomas West with an offence under section 5 (1) of the Criminal Law Amendment Act, 1885 (48 and 49 Vict., c. 69.), against a girl over 13 and under 16 years of age, on July 19 last. The original charge was one of rape, and the commitment, dated July 27, was for rape, but as it appeared on the deposition that it was not a case of that description the bill laid before and found by the grand jury was for the other offence. The question raised was whether the provision in the section that no prosecution shall be commenced for such an

offence more than three months after the commission of the offence applied inasmuch as the bill was presented to the grand jury more than three months after it. The judge overruled the objection and the prisoner was convicted and sentenced.

Mr. MEYNELL appeared in support of the conviction; the prisoner was not represented.

Mr. MEYNELL submitted that there was a prosecution commenced within the three months. The only possible question was whether the difference between the commitment and the indictment created a difficulty. The commitment was for rape, and the indictment for the lesser offence. He cited "*Reg. v. Wallace*" (1 East's Pleas of the Crown, 186), which was a case where a man was committed for counterfeiting and indicted for colouring coin, and it was held that the date of the commitment was the important date.

The COURT upheld the conviction.

The LORD CHIEF JUSTICE, in delivering judgment, said:—The facts were that the prisoner had an information laid against him for rape, and the justices thought fit to commit him for trial for that offence. It came on to be tried at Durham, at a period when more than three months had elapsed since the commission of the offence. It was considered at the Assizes that it would not be proper to put the prisoner on trial for rape, as there was some evidence of consent on the part of the girl; so the bill was sent up for unlawful carnal knowledge of a girl between 13 and 16. It was clear that on a charge of rape it was lawful under section 9 of the statute for a jury to convict the prisoner of the offence under section 5 (1). If the indictment had been for rape, and the jury had convicted of the misdemeanour, no possible question could have arisen. But it was said that this was a substantive charge, and made after the limit of three months from the commission of the offence. Could it be said, therefore, that the prosecution had commenced in time? In the opinion of the learned Chief Justice it could. The prosecution for rape was a prosecution for any offence of which, on a prosecution for rape, a prisoner could properly be convicted. The evidence before the magistrate in the case was such that the magistrate was entitled to send the prisoner to trial on a charge of rape, though he might have some doubt as to whether he would be convicted of it. The principle of *omne majus continet in se minus* applied. Therefore the lesser charge was included in the greater at the time of the commitment by the magistrate.

The other learned JUDGES concurred.

[Solicitors—Solicitor of the Treasury, in support of conviction.]

O.B. Div. (Crown Cases Reserved)
Lord Russell of Killowen, C.J.,
Hawkins, Mathew, Grantham,
and Darling, JJ.

1897.
Dec. 13.

REG. V. ISABELLA COX.*

Criminal Law—Children—Neglect of—Uncleanliness—57 & 58 Vict., c. 41.

This was a case reserved by the Chairman of the Worcester Quarter Sessions. An indictment was preferred against Frederick Cox and his wife, Isabella Cox, under 57 and 58 Vict., c. 41, that being persons over the age of 16, and having "custody and charge" of certain children specified in the indictment, they neglected such children in a manner likely to cause them unnecessary suffering. Frederick Cox was acquitted, but Isabella was convicted. The children in

question consisted of a lawful child of Frederick and Isabella Cox, an illegitimate child of Frederick Cox by another woman, and an illegitimate child of Isabella Cox by another man, born before the marriage. It was proved that these children were in a verminous condition as to their heads and were not allowed to come into school in consequence. The indictment contained separate charges against each prisoner as well as joint charges against both.

Mr. Clarke Hall appeared for the Crown, but was not called on to argue.

Mr. STANFORD HUTTON appeared for the prisoner. He contended that Isabella Cox was not responsible for the illegitimate child of her husband, even though the child lived in the house with them. He also contended that as the husband had been acquitted the wife ought to be, and cited "*Reg. v. White*" (40 L.J., M.C. [1871], 134) to show that the obligation of the husband absolved the wife. As to the age of the children, it was necessary to produce a certificate of birth and proof of identity, which had not been done. He cited on this "*Reg. v. Wedge*" (9 Car. and Payne, 298). None of these children was produced except one. The fact of a child attending an elementary school was no evidence that it was under 16. Then as to the age of the prisoner, that should be proved strictly.

The COURT affirmed the conviction.

The LORD CHIEF JUSTICE, after commenting on one part of the Chairman's direction to the jury, said that as to the points actually left for the Court, (1) the fact that separate counts and joint counts were included in one indictment did not make it a bad indictment. See the case of "*Reg. v. Gibson*" (8 East's Reports). It was true that in some cases it might work injustice, as where the offence was such that prisoners might themselves be called to give evidence, or where evidence given against one might prejudice the jury against the other prisoner. That, however, would be a case in which application to the Judge at the trial might be made for relief. The second point raised was whether Isabella Cox was a person who had the custody, charge, or care of the children, within the Statute 57 and 58 Vict., c. 41. There was ample evidence in the case that she had the charge and custody of the children. She lived with her husband, a working man. There were in the house the children of the marriage, the illegitimate child of the husband, and the illegitimate child of the wife. It was a question of fact for the jury, whether they were in her "custody and charge." As a question of accuracy it should be noted that the count in the indictment did not allege that the children were in her "care." The next point relied on was there was no legal evidence that the children were under 16 years of age. It had been contended that a certificate of birth and proof of identity of the person was the only satisfactory evidence. But that was not so; the age of children might be proved by any lawful evidence, and it had been done here. One child was produced in Court, and the evidence set out in the case was as follows:—"It was proved by the officer of the National Society of the Prevention of Cruelty to Children that he had seen the children, and he stated what he believed were their respective ages, all of which were under 16. A police constable gave evidence generally confirming the officer. The mistress of the school was called, and said that the eldest children attended a public elementary school. She believed that they were within the statutory age limit for such schools, but beyond this no evidence was given of the age of the children." Then there was a contention as to the propriety of the proof of the parents being over 16. But that was a ludicrous objection. The point was first taken that there was no evidence that the children were under 16, and then that there was no evidence that

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

their parents were over 16. There was nothing in that point, to state it was enough to confute it. The last objection was that there was no evidence that the wife was provided with or could obtain the requisites for keeping the children clean, and as the husband had been acquitted by the jury the wife could not be convicted. That, however, was a question for the jury. They had the character of the neglect before them. Soap and water was all that seemed to be required. The conviction must be affirmed. It might be added, however, that as there did seem to have been some attempt on the part of the woman to cure the children, it need not be treated as a very serious case.

MR. JUSTICE HAWKINS said he was quite of the same opinion, and he would add nothing, lest he should have the appearance of giving the objections more importance than they deserved.

The rest of the COURT concurred.

[Solicitors—W. Moreton Phillips, for Coleman and Whiteley for the Crown; Clarke and Blundell, for the prisoner.]

Q.B. Div. (Grantham)
and Channell, JJ.)

1897.
Dec. 13.

ATTORNEY-GENERAL AND EARL GREY.*

Revenue—Estate Duty—Gift *inter vivos*—Deed—Finance Act, 1894, secs. 1 and 2 (1).

This was an information by the Attorney-General claiming estate duty in respect of certain property bestowed in 1885 by a deed of the third Earl Grey on the defendant, his nephew, then Albert Henry George Grey, Esq., now the fourth Earl Grey. The deed purported to transfer to the defendant the property for which estate duty was now claimed.

The Attorney-General, the Solicitor-General, and Mr. Vaughan Hawkins appeared for the Crown; Mr. Cozens-Hardy, Q.C., and Mr. Bremner for the defendant.

The information was to the following effect:—By a deed dated October 19, 1885, made between Henry (third) Earl Grey (since deceased) of the one part and the defendant, then Albert Henry George Grey, Esq., of the other part, reciting that the said Henry Earl Grey was absolutely seised of or entitled to considerable family estates and to other estates and real property purchased or acquired by him in the county of Northumberland, but that a portion of the said estates was subject to several life annuities amounting to £2,200 a year, and reciting that another portion of the said estates was subject to a mortgage for £200,000, and reciting that the said Earl Grey was also possessed of personal estate, comprising arrears of rent, &c., and the furniture and effects in and about the mansion-house in which the earl then resided at Howick, and farming stock, crops, and other effects, and reciting that the defendant, Albert Grey, was the nephew of the said Earl Grey and heir-presumptive to the peerage, and that the said Earl Grey was desirous of giving his real and personal estate to the said Albert Grey. It was witnessed that in pursuance of the said agreement and in consideration of the natural love and affection which the said earl bore to his nephew, and for other considerations therein appearing, the said earl did thereby convey to the defendant all the real estate of him, the third earl, and all leaseholds and terms of years (if any) belonging to him, to hold the same to the defendant in fee simple, subject, nevertheless as to the parts of the property charged therewith to the payment of the said annuities and to the mortgages affecting the same to the use that the third Earl Grey should thenceforth

during his life receive an annual rent-charge of £4,000, to be issuing out of the said hereditaments (other than such parts as the third Earl Grey was to occupy and enjoy under the trusts thereafter declared), and subject to this rent-charge all the hereditaments thereby conveyed were to be held in use of the defendant in fee simple, but as to the said mansion-house at Howick and the premises to be enjoyed therewith subject to the trusts thereafter contained, and as to the leaseholds, &c., for the whole term or interest of the said third earl therein. And it was also witnessed that the third Earl Grey did thereby assign unto the defendant all rents owing, and also all furniture and effects in or about the said mansion-house and premises at Howick, and all stock, crops, effects, and other the personal property of the third Earl Grey other than money at his bankers or elsewhere, and private papers, his wardrobe, and effects in his own personal use, to hold the premises thereby assigned to the defendant subject to the trusts in the deed for his own use. And it was declared that the mansion-house at Howick, together with the gardens, &c., as then occupied by the third earl should be held upon trust to permit him to occupy and enjoy the same during his life. And the defendant covenanted that he would (1) pay the annuities charged on the property; (2) pay the mortgage debt of £200,000 and other charges on the property; (3) pay to the said third Earl Grey the said annual rent-charge of £4,000; (4) at the cost of the defendant that he would keep the mansion-house and buildings at Howick insured, and maintain it in repair and manage the garden; (5) supply farm and garden produce; (6) pay at the death of the said earl his funeral and testamentary expenses; (7) retain unsold and farm certain lands at Howick. And it was provided that in the event of the defendant's dying in the lifetime of the third earl or of any breach by the defendant of any covenant that it should be lawful for the said third Earl Grey to revoke the deed, either wholly or in part, but save in the event aforesaid the deed was to be irrevocable, but any revocation under that power was to be without prejudice to the title of any purchaser or mortgagee from the defendant under a sale or mortgage made previously to such revocation. By an indenture, dated September 26, 1894, between the same parties the third Earl Grey, in consideration of £5,000, sold the rent-charge of £4,000 per annum. It released the covenant to retain unsold and to farm the lands near Howick, to the intent that the lands charged with the payment of the £4,000 per annum might be released, and the deed also did away with the power of revocation. The third Earl Grey died on October 9, 1894. The average net annual income of the property comprised in the deed was very considerably in excess of £4,000. The Crown claimed estate duty on the principal value of the whole of the property comprised in the said deed, as being property passing on the death of the said earl within section 1 and 2 (1) c. of the Finance Act, 1894, which incorporates section 38 of 44 and 45 Vict., c. 12, as amended by section 11 (1) of 52 Vict., c. 7. The defendant refused, contending that no such duty was payable, though he had paid duty in respect of the mansion-house and the effects therein.

The ATTORNEY-GENERAL contended that the property in the case was property deemed to pass on the death of the third earl. Any property liable to pay account duty under 44 and 45 Vict., c. 12, section 38, as amended by 52 Vict., c. 7, section 11, was liable to pay estate duty. Here there was an interest in £4,000 a year for life issuing out of the estate other than the mansion-house. The power of revocation by the third earl under the deed was such that he might on the death of the defendant revoke the gift, which might have the effect of depriving the defendant's children of a benefit

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

under the defendant's will. As to the deed of 1894, that was made only ten days before the death of the earl, and it could therefore make no difference.

MR. COZENS-HARDY said that *quoad* the £4,000 a year sold for the £5,000 under the deed of 1894, he could not in this Court combat the contention of the Crown, as he was bound by the case of "The Attorney-General v. Beech" (66 L.J., Q.B., 800). As to the other portion of the property, the defendant had assumed very onerous obligations. It was not a mere voluntary settlement. It would be an injustice to hold that the mere reservation of some interest should make the whole estate liable to be taxed. It would be just to levy a tax to the extent of the property in which there was an interest. As to the power of revocation, this was only a very limited power arising only on an event which was not at all likely to happen—namely, the death of Albert Grey in the life of the earl, or his failure to keep the covenants.

The COURT upheld the view put forward on behalf of the Crown.

MR. JUSTICE GRANTHAM said that the defendant had evidently improved the value of the estate by his management, and it did seem somewhat hard that he should have to pay tax on what might be looked on as his own improvements. But the Court could not detract from the language in the Act of Parliament, and it was the language of the Act that was hard. The statutes of 1881 and 1889 were meant to spread the net very wide and to include a great many gifts *inter vivos*. The deed in this case as drawn brought the case within the section. The agreement was meant for the benefit of the third earl. The defendant had to pay the income of £4,000 a year whether he received it from the estate or not. But there was a power of revocation. The earl even after the agreement had a substantial interest in the estate. If the defendant had died during the life of the earl, the defendant's will would not necessarily have had any effect in respect of the property. It could not be said that by the deed of 1885 the property was handed over to the defendant without reservation. The deed bristled with covenants and limitations. In the opinion of the learned Judge there was no ground for excluding the claim of the Crown.

MR. JUSTICE CHANNELL concurred. He thought that in this case an interest on the whole property had been reserved by the third earl, and there was a power of revocation with regard to the whole property. The £4,000 per annum was charged on all the property. It was not as though the property had been divided up and the annuity made chargeable in respect of a part only. He was inclined to think that that would have made a distinction, but as it was not so there must be judgment for the Crown.

[Solicitors—E. Flux and Leadbitter for the defendant; Solicitor for Inland Revenue for the Crown.]

Q.B. Div. (Grantham)
and Channell, J.J. }

1897.
Dec. 13.

WATSON (SURVEYOR OF TAXES) AND SANDIE AND HULL.*
Revenue—Income-tax—Trade exercised within
the United Kingdom—Assessment of agent—
Income-tax Act, 1853, Sched. D—Income-tax
Act, 1842, secs. 41, 44, 51, 106, 120, & 126.

This was a case stated at a meeting of the General Commissioners of Income-tax for the Division of Liverpool, held on June 22, 1896. Messrs. Sandie and Hull appealed against two assessments—viz., for £500 for the year ended April 5, 1895, and £1,000 for the

year ended April 5, 1896, both assessments having been made on them as estimates of the annual profits alleged to have arisen from a trade exercised within the United Kingdom by the firm J. P. Squire and Co., of Boston, U.S.A., packers and provision merchants, under the following circumstances. Messrs. J. P. Squire and Co. are packers, that is to say, they own or purchase live stock which they convert into provisions on their premises in Boston, U.S.A. The provisions thus manufactured were stated to be chiefly consumed in the United States, but the surplus is exported by Messrs. J. P. Squire and Co. to this and other countries. Messrs. Sandie and Hull are commission agents carrying on business in Liverpool, and among the firms making consignments to them is that of Messrs. J. P. Squire and Co., who, at irregular intervals and in varying quantities, make consignments to them for sale on commission of lard and bacon, being a part of the surplus provisions exported by Messrs. J. P. Squire and Co. as aforesaid. Messrs. Sandie and Hull do not receive any remuneration beyond the usual charge and commission. There is no agreement between them, and Messrs. J. P. Squire and Co. may at any time, without notice, discontinue their consignments, but the mode of conducting the consignments that are made is that Messrs. J. P. Squire with each consignment send forward documents comprising consignment notes, showing in detail the amount drawn against each lot of goods making up the consignment. Bills of lading with the drafts attached are sent forward through a bank by the same mail. Messrs. Sandie and Hull take up the drafts and realize the goods. Sometimes the draft exceeds the prices realized, and sometimes the price realized exceeds the draft. The risk of profit or loss on the transaction rests with Messrs. J. P. Squire and Co. Messrs. Sandie and Hull have full discretion as to the prices at which the goods are sold; they invoice the goods in their own name, receive the proceeds of sales, assume all responsibility of payment by the purchasers, and from time to time render statements to Messrs. J. P. Squire and Co., showing full receipts and debiting the said account with their charges and commission, and remitting to Messrs. J. P. Squire and Co. the credit, or drawing upon them for the debit balance, as the case may be. Under these circumstances, Messrs. Sandie and Hull contended, first, that Messrs. J. P. Squire and Co. were not persons exercising a trade within the United Kingdom, either within the terms of Schedule D, 16 and 17 Vict., c. 34, alone, or read with Section 41 of 5 and 6 Vict., c. 35; second, that they were not agents of Messrs. J. P. Squire and Co. within the terms of Section 41 of 5 and 6 Vict., c. 35, and they further contended that, if they were agents, it was impossible for them to ascertain what profit, if any, Messrs. J. P. Squire and Co. might make in respect of those portions of goods manufactured by them which were consigned to this country, and that they could not therefore, as agents, make any deduction in respect of income-tax. The surveyor referred to Sections 41 and 44 of the Income-tax Act of 1842, by which non-residents are made chargeable in the name of their agents for profits derived from sources in the United Kingdom, and the said agents are empowered to deduct duties paid out of moneys they have in hand belonging to such non-residents. He contended that as Messrs. J. P. Squire and Co. actually transacted business in this country through their agents (Messrs. Sandie and Hull), the results of which must show either a profit or a loss, any profit from the said business was liable to be assessed, and that Messrs. Sandie and Hull as agents were responsible under section 41, above referred to, for doing all matters necessary for the making of proper assessments. As no accounts had been

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

furnished showing that the estimates were incorrect, the surveyor submitted that the assessments should be confirmed. The Commissioners considered that the assessments should be discharged, and accordingly allowed the appeal, subject to the case. The questions for the Court were (1) whether Messrs. J. P. Squire and Co. exercised a trade within the United Kingdom; (2) whether Messrs. Sandie and Hull are the agents of Messrs. Squire and Co. within the meaning of section 41 of 5 and 6 Vict., c. 35; (3) whether Messrs. Sandie and Hull as such agents are liable to be assessed in respect of such trade.

The ATTORNEY-GENERAL (Mr. Danckwerts with him), for the Crown, said the question was whether the contracts were made in this country. It was a different thing if the goods were sold outright from abroad. Here the goods were sent over and the contracts made in this country. He referred to Schedule D of the Income-tax Act, 1853, as to persons residing abroad having a trade exercised within the United Kingdom, and to the following sections of the Act of 1842:—Section 106, section 41, section 44, section 51, section 120, and section 126. A person not resident here, but carrying on business here by means of his agent, was chargeable. He cited "*Erichsen v. Last*" (8 Q.B.D., 414); "*Tischler v. Apthorpe*" (52 L.J., 814, 2 Tax Cas., 89); "*Pommery v. Apthorpe*" (35 W.R., 307, 2 Tax Cas., 182); "*Werle v. Colquhoun*" (20 Q.B.D., 753); "*Grainger v. Gough*" (1896, App. Cas., 325).

Mr. A. T. LAWRENCE, Q.C. (Mr. James Fox with him), contended that this case was not within any of the authorities cited. There was no privity of contract between Squire and Co. and the English purchaser. Sandie and Hull were taxable for their profits, but Squire and Co. were not, as they resided out of the country. It would upset the trade of the country if this contention were upheld. His view of the transaction was that Squire and Co. only made a contract with Sandie and Hull, and sold to them at a price which was afterwards determined by the result of Sandie and Hull's sale.

MR. JUSTICE GRANTHAM dissented from the description of what the arrangement amounted to.

Mr. LAWRENCE said that at any rate the name of Squire was not mentioned in the contracts made in this country.

The COURT adopted the view in favour of the Crown and allowed the appeal.

MR. JUSTICE GRANTHAM said that the argument of the counsel for the respondents was not supported by the facts. He had assumed that the property in the goods passed to Messrs. Sandie and Hull, but that did not appear to be so. They remained the goods of Messrs. Squire, though their name was not used. It was Messrs. Squire's business, and they came within the Act as trading within this country. This case was stronger than the cases cited. Here the goods were all actually in England before the contract of sale was entered into. In the other cases some of them, at any rate, were in foreign countries.

MR. JUSTICE CHANNELL concurred. This case came within the principle of the cases cited, and judgment should be given for the Crown.

[Solicitors—Rowcliffes, Rawle and Co., for Stone, Fletcher, Hull, and Stone; Solicitor for Inland Revenue.]

Q.B. Div. } 1897.
(Wright, J.) } Dec. 13.

IN RE GILBERT—EX PARTE GILBERT.*

Bankruptcy—Deceased insolvent—Administration of estate in bankruptcy—Retainer by executrix of assets.

This was an application by the executrix of a deceased insolvent, and raised a novel point of law. On September 2 last H. F. Gilbert, who was carrying on business in a small way as a clothier, died insolvent, having by his will appointed his wife his executrix. His only assets were the leasehold premises and stock-in-trade of the business and some book-debts, which were valued altogether at about £300. He owed his wife £870, and his other unsecured debts amounted to about £800. His widow proved the will at once and took possession of the business premises and stock-in-trade, got in a few of the book-debts, and proceeded to carry on the business on her own account and for her own benefit. Shortly afterwards a creditor of the deceased applied to her for particulars of the estate. She replied through her solicitor claiming her right as executrix to retain the whole of the assets in satisfaction of her debt. The creditor then presented a petition under section 125 of the Bankruptcy Act, 1883, that the estate of the deceased insolvent might be administered in bankruptcy, and obtained the usual order, and a Mr. Nicholson became the trustee in bankruptcy. On October 12 Mr. Nicholson, under an order of the Court, took possession of the business premises and stock-in-trade. Thereupon Mrs. Gilbert now applied that the trustee in bankruptcy might be ordered to deliver up to her possession of the business premises and stock-in-trade, on the ground that they were her property. On behalf of the trustee it was contended that an executor's right of retainer—i.e., to pay himself, did not arise until he had realized the assets of the testator, and that he was not entitled to retain such assets in specie in payment of his debt.

Mr. Stevens appeared for the executrix; Mr. Carrington appeared for the trustee in bankruptcy.

MR. JUSTICE WRIGHT, in delivering judgment, said it was curious that there was no direct authority on the point. It might very well be that where the assets of a testator exceeded in value the debt to the executor, the executor could not set up a right to retain in specie unless he had clearly appropriated certain of the assets of ascertained value in payment of his debt. But where the assets of a testator were manifestly much less in value than the debt due to the executor, he was not prepared, in the absence of authority, to hold that the executor could not retain the assets in specie in satisfaction of the debt, but was bound to realize the estate before he could pay himself. In the present case the executrix had clearly asserted her right to retain in specie before she received notice of the petition in bankruptcy. Under the circumstances, therefore, she was entitled to judgment.

[Solicitors—W. B. Millar; J. N. Mason and Co.]

House of Lords (Lord Halsbury, L.C.,
Lords Watson, Ashbourne, Herschell,
Macnaghten, Morris, Shand, Davey,
and James of Hereford) } 1897.
Dec. 14.

ALLEN V. FLOOD.*

Action, Cause of—Inducing discharge of servant—Malice—Inducing to abstain from employing.

Where the defendant, by means which were not unlawful, induced a third person to do an act which was not unlawful, but was injurious to the plaintiff,

Held, that an action would not lie (Lord Halsbury, L.C., Lord Ashbourne, and Lord Morris dissenting).

Decision of the Court of Appeal (11 *The Times* L.R., 335, and [1895] 2 Q.B., 21) reversed.

Judgment was given in this trade union appeal, which has been twice argued before their Lordships. The litigation has been protracted over nearly three years—an unusual period in recent times—but not comparable to that over which the famous Mogul case, which was much cited during the present appeal, extended, for that lasted altogether more than five years. The trial before Mr. Justice Kennedy was in February, 1895, and judgment (11 *The Times* L.R., 276) was given in accordance with the findings of the jury in the following March. Within a month the case found itself in the Court of Appeal, which affirmed (11 *The Times* L.R., 335) the decision of the learned Judge of first instance. The appeal came before the Lords in the first instance in December, 1895, and was argued before the Lord Chancellor, Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand, and Lord Davey. As there was a diversity of opinion among the noble and learned Lords, it was announced in December, 1896, that the appeal was to be reheard in the presence of certain of her Majesty's Judges; and on March 25, 1897, and the following days it was heard before a House strengthened by the addition of the Lord Chancellor of Ireland and Lord James of Hereford and the members of the Bench who assembled to hear the arguments and to tender their advice, namely, Mr. Justice Hawkins, Mr. Justice Mathew, the late Mr. Justice Cave, Mr. Justice North, Mr. Justice Wills, Mr. Justice Grantham, Mr. Justice Lawrance, and Mr. Justice Wright. Six of the learned Judges thought the appeal should be dismissed, whilst two, Mr. Justice Mathew and Mr. Justice Wright were in favour of its allowance. It will be seen that the decision of their Lordships was the other way and that the appeal has been allowed by a majority of six to three. In the days when it was the rule rather than the exception in common law appeals to summon the Judges, the legal peers did not always adopt the views of the majority of the Judges. But probably no precedent exists in which their Lordships have overruled such a preponderance of judicial decision and opinion as existed in the present appeal. Four Judges below had unanimously been in favour of the respondents, and thus on this side, with the six assessor Judges and the dissenting minority of the Lords, there were 13; and on the other eight—six law Lords and two Judges.

The facts of the case were stated, with more or less of comment and inference, by several of their Lordships; but the following may be taken as a bare outline:—The respondents Flood and Taylor were workmen engaged by the day at the works of the Glengall Company. They were shipwrights doing wood work on a vessel called the *Sam Weller*. The company employed a far larger number of men doing iron work than of shipwrights; and there was a strong feeling against the respondents on the ground that they had previously, being shipwrights, done iron work for another firm. One of the iron men on April 12, 1894, telegraphed to the appellant, Allen, who was a delegate or official of the Boilermakers' Union, and he came to the dock and saw the man who had sent the telegram. This man, Elliott by name, told Allen that the men were talking of throwing down their tools at dinner-time. Allen warned Elliott to be careful, and said the men must not leave without the sanction of the union. Shortly afterwards the appellant saw Mr. Halkett, the managing director, to whom he showed the telegram, observing that the men felt aggrieved at having to work with Flood and Taylor, and that if these were continued on the job the iron men would leave off work or be called out. The two men were thereupon dismissed by Mr. Halkett and brought their action against Allen. At the trial Mr. Justice Kennedy, after stating that no case had been established of conspiracy or of coercion or intimidation,

left two questions to the jury:—1. "Did Allen maliciously induce the company to discharge the plaintiffs?" 2. "Did Allen maliciously induce the company not to engage the plaintiffs?" The questions were answered adversely to the appellant, against whom damages was given. The question addressed to the Judges were:—"Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?"

Mr. Cohen, Q.C., and Mr. Robson, Q.C. (with whom was Mr. E. Morten), argued for the appellants; Mr. Lawson Walton, Q.C., and Mr. Rufus Isaacs were for the respondents.

The LORD CHANCELLOR, after stating the facts and analyzing the evidence, said in the course of his judgment,—The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognized by law, or at all events only such a right as that every one else is entitled to deprive them of if they stop short of physical violence or obstruction. I think the right to employ their labour as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong. Very early authorities in the law have recognized the right, and in my view no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action; the quarryowner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, has not been sufficiently considered. It is said that threats of violence or of actual violence were unlawful means; the lawfulness of the means I will discuss hereafter. But on the point on which these cases are important is the existence of the right. It was not the schoolmaster who was assaulted, it was not the quarryowner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarryowner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves by violence and threats applied to others. In my view these are binding authorities to show that the preliminary question—namely, whether there was any right of the plaintiffs to pursue their calling unmolested must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action which, in my view, may be found to be running through the principles of our law. As I have said, I will deal separately both with the remedy for the infringement of that right, if it has been infringed, and with the means by which it is alleged to have been infringed. After a quotation from the language of Baron Bramwell in "*Reg. v. Drutt and others*" (10 Cox's Criminal Law Cases, page 600), the noble and learned Lord said:—"It is said, indeed, that an action for the infringement of such a right is a novelty; but I do not concur that it is, or that if it were it would be a sufficient argument. The whole history of the action upon the case from the 13 Edward I., c. 24, downwards affirms the principle that where cases fall under the same right and require a like remedy new precedents should be created. So in "*Pasley v. Freeman*" (3

T. B., 63), per Mr. Justice Ashhurst:—"Another argument which has been made use of is that this is a new case, and that there is no precedent for such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law of such new case, it will be just as competent to Courts of justice to apply the principle in any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law-books one-fourth part of the cases that are to be found in them." It is said that the company were acting within their legal rights in discharging the plaintiffs. So they were, but does that affect the question of the responsibility of the person who caused them so to act by the means he used? The question must be whether what was done in fact, and what did in fact procure the dismissal of the plaintiff, was an actionable wrong or not. I have never heard that a man who was dismissed from his service by reason of some slander could not maintain an action against the slanderer because the master had a legal right to discharge him. In treating this question I can desire no more apt exposition of the law than what is contained in Lord Justice Bowen's admirably-reasoned judgment in the *Mogul* case in the Court of Appeal. "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence, 'Tarleton v. M'Gawley' (Peak N.P.C., 270); the obstruction of actors on the stage by preconcerted hissing, 'Clifford v. Brandon' (2 Camp., 358), 'Gregory v. Brunswick' (6 Man. and Gr., 205); the disturbance of wildfowl in decoys by the firing of guns, 'Carrington v. Taylor' (11 East, 571) and 'Keeble v. Hickeringill' (11 East, 574 n.); the impeding or threatening servant or workmen, 'Garret v. Taylor' (Cro. Jac., 567); the inducing persons under personal contracts to break their contracts, 'Bowen v. Hall' (6 Q.B.D., 333), 'Lumley v. Gye' (2 Ell. and Bl., 216), all are instances of such forbidden acts." It will be observed that in what Lord Justice Bowen says, if there be intimidation, obstruction, or molestation, or if there be intentional procurement of a violation of individual rights, contractual or other (always assuming that there is no just cause for it), are each of them, where damage has been caused, actionable wrongs. And so Sir William Erle, in a passage quoted by the late Master of the Rolls (Lord Esher), points out that "every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition." The Lord Justice was too keen a reasoner not to observe that the words "without just cause or excuse," which he had used, required exposition to render his reasoning complete, and accordingly he explains in another part of his judgment what his view was of malice. His Lordship thus describes the state of mind which in his view would negative just cause or excuse. "*Mogul Steamship Com-*

pany v. M'Gregor, Gow, and Co." (23 Q.B.D., p. 613). . . "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong [see '*Bromage v. Prosser*' (4 B. and Cr., 247); '*Capital and Counties Bank v. Henty*, per Lord Blackburn' (7 App. Cases, 741 at p. 772)]." My Lords, I must for my own part disclaim the idea that you can get rid of observations such as these in the learned Judge's judgment by saying that they are *obiter*. Now it will be observed that Lord Justice Bowen points out that not only contractual rights are comprehended within his view, but other rights, such as the right to carry on the business of an actor and the like. In the same case, when appealed to this House, it appears to me that the principle upon which that decision was arrived at is an important one as excluding what is here suggested to be lawful. I myself asked in that case:—"What legal right is interfered with? What coercion of the mind or will or of the person is effected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests." Lord Watson pointed out that the withdrawal of agents at first appeared to him to be a matter attended with difficulty, but that on consideration he was satisfied that it could not be regarded as an illegal act. "In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents, and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage." And he added:—"That it had not been proved and not been suggested that the respondents used either misrepresentation or compulsion for the purpose of obtaining the object of their combination." And Lord Bramwell begins his judgment by saying that the plaintiffs in that case "did not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them." Lord Morris expressed his intention to adopt entirely the principles laid down by Lord Justice Bowen. Lord Field justifies his opinion, which he says may be supported upon the principles laid down in '*Keeble v. Hickeringill*,' as to which I shall have a word to say hereafter. But he goes on to say that "everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bona fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm." And Lord Hannen says, "that he considered that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one—namely, to injure the plaintiff, whether they, the defendants, should be benefited or not." And he concludes his judgment by saying "that it appears to him that in that case there was nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining

for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer." I have been careful to call attention to the opinions of the noble and learned Lords, not only because I think a use has been made of the decision in that case which is not justified by anything in the opinions delivered; but rather because I think that upon the principles I have indicated before that these opinions form a very considerable body of authority, that if the elements which each noble Lord in turn pointed out did not exist in that case had in fact existed, the decision would have been the other way. I do not think that the case of "Keeble v. Hickeringill" stands alone, though if it did, considering who decided it, and that certainly in later years it has been much quoted and commented on, and never until now, so far as I am aware, criticized or questioned, I should be quite content to rely upon the authority of so profound a lawyer as Sir John Holt, and such an expositor as he was of the spirit of freedom which runs through the English law, but it will be also observed that in this House Lords Bramwell and Field, and in the Court of Appeal Lord Justice Bowen, assume it to be good law. It is interesting to observe that that case has been recognized and acted upon in the American Courts, where these questions of capital and labour have not infrequently arisen. The noble and learned Lord then discussed several American cases:—"Walker v. Cronin" (107 Mass., 555), "Benton v. Pratt" (2 Wend., 385), "Rice v. Manley" (C.A., State of New York, 21 Sichels, 82) (66 N. Y.), "Bixby v. Dunlap" (22 Amer., 475), and "Angle v. Chicago, &c. Co." (44 Davis, Sup. Ct. U.S. 1; 151 U.S. Rep.). I now revert to that part of the case which I admit has to be carefully considered—whether in what the defendant did in order to procure the dismissal of the plaintiffs he came within any of the rules which have been laid down in the cases quoted. Now, to my mind, he was guilty of intimidation and coercion from that intimidation—though in using that phrase, "or intimidation," I am not using it in the technical sense which the statutes upon the subject have been construed to mean. I will explain in what sense I do understand the words, but in passing I must deprecate the language which has been used to minimize the effect of what Allen said. I observe it is described as "inconvenience." That is not how it is described by the witness. Edmonds, the foreman of the Glengall Company, thus described what would have been the effect upon the business of the firm. He said:—"They were rather busy just then with boilermakers; that they employed three times as many boilermakers as shipwrights; and if the boilermakers had knocked off work or struck, it would have stopped the business of the company altogether—entirely—at that time, and that it was a very serious matter to the firm, and that the discharge of the men was in order to prevent their having to stop their business." It seems to me very obvious to ask whether the threat to do that which will have such an effect as the witness described is a coercion of the will or not. The men were good workmen and of good character; they were working, even according to Allen's own view, at their own trade as shipwrights, but they had worked upon a former occasion for a different employer upon an iron ship. And now it is important to call attention to the exact question which was left to the jury. Mr. Justice Kennedy said:—"The question that I want you to answer is that, if you find he induced the Glengall Iron Company by the threat which is suggested by the plaintiffs of calling out all the men on strike" (observe the phrase used, "the threat suggested by the plaintiffs of calling out all the men on strike," and that that induced the Glengall

Iron Company to discharge the plaintiffs, and yet it is to be said Allen's threat had nothing to do with the discharge of the plaintiffs), "and he continued in that course of conduct if there was any attempt to employ them again, did he do that with the malicious intention which I have endeavoured to explain—that is merely, not for the purpose of forwarding that which he believed to be his interest as a delegate of his union in the fair consideration of that interest, but for the purpose of injuring these plaintiffs and preventing them doing that which they were each of them entitled to do." It appears to me that that is a direction of which the defendants cannot complain, since it puts what is to my mind an alternative more favourable to them. In my view his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do. It is alleged, and to my mind and to the mind of the jury proved, that the employers were compelled under pressure of the threats that he used to discharge the plaintiffs. I have not used the word "intimidated," because I observe the learned Judge says there was no intimidation in a legal sense. If what was meant by that was that there was no threat of violence to person or property, it is true; but the word "intimidation" is not always to be construed as it has been construed under 26 Geo. IV., c. 129. The construction of it in that statute flowed from the other words with which the word "intimidate" is associated; and if, instead of the word "intimidate," that which was held out as the inducement to dismiss the plaintiffs flow—that such a stoppage of the works should be occasioned as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear from the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as intimidated. But the objection made by the defendants appears to be that the word "malicious" adds nothing; that if the thing was lawful it was lawful absolutely; if it was not lawful it was unlawful—the addition of the word "malicious" can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to circumstances. In a decision of this House it has undoubtedly been held that whatever a man's motives may be, he may dig into his own land and divert subterranean water which but for his so treating his own land might have reached his neighbour's land. But that is because the neighbour had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional inflicting of injury upon another person's property, reputation, or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. He may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others. But referring to Lord Justice Bowen's observation, which to my mind is exactly accurate, "in order to justify the intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage, another in that other person's property or trade" you must have some just cause or excuse. Now, the word "malicious" appears to me to negative just cause or excuse, and, without attempting an exhaustive exposition of the word itself, it appears to me that if I apply the language of Lord Justice Bowen it is enough to show that this was within the meaning of the law "malicious."

If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did. I turn now to the course of the trial, which is important in more ways than one. It is manifest that both the form of the statement of claim and the evidence directed at the trial were intended to raise the question of the right of the Boilermakers' Union to use what I will call their union for the combined action against the individual plaintiffs who belonged to another union. The plaintiffs apparently proceeded upon the assumption that what was represented to them as having been said by Allen was said in his character of delegate of and speaking with the authority of the Boilermakers' Union, and accordingly the general secretary of this trade union and the chairman at the time of these transactions were both joined as defendants. Had they adopted or had been proved to authorize the course taken by Allen, a question would have arisen whether or not they were all three parties to a conspiracy. Whether that charge could have been maintained against them or not, I at present desire to say nothing. Such a question may arise again, and I wish to keep myself free to consider that question when it arises. But the chairman and the secretary of the union absolutely disclaimed any general or specific authority on the part of Allen either to threaten the employers or to withdraw the men. As to specific authority, the chairman proved that he had never heard of the dispute until he was served with the writ in the action. He says in terms that he never gave any authority to Mr. Allen to threaten employers to withdraw men from the work, and to do any such thing he regarded as a very serious matter for any delegate to take upon himself; and so far from adopting what Allen is sworn to have done, that the union would hunt the two men out of every employment where they were known to be because they had once worked on an iron ship, he emphatically denies the right of his union to do anything of the sort; he says in terms, "providing that the shipwright, after being at the ironwork, started in some other place, for instance, then I would say we have no right whatever to interfere with him unless we were then beginning ironwork again. If he started at woodwork we would not interfere with him in any other place." The learned counsel then puts a question to him (I think somewhat under a misapprehension as to what the learned Judge himself meant by a question he put), "You say that may depend on circumstances?" And his answer is, "I do not say they would in that instance, because in no instance have I ever known men interfering with him when he went to some other works and started his own particular work." My Lords, I think it is only just to the Boilermakers' Union to point out how emphatically and distinctly their authorized officers (chairman and general secretary) disclaimed any such practice or principle as that which Allen is sworn to have attributed to them, and accordingly no imputation or liability could properly be attributed to the Boilermakers' Union or their authorized officers; but does that relieve Allen from the consequences of what he did? If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a

small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that the action of an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual, or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats; so that, if they in truth authorized him, he and they might all have been responsible, while the false statement that he made, though acting upon the employer by some pressure because it was believed and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false. I regret that I am compelled to differ so widely with some of your Lordships, but my difference is founded on the belief that in denying this plaintiff a remedy we are departing from the principles which have hitherto guided our Courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished Judges, going back now for certainly 200 years, and that up to the period when this case reached your Lordships' House there was a unanimous consensus of opinion; and that of eight Judges who have given us the benefit of their opinions six have concurred in the judgments which your Lordships are now asked to overrule.

LORD WATSON in the course of his judgment, after stating the facts and dealing with the evidence, said,—Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong, for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances, from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, that he may with immunity commit an act which is a legal wrong, and but for his privilege would afford a good cause of action against him; all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it, and still less that an act in itself lawful

is converted into a legal wrong, if it was done from a bad motive. Lord Bowen (at that time Lord Justice Bowen), in the case of "Mogul Steamship Company v. McGregor," laid it down that in order to constitute legal malice, the act done must, apart from bad motive, amount to a violation of law. The learned Judge, with his accustomed accuracy and felicity, said (23 Q.B.D., 612):—"We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure,' are words which have accurate meanings well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right." The words which I have quoted are in substantial agreement with the language used by Mr. Justice Bayley in "Bromage v. Prosser" (4 B. and C., 25), to the effect that, "malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." According to the learned Judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer in responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that Mr. Justice Bayley obviously refers. The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive. It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive—namely, an intention to injure the respondents in their trade or calling of shipwrights. At the trial, the case for the plaintiffs was conducted, and was submitted to the jury by the learned Judge who presided, upon the lines laid down by the Master of the Rolls and the Lords Justices Lopes and Smith in "Temperton v. Russell" (1893, 1 Q.B.D., 715). When the present case was before the Appeal Court the same doctrine was repeated by the Master of the Rolls and Lord Justice Lopes, and was expounded at great length by Lord Esher. Lord Justice Rigby deferred to, but did not express his concurrence in, the authority of "Temperton v. Russell," which he accepted as binding upon him. I do not dispute that the law laid down in this case by the presiding Judge, and upheld by the Court of Appeal, would justify the verdict of the jury. It simply comes to this—that to induce another person to commit an act which is within his legal right does not in itself afford a cause of action, but that the person who procures his action is guilty of a legal wrong if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed. Whether mere

"persuasion" or mere "advice" entails liability on the person using them appears to me to be a speculation which it would be unprofitable to discuss, and I shall therefore assume that the words refer to the means used by a person who, in the sense of law, "procures" the act of another. A breach of contract is in itself a legal wrong; and in "Lumley v. Gye" (2 E. and B., 216) it was said by Mr. Justice (afterwards Chief Justice) Erle:—"It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." In the same case it was held by the majority of the learned Judges that the defendant was liable in damages, upon the express ground that, in knowingly procuring an illegal act, he had committed a wrong which the law regards as malicious. They regarded malice as signifying, in law, not that the defendant had been actuated by a bad motive, but that he had procured the commission of an act which he knew to be illegal. There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly, and for his own ends, induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party, and in that case, according to the law laid down by the majority in "Lumley v. Gye," the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party. The doctrine laid down by the Court of Appeal, in this case, and in "Temperton v. Russell," with regard to the efficacy of evil motives in making—to use the words of Lord Esher—"that unlawful which would otherwise be lawful," is stated in wide and comprehensive terms; but the majority of the consulted Judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application it would lead, in some cases, to singular results. One who committed an act not in itself illegal, but attended with consequences detrimental to several other persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man, and desired to punish him, would be liable in an action for tort. And *ex pari ratione* a servant would be liable in damages to a master whom he disliked if he left his situation at the expiry of his engagement and declined to be re-engaged, in the knowledge and with the intent that the master would be put to considerable inconvenience, expense, and loss before he could provide a substitute. If that be the state of the law it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained. The authority which is mainly relied on as supporting the doctrine of the recent cases is "Keeble v. Hickeringill" (11 East, p. 576, note), which was decided by the Court of Queen's Bench about two centuries ago. I am very far from suggesting that the antiquity of a decision furnishes a good objection to its weight, but it is a circumstance which certainly invites and requires careful consideration, unless the decision is directly in point, and its principle has since been recognized and acted upon. A variety of well-known cases, including even "Lumley v. Gye" (2 E. and B., 216) were relied on by the respondents as showing that the so-called principle of "Keeble v. Hickeringill" has been from time to time

applied by the English Courts since the date of that judgment. Except in the case of "Carrington v. Taylor," which I have already noticed, I have been unable to discover in these authorities, which I do not consider it necessary to examine in detail, any trace of the doctrine for which the respondents contend, until recent years, when it is first dimly foreshadowed in a *dictum* which occurs in "Bowen v. Hall" (6 Q.B.D., 333), and is subsequently developed in "Temperton v. Russell" and in the present case. The authorities antecedent to "Rowen v. Hall," as well as that decision itself, are all cases belonging to one or other of these three classes: (1) cases of privilege, where the perpetrator of an act which *per se* constituted a legal wrong, was protected from its usual consequences, in the event of its being proved that he was actuated by an honest desire to fulfil a public or private duty; (2) cases in which the act complained of was in itself a plain violation of private right; and (3) cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means. After discussing several other cases the noble and learned Lord proceeded:—"Lumley v. Gye" is a weighty authority in this branch of the law, but it does not lend any aid to the respondent's argument. It was an action of damages against a defendant who had induced a professional singer to break her engagement with the plaintiff, to his detriment, and it was resisted mainly upon the ground that the engagement broken did not constitute the relationship of master and servant between the contracting parties. That plea was over-ruled, and the defendant found liable. The principle of the decision (from which Coleridge, J., alone dissented) was clearly explained by Mr. Justice (afterwards C.J.) Erle, whose opinion is in complete accordance with the views expressed by the other learned Judges who constituted the majority of the Court. He said:—"The authorities are numerous and uniform that an action will lie against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the matter arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed, and the present case is the same." The learned Judge went on to say, in language which I have already referred to:—"It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided. He who wilfully induces another to do an unlawful act, which, but for his persuasion, would or might never have been committed is rightly held to be responsible for the wrong which he procured. None of the learned Judges made any reference to the case of "Keeble v. Hetherington," and not a single expression is to be found in their opinions, tending to suggest that an injurious motive can impart a wrongful character either to a lawful act or to its procurement by means which are not in themselves illegal. In "Bowen v. Hall" (1840, 6 Q.B.D., 333) the wrong complained of was the intentional inducing of a breach of contract to the detriment of the plaintiff, who was obviously entitled to succeed if "Lumley v. Gye" had been well decided. According to the opinion expressed by C. J. Erle and the other Judges of the majority in that case, the defendant in "Bowen v. Hall" had been guilty of a wrong which was in the sense of law malicious, because he had knowingly procured the commission of an illegal act. The judgment in "Lumley v. Gye" was followed by Earl Selborne and by Lord Esher (at that time

Lord Justice Brett), whilst C. J. Coleridge adhered to the opposite view, which had been taken by Mr. Justice Coleridge. Lord Esher, in delivering the judgment of Earl Selborne and himself, substantially affirms the reasoning of the majority in "Lumley v. Gye," but there are one or two sentences in his judgment relating to points with which the learned Judges who decided that case did not deal, and which were not raised by the facts either of "Lumley v. Gye" or of the case before him. His Lordship said, "Merely to persuade a man to break his contract may not be wrongful in law or fact as in the second case put by Coleridge, J. But if the persuasion he used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law or in fact a wrong act, and, therefore, a wrongful act, and, therefore, an objectionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." These words are obviously susceptible of two very different constructions, according as they are understood to refer to the procurement of an act which is in violation of the law, and therefore a legal wrong, or to the procurement of a lawful act. *Prima facie*, they would have appeared to me to refer to the procuring of an illegal act, because the assumption upon which the whole passage is framed is that there has been successful persuasion to break a contract, which is an undoubted violation of the law; and in that case there would be a malicious wrong as it is defined in "Lumley v. Gye." But the words have now been explained by their author to mean, not merely that the procuring of an unlawful act with intent to injure is a malicious wrong, giving a good cause of action, but that the presence of injurious intent in the mind of the procurer gives a good cause of action, although the act procured is in itself lawful. In that aspect of them the words can only be regarded as *obiter dicta*, because no such question was raised by the circumstances of the case. I am quite alive to the fact that the question which we have to decide is one of importance, and also that it has never been previously considered by this House. Having come to the conclusion with the majority of your Lordships who have heard the appeal that the doctrine advanced by the respondents is neither sound in principle nor supported by authority, I move that the orders appealed from be reversed and judgment entered for the appellant, that the appellant have his costs of this appeal, and costs in both Courts below, including the costs of the trial.

The judgment of LORD ASHBORNE was read in his absence by Lord Morris, and was in concurrence with that of the Lord Chancellor.

LORD HERSHELL, in the course of his judgment, after stating the facts, said,—The question is whether the findings of the jury entitled the plaintiffs to judgment. After a careful and prolonged consideration of the arguments addressed to your Lordships when the case was first presented at the bar of this House, I arrived at the conclusion that the question must be answered in the negative. It is to be observed, in the first place, that the company in declining to employ the plaintiffs were violating no contract; they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self-interest; they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on behalf of the ironworkers. It was not contended at the bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously. The Master of the Rolls declined in the

present case to define what was meant by "maliciously"; he considered this a question to be determined by a jury. But if acts are, or are not, unlawful and actionable, according as this element of malice be present or absent, I think it is essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own. However malice may be defined, if motive be an ingredient of it, my sense of the danger would not be diminished. The danger is, I think, emphasized by the opinions of some of the learned Judges. In a case to which I shall allude immediately, the Master of the Rolls included within his definition of malicious acts persuasion used for the purpose "of benefiting the defendant at the expense of the plaintiff." Mr. Justice Wills thinks this "going a great deal too far," and that whether the act complained of was malicious depends upon whether the defendant has, in pursuing his own interests, "done so by such means and with such a disregard of his neighbour as no honest and fair-minded man ought to resort to." Here it will be seen that malice is not made dependent on motive. The assumed motive is a legitimate one, the pursuit of one's own interest. The malice depends on the means used and the disregard of one's neighbour, and the test of its existence is whether these are such as no honest and fair-minded man ought to resort to. There is here room for infinite differences of opinion. Some, I daresay, applying this test, would consider that a strike by workmen at a time damaging to the employer or a "lock-out" by an employer at a time of special hardship to the workmen were such means and exhibited such a disregard of his neighbour as an honest and fair-minded man ought not to resort to. Others would be of the contrary opinion. The truth is this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests. Again, the late Mr. Justice Cave (whom I cannot name without deploring his loss) expressed the view that the action of the appellant might have been justified on the principles of trade competition if it had been confined to the time when the men were doing ironwork, but that it "was without just cause or excuse, and consequently malicious," inasmuch as the respondents were not at the time engaged upon ironwork. On the other hand it is evident, from the reasoning of some of the learned Judges who think the respondents entitled to succeed, that they would not be prepared to adopt this distinction, and would regard the act as "malicious" in either case. The present case was treated in the Court below as governed practically by the previous decisions of the same Court in "*Bowen v. Hall*" and "*Temperton v. Russell*." The former of these cases was an action brought against the defendant for maliciously inducing a person who had entered into a contract of service with the plaintiff to break that contract. It raised, for the first time in the Court of Appeal, the question whether "*Lumley v. Gye*" was rightly decided. The Master of the Rolls delivered the judgment of the Court, in which the late Lord Selborne concurred, the late Lord Chief Justice dissenting. The law was thus laid down in the judgment of the majority of the Court:—"Merely to persuade a person to break his contract may not be wrongful in law or fact as in the second case put

by Coleridge, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and, therefore, a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." This case was followed, and the view of the law thus expressed was reasserted by the Master of the Rolls in "*Temperton v. Russell*." It will be seen that "malicious" is here defined as the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff. It is said that a malicious act thus defined is, in law and in fact, a wrong act, and therefore a wrongful act. I am not sure that I quite understand what is meant by saying that it is "in fact" a wrong act, as distinguished from its being so in "in law," and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality; but, further, I cannot agree that all persuasion where the object is to benefit the person who uses the persuasion at the expense of another is morally wrong. Numberless instances might be put in which such persuasion, which is of constant occurrence in the affairs of life, would not be regarded by any one as reprehensible. The judgment is grounded almost wholly upon the presence of this element, that the purpose of the inducement is to injure the plaintiff or to benefit the defendant at his expense. The fact that the act which is induced by the persuasion is the breach of a contract with the plaintiff is treated as a subordinate matter, which without this element would not be a wrong act, or an act wrongful, and therefore actionable. The motive of the person who did the act complained of was thus treated as the gist of the action. In "*Temperton v. Russell*," the further step was taken by the majority of the Court—A. L. Smith, L. J., reserving his opinion on the point—of asserting that it was immaterial that the act induced was not the breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff, or to benefit the defendant at the expense of the plaintiff, was present. It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this; that in the one case the Act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued, as well as the person who procured it, whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered, he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action. I think this was an entirely new departure. A study of the case of "*Lumley v. Gye*" has satisfied me that in that case the majority of the Court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration the validity of which was then under consideration, but I do not think the learned Judges regarded the allegation as involving the necessity of proving an evil motive on the part of the de-

fondant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract. It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect. It has recently been held in the House, in the case of "The Mayor of Bradford v. Pickles," that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. The Lord Chancellor said,—“This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it.” The statement was confined to the class of cases then before the House, but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights. The question raised by the decision under appeal is one of vast importance and wide-reaching consequences. In "Temperton v. Russell" it was held that the principle of "Lumley v. Gye" and "Bowen v. Hall" was not confined to breaches of contract of service, but applied to breaches of any contract. The law laid down in "Bowen v. Hall" in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference. If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person. I understood it to be admitted at the Bar, and it was indeed stated by one of the learned Judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events, I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognized by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best and most likely to be effectual. I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that every one has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition—namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If

it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling? In the course of the argument one of your Lordships asked the learned counsel for the respondents whether, if a butler on account of a quarrel with the cook, told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the latter could maintain an action against the butler. One of the learned Judges answers this question without hesitation in the affirmative. As in his opinion the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And, if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose after the quarrel each of the servants made the termination of the contract with the other a condition of remaining in the master's service, and he chose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification. The notion that there may be a difference in this respect between acts affecting trade or employment and other acts seems to be largely founded on certain *dicta* of Lord Justice Bowen in the case of the "Mogul Steamship Company." It must be remembered that these were mere *obiter dicta*, for the decision was that the defendants were not liable. The passage perhaps chiefly relied upon is the following:—"Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong." It will be noted that the learned Judge here makes no distinction between acts which interfere with property and those which interfere with trade. For the purpose then in hand, the statement of the law may be accurate enough, but if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade, then I say, with all respect, the proposition is far too wide, everything depends on the nature of the act, and whether it is wrongful or not. Whatever may be the effect of the *dicta* of some of the Judges in the case of "The Mogul Steamship Company v. McGregor," I regard it as an authority supporting the appellant's

case. Certain owners of ships formed an association with the object of securing to themselves exclusively a particular carrying trade. They allowed a rebate on the freights to all shippers who shipped only with members of the association. They also sent ships to ports where the plaintiffs were endeavouring to obtain cargoes, to carry at unremunerative rates, in order to secure the trade to themselves. A circular was sent by an agent of the defendants reminding shippers at a particular port that shipments for London by any of the plaintiffs' steamers at any of the ports in China would exclude the firm making the shipment from participation in the returns of freight, during the whole six-monthly period in which they had been made even though the firm elsewhere might have given exclusive support to the steamers of the combination. It was held by this House that the plaintiffs had no cause of action. This, too, be it observed, though the action was in respect of a conspiracy, what was done being in pursuance of a common course of action concerted by several ship-owners. In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful because the law sanctions acts which are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased. I am aware of no ground for saying that competition is regarded with special favour by the law; at all events, I see no reason why it should be so regarded. A further point to which I have not yet alluded was raised by the junior counsel for the respondents on the first argument at the Bar. It was strenuously insisted upon by both learned counsel, on the occasion of the second argument. It was said that the appellant had been guilty of misrepresentation, which had induced the company to take the course they did. No such point is to be found suggested in the pleadings, no such point was raised at the trial or in the Court of First Instance, or until the junior counsel for the respondents addressed your Lordships. The jury were not asked whether there had been a misrepresentation, and have not found that this was the case. It is certainly not admitted by the appellant. Under these circumstances it would, in my opinion, be without justification and contrary to precedent for your Lordships to attach any weight to the point now. But I think it right to add that it does not seem to me to have been made good as a matter of fact. For the reasons I have given, I think the judgment should be reversed, and judgment entered in the action for the defendant with costs. I have only very recently had the opportunity of knowing the views entertained by my noble and learned friend on the woolsack with regard to this case. In consequence of them, I think it right to add the following observations. I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful. I am unable to regard as altogether accurate the statement of my noble and learned friend that up to the period when this case reached your Lordships' House there was a unanimous consensus of opinion. I think he has overlooked the following facts. When the Court of Appeal in "Bowen

v. Hall" held that an action lay for maliciously inducing another to break his contract, the late Lord Chief Justice, differing from his two colleagues, was of opinion that even in such a case an action could not be maintained. When in "Temperton v. Russell" Lord Esher and Lord Justice Lopes carried the doctrine further, and held that an action would lie for maliciously inducing another not to enter into a contract, Lord Justice A. L. Smith, notwithstanding the strong expression of opinion by those learned Judges, significantly reserved his own opinion on the point. And when in the present case Lord Esher and Lord Justice Lopes reaffirmed the opinions they had previously pronounced, Lord Justice Rigby only concurred in the judgment under appeal in deference to the opinions expressed in the previous case. In my opinion the conclusion at which I have arrived is not in conflict with any decision, or even with the pronounced opinions of any Judges except those enunciated in the recent cases now under review. On the contrary, I believe, with all deference to my noble and learned friend on the woolsack, that any other conclusion would run counter to principles of the common law which have been long well established.

LOED MACNAGHTEN stated the facts, and continued:— Even if I am wrong in my view of the evidence and the verdict; if the verdict amounts to a finding that Allen's conduct was malicious in every sense of the word, and that he procured the dismissal of Flood and Taylor—that is, that it was his act and conduct, and his act and conduct alone, which caused their dismissal—and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who by persuasion or some other means, not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse. The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point. But if the immediate agent cannot be made liable, though he knows what he is about and what the consequences of his action will be, it is difficult to see on what principle a person less directly connected with the affair can be made responsible unless malice has the effect of converting an act not in itself illegal or improper into an actionable wrong. But if that is the effect of malice, why is the immediate agent to escape? Above all, why is he to escape when there is no one else to blame, and no one else answerable? And yet many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of debt with which he has no concern for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement; suppose a man declines to give a servant a character because he is offended with the servant for leaving; suppose a person of position takes away his custom from a country tradesman in a small

village merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling—no one, I think, would suggest that there could be any remedy at law in any of those cases. But suppose a customer, not content with taking away his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce others not to employ the tradesman any more. Neither one nor the other is liable for taking away his own custom, nor is he liable for withdrawing his. Is it possible that the one can be made liable for inducing the others not to employ the person against whom he has a grudge? If so a fashionable dressmaker might now and then, I fancy, be plaintiff in a very interesting suit. The truth is that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguards are to be found in self-interest and public opinion. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable, to say nothing of the probability of injustice being done by juries in a class of cases in which there would be ample room for speculation and wide scope for prejudice. As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than "*Lumley v. Gye*" in 1853. There is not much help to be found in the earlier cases that were cited at the Bar, not even I think in the great case about frightening ducks in a decoy, whatever the true explanation of that decision may be. In "*Lumley v. Gye*" it was held that an action would lie for procuring a person to break a contract for personal service. The subsequent cases of "*Bowen v. Hall*" and "*Temperton v. Russell*" are authorities for the proposition that the principle is not confined to contracts for personal service. There is no doubt much to be said for that proposition. But the judgment under appeal does not depend on "*Lumley v. Gye*," or on any decision before or after that case. It rests only on certain *dicta*, to be found first in "*Bowen v. Hall*," and afterwards repeated in "*Temperton v. Russell*." Those *dicta* are of great weight, owing to the eminence of the Judge by whom they were pronounced, but they certainly were not necessary for the decision in either case. "*Lumley v. Gye*" was heard on demurrer. The counts which were demurred to alleged that the defendant knew "the premises," that is, the existence of the contract stated in the declaration, and was "maliciously intending to injure the plaintiff." Mr. Willes, for the defendant, in reply, pointing out that malice was never averred in actions for seducing servants, argued that "the averment of malice can make no difference": and that seems to have been the opinion of the majority of the Court, who thought the action would lie. Crompton, J., treats the allegation of malice as meaning nothing more than the allegation of notice, and Erle, J., indicates that the principle on which the action is to be rested is that "the procurement of the violation of the right"—that is, the plaintiff's right under the contract—"is a cause of action." If so, it would seem to follow that, provided the violation is committed knowingly, it cannot matter whether the thing is done maliciously or not. And, therefore, with all deference to the opinion of Blackburn, J., who, if I rightly understand his words in "*Cattle v. Stockton Waterworks*" (L.R., 10 Q.B., 453), seems to say that "malicious intention" was the gist of the action, I should be disposed to hold that, if a right has been

knowingly violated, an allegation of malice is superfluous, and that if there has been no violation of any right, malice by itself is not a cause of action. I cannot, therefore, agree with the late Master of the Rolls in thinking that the act complained of was "wrongful," because it was "malicious," and that if there be a malicious act, and loss resulting from that act, it does not matter whether there has been a violation of right or not. In order to prevent any possible misconstruction of the language I have used, I should like to add that, in my opinion, the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of "boycotting," and other examples of oppressive combination seems to depend on considerations which are, I think, in the present case conspicuously absent. I am of opinion that judgment should be entered for the appellant.

LORD MORRIS read a judgment in agreement with that of the Lord Chancellor.

LORD SHAND.—I am of opinion that the judgment complained of should be reversed and judgment entered for the defendant with costs. Certain facts have, with reference to the evidence and the verdict of the jury, been clearly established. (1) It is clear that the plaintiffs had no contract with their employers, the Glengall Iron Company, entitling them to continuous employment. They were engaged to work by the day, entitled to leave the employment at the end of each day, and, on the other hand, subject to the risk that their employers might at any time cease to employ them further. While this was so, it is, however, to be observed that it is matter of clear inference, and, indeed, of some direct evidence, that the employment would have gone on for some time longer than it did if the employers had not been induced to discontinue it. (2) It is, in my opinion, further clear that the employment was discontinued by the employers, the Glengall Iron Company, because of the representations made to them by the defendant Allen. This has, I think, been proved, and, indeed, has been expressly affirmed by the verdict of the jury. There is no real controversy as to the statement or representation made by the defendant which induced the employers to discontinue the plaintiffs' services. The defendant, in effect, stated that if the plaintiffs were continued as workers, even at woodwork only, on the vessel then in the course of being repaired, the boilermakers then engaged at the ironwork on the ship would cease work, and so put a stop to the completion of the repairs. Coming now directly to the merits of the question in controversy in the case the argument of the plaintiffs and the reasons for the opinions of the majority of the consulted Judges seem to me to fail because, although it is no doubt true that the plaintiffs were entitled to pursue their trade as workmen "without hindrance," their right to do so was qualified by an equal right, and indeed the same right, on the part of other workmen. The hindrance must not be of an unlawful character. It must not be by unlawful action. Amongst the rights of all workmen is the right of competition. In the like manner, and to the same extent as a workman has a right to pursue his work or labour without hindrance, a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—competition which is in itself lawful, and which cannot be complained of where no unlawful means (in the sense I have already explained) have been employed. The matter has been settled in so far as competition in trade is concerned by the judgment of this House in the case of the "*Mogul Steamship Company*" (1862, Appeal Cases, 25). I can see no reason for saying that a

different principle should apply to competition in labour. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons, and in intimating that resolution to his employers. It is further to be observed, distinguishing the case from one in which a contract might have subsisted between the plaintiffs and their employers for a definite period, or for the work it might be on a particular ship until the whole was completed, in which case the refusal to continue to give the work would be a breach of contract on the employers' part—that there was here no such breach of contract. The employers' act in dispensing with the services of the plaintiffs at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and in the absence of any fraud or other unlawful means used to bring this about, the action fails. My noble and learned friends, Lord Herschell and Lord Macnaghten, have reserved their opinions as to the law applicable to a case in which the ground of action is that the defendant had induced an employer to commit a breach of contract, as in the cases of "Lumley v. Gye," "Bowen v. Hall," and the first branch of "Temperton v. Russell." I desire also to reserve my opinion as to that case. The person who has committed a breach of contract is, of course, liable in damages in consequence. If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration. The proper and usual application of the maxim *Qui facit per alium facit per se* in cases in which a wrongful act has been performed is to hold the person who has committed the wrong—i.e., in the case supposed the person who has broken his contract, liable, although his act has been done through another acting for him, and it is at least open to consideration whether the maxim would apply to one who is not himself the wrongdoer, committing a breach of contract, but only persuades or induces another to do so. I have little, if anything, to add to what I have already said as giving my reasons or grounds of judgment. The case was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of the Mogul Steam Ship Company, and was there held to be lawful. Combination for no such object, but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful, but this case raises no such question. As to the older authorities referred to in the argument I agree in the views of my noble and learned friends, Lord Herschell and Lord Watson, and I agree in thinking with them and with my noble and learned friend Lord Macnaghten that "Lumley v. Gye" was not decided on any question of malice. It was urged by the counsel for the respondent that a disapproval of the law laid down in "Temperton v. Russell," and repeated in this case, will be attended with dangerous consequences as extending the power of trade unions or combinations beyond limits which these cases laid down, and I am not insensible to the truth of the observation that a certain amount of restraint which these cases introduced will be removed. But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this Court of last resort it should be removed. And if the force of combination should be harshly or oppressively used, if it should

be used in circumstances in which right-minded men would deplore its use, it must be observed that those against whom combination it is so employed have precisely the same liberty of action for resisting oppressive measures and for causing those who use them to desist from that course of action.

LORD DAVEY read a judgment to the same effect; and the judgment of LORD JAMES of HEREFORD also in favour of allowing the appeal was read by Lord Shand.

The orders appealed from were reversed and judgment entered for the appellant with costs in the House and in both Courts below, including the costs of the trial.

[Solicitors—Shaen, Roscoe, and Co., for the appellant; C. J. Smith and Gofton, for the respondents.]

Q.B.Div., Hawkins and }
Channell, JJ. }

1897.
[Dec. 14.]

ROYAL COLLEGE OF MUSIC V. THE VESTRY OF THE PARISHES OF ST. MARGARET AND ST. JOHN, WESTMINSTER.*

Rating—Rateability—Exemptions—"Society instituted for purposes of . . . the fine arts"—Royal College of Music—6 and 7 Vict., c. 36.

This was a special case, stated by order of a Judge, raising the question whether the Royal College of Music was exempt from rating under 6 and 7 Vict., c. 36. The Scientific Societies Act, 1843, provided by section 1 that no persons should be assessed or rated "in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or owner, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members."

Mr. Danckwerts appeared for the college; Mr. R. Cunningham Glen in support of the rate.

The Royal College of Music was incorporated by Royal charter May 23, 1883, and is governed by the charter and two amendments. The college and its affairs are carried on wholly in accordance with and for the purposes of the charter. The recitals on the charter state:—"The purposes for which the corporation is founded are—first, the advancement of the art of music by means of a central and examining body charged with the duty of providing musical instruction of the highest class and of rewarding with academical degrees and certificates of proficiency and otherwise persons whether educated or not at the college; secondly, the promotion and supervision of such musical instruction in schools and elsewhere as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and, lastly, generally the encouragement and promotion of the cultivation of music as an art throughout our dominions." At the college there were pupils, some of whom were scholars and exhibitors and others students. The college was not allowed to make any dividend, gift, division, or bonus in money unto or between any of its members. It was also provided that no graduate competing for, entitled to, or holding a Fellowship from or in the gift of the corporation shall, while he is competing for or entitled to or holds such Fellowship, be a member of the corporation. By the regulations it was provided

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

that the buildings of the Royal College of Music should be used exclusively for the transaction of its business and the carrying into effect the purposes of the charter and the amendments to it. The building of the college is situated in Prince Consort-road, in the parish of St. Margaret, and is built upon land demised to the institution by indenture, dated December 30, 1891, by the Commissioners of the Exhibition of 1851, for 999 years, at a nominal annual rent of £5. The lease provides for the erection of the college and its use solely for the purposes of the charter. The building was duly completed out of funds provided by private munificence, and was the subject of the rates now in question. The college was supported in part by annual voluntary subscriptions from a number of individuals and from the Commissioners of the Exhibition of 1851, and an annual subscription from her Majesty out of a grant voluntarily voted to her Majesty by Parliament for that purpose. The revenue account of the college showed annual subscriptions £1,632, dividends and interest from investments of donations made to the college upon trust for scholarships, prizes, &c., £4,639; fees from pupils, £11,535; Government grant, £500, &c. It was stated that the fees from candidates and pupils were insufficient to defray the expenses of examinations and tuition, and teaching by the college was not carried on at a profit, or with a view of making a profit over and above the expenses. The college does not train either teachers or professional musicians or singers as such, having no course of instruction arranged with that view, but teaches the science and art of music in all its branches to all its pupils alike and imparts the same course of musical instruction to all. Without the annual voluntary contributions, the donations, and the dividends from invested funds the college could not meet its expenses. The college had not made, and did not make, any dividend, gift, division, or bonus on money unto or between any of its members.

Mr. DANCKWERTS contended that the buildings were exempt under the Act. Music was a fine art, the building was used for musical purposes only, and it was supported by annual voluntary subscriptions. He referred to "The Overseers of the Savoy v. Art Union, London" (1896, App. Ca., 296, at page 313), "Mayor of Manchester v. Molham" (1896, App. Ca., 500), "Reg. v. Institute of Civil Engineers" (5 Q.B.D., 48), "The Commissioners of Inland Revenue v. Forrest" (15 App., 334), which, he said, minimized the authority of the last previous case, "Reg. v. Pocock" (8 Q.B., 729), "Reg. v. Overseers of Manchester" (16 Q.B., 449). By looking at the charter they would see that the purpose of the charter was the advancement of the art of music exclusively.

Mr. GLEN submitted that the Royal College of Music was not exempt. It was not devoted exclusively to propagating music as an art. The case of the Institute of Civil Engineers showed that it was not the purpose of the charter, but the mode on which an institution was carried out that the Courts looked at. "Reg. v. Grant" (16 Q.B.). The main source of income was the fees paid by persons whose object was their own advancement. The primary object of the society was the advantage of the pupils by education, many of whom became teachers of music afterwards. To teach how to teach was not a primary diffusion of art.

Mr. DANCKWERTS, in reply, said where there was an incorporated society the charter must be looked at; it was where there was no charter that the method of carrying out the society was the basis of decision. The college did not train teachers as such, though they did train people who subsequently might go out as teachers.

Mr. JUSTICE HAWKINS delivered an elaborate written judgment, and said the question was whether

the Royal College of Music was exempt under the statute. He then referred at length to the section and the facts set out in the case. It was difficult, he said, to imagine anything which could be better described as being instituted for the purpose of the fine arts exclusively than the Royal College of Music. The building had been exclusively used for the purposes of the college. The proviso in the section that no bonus was to be paid to members had been fulfilled. The College of Music was supported partly by voluntary subscriptions. It was true that the sum of £1,632 given as voluntary annual subscriptions was only a small portion of the income of the establishment, but still it was a substantial sum and enough to satisfy the requirements of the section. Then there were invested moneys which brought in income. This came, for the most part, originally from voluntary donations. Further, no bonus was given or allowed. His Lordship then dealt with the cases about the Institute of Civil Engineers, reported in 5 Q.B.D., 48; 19 Q.B.D., 610; 20 Q.B.D., 621; and 15 App. Ca., 334. The latter of these authorities, in fact, overruled the first. In this case the fees were paid by persons able to afford them; there was remission of fees in certain cases where people could not. Any moneys received, however, were applied to the purposes of the college. It might be that the scholars might afterwards become teachers of music. The more that was done the more the knowledge of good music would be spread abroad. That, however, was only an incidental advantage. Under these circumstances, there was nothing in the facts to take the college out of the exemption. There must be judgment for the appellants.

MR. JUSTICE CHANNELL concurred.

[Solicitors—Gates, for the respondent; H. T. Boodle, for the appellants.]

Q.B.Div. (Grantham and)
Channell, J.J.)

1897.
Dec. 14.

CITY OF LONDON BREWERY COMPANY (LIMITED) AND
COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Higher or lower scale—
Deed to secure Debenture Stock—Substituted
security.

This was a case stated by the Commissioners of Inland Revenue. On May 21, 1897, an instrument was presented on behalf of the City of London Brewery Company to the Commissioners for their opinion as to the stamp duty with which the instrument was chargeable. By section 83 (1) of the Stamp Act, 54 and 55 Vic. c. 39, it is provided "that a security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current either with or without money previously due, is to be charged when the total amount secured or to be secured or ultimately recoverable is in any way limited with the same duty as a security for the amount so limited." The instrument is a trust deed for securing debenture stock. It is dated May 6, 1897, and is made between the appellants and certain trustees. After reciting that there was then outstanding £500,000 debenture stock of the appellants constituted and secured by a trust deed dated February 20, 1892, between the same parties, and reciting the determination of the appellants to issue further debenture stock, to be called irredeemable 8½ per cent. debenture stock, ranking after the former debenture stock, and to be constituted and secured in manner thereafter provided, it was witnessed as follows:—By clause 7 the stock is limited in the first

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

instance to £300,000, but the company is to be at liberty to issue further irredeemable $3\frac{1}{2}$ per cent. debenture stock, entitled *pari passu* to the benefit hereof, subject to the following provisions, that is to say—“(a) Such further irredeemable $3\frac{1}{2}$ per cent. debenture stock shall not exceed £540,000 in amount, making, with £300,000 stock above mentioned, a total of £840,000. (b) Such further stock shall only be issued for the purpose of redeeming or paying off the 4 per cent. debenture stock of £500,000. (c) Whenever it is proposed to issue any of the said further irredeemable $3\frac{1}{2}$ per cent. debenture stock the company must notify in writing to the trustees or trustee the amount of the proposed further issue, and must satisfy the trustees or trustee that, by arrangement with the holders of a corresponding amount of the 4 per cent. debenture stock, or by reason of notice of redemption having been given, the company is in a position to pay off or redeem a corresponding amount of the 4 per cent. debenture stock, and must provide to the satisfaction of the trustees for the application of such further debenture stock . . . in such redemption . . . for the transfer of the 4 per cent. debenture stock to be redeemed . . . to the trustees . . . and the corresponding amount aforesaid is to be calculated on the basis that not more than £108 of the $3\frac{1}{2}$ per cent. debenture stock is to be issued in respect of every £100 of the 4 per cent. stock. (d) The company must, before any of the said further debenture stock is issued or offered for subscription, execute and deliver to the trustees an acknowledgment of indebtedness for the amount of the further proposed issue, duly stamped and framed in accordance with clause 2 hereof, and until such acknowledgment is so executed, stamped, and delivered, no part of such further stock is to be entitled to the benefit hereof.” No such acknowledgment of indebtedness had been executed. The Commissioners were of opinion that the sum of £840,000 mentioned was the limit of the total amount secured by, or to be ultimately recoverable under, the trust deed, within the meaning of section 88 (1) of the Stamp Act, 1891. They therefore charged the instrument with the duty chargeable under the head “Mortgage, &c.,” in the first schedule to the Stamp Act, 1891, by reference to section 88 (1) of that Act, and they assessed such duty at £1,050, being 2s. 6d. for every £100 of the amount secured. The questions for the Court were—(1) Whether the instrument is chargeable with the duty of £1,050; (2) if not, with what duty it was chargeable.

Mr. BOSANQUET, Q.C. (The Hon. M. M. Macnaghten with him), for the appellants, contended that the deed was not taxable for anything more than the £300,000 issued, and, secondly, if in any sense any tax was to be put on it for the £540,000, either now or hereafter, it would be at the rate of only 6d. in the pound. This was a security for £300,000, but it could not be said that this was a security for anything more. It was necessary to reserve the right of the company to execute a further deed to create debentures which should rank *pari passu* with the others, or they could not have done so. He cited “*Wale v. Commissioners of Inland Revenue*” (4 Ex. D., 270).

The SOLICITOR-GENERAL (Mr. Danckwerts with him), for the Crown, contended that the Commissioners were quite right under sections 86 (1) and 88. This was a trust deed for the full amount. The acknowledgment of indebtedness proposed would not be in any sense a mortgage when made. When the £540,000 should be raised it would be only on the security of this deed. It did not matter that only £300,000 had been raised. The words of the section “to be thereafter lent or paid” meant sums which might hereafter have to be raised. This instrument was not a substituted security or a transfer, which would be taxed on a lower scale;

it was a new loan, with different interest, and under different conditions from the old.

The Court held that with respect to £500,000 there was a substituted security, and that, therefore, the duty of 6d., instead of 2s. 6d., was payable, and the Crown should repay the difference.

MR. JUSTICE GRANTHAM said this instrument set out in the case was not a transfer, but, in his opinion, it was a substituted security as far as regarded the £500,000. The deed was a deed to secure an irredeemable $3\frac{1}{2}$ per cent. debenture stock in lieu of the old 4 per cent. debenture stock. The system was that the new stock was not to issue till there was an acknowledgment of indebtedness delivered to the trustees. The deed itself was for £840,000, and the question arose, what duty was payable in respect of it. Was it to be a 2s. 6d. duty or a 6d. duty? As far as regarded the £300,000, it was admitted that the higher scale was due. With regard to the £500,000, that would be substituted for the old 4 per cent., and therefore duty should only be paid as for a substituted security.

MR. JUSTICE CHANNELL was of the same opinion. He thought that a security was not the less a security for money because something else had to be done before the money could be raised. In this case the delivery of the acknowledgment of indebtedness was the preliminary required. But, on the whole, he agreed with Mr. Justice Grantham that this instrument, so far as the sum of £500,000 was concerned, was a substituted security, which was chargeable with the smaller duty. The property was the same in both cases, and the creditors were the same practically. The lower rate was chargeable. Section 87 (3), within which, however, the matter did not come, indicated that a full rate was not to be charged in a case such as this.

[Solicitors—Western and Sons.]

Q.B. Div. }
(Hawkins, J.) }

1897.
Dec. 14.

WARREN V. MOORE.*

Vendor and Purchaser—Deposit—Sale of public-house—Vendor's inability to complete—Action to recover deposit.

In this case the plaintiff claimed for money had and received by the defendant for the use of the plaintiff. The amount paid to the defendant's agent was £500, which was paid as deposit under a contract dated October 26, 1896, which contract had since been rescinded on December 18. The defendant denied that the plaintiff was entitled to rescind the contract.

Mr. Blake Odgers, Q.C., and Mr. H. A. Forman appeared for the plaintiff; and Mr. McCall, Q.C., and Mr. R. A. Germaine for the defendant.

On October 26, 1896, the defendant had an underlease with 40 years to run of the Prince Albert publichouse at Peckham. That underlease was granted by the Wenlock Brewery Company, and the house was a tied house. At that time the Wenlock Brewery Company had a lease of over 65 years to run, which was a perfectly free lease. On October 26 Mr. Beard, the agent for Moore, who was also the agent for the Wenlock Brewery Company, agreed, on behalf of Moore, his disclosed principal, for the sale of the lease of the house, the lease to be at least for 65 years; not being a brewer's lease, £500 deposit was paid. The day for completion was originally November 30 but was extended to December 17. Before this Mr. Alderman Bell, one of the directors of the Wenlock Brewery Company, had

*Reported by J. F. WALKER, Esq., and S. M. EVERARD, Esq., Barristers-at-Law.

told Mr. Moore that he might sell the interests of the brewery as well as his own, and had also told Mr. Beard that Mr. Moore had authority to dispose of the company's interest as well as his own. On November 11 an abstract of title was sent to the plaintiff. On November 12 the plaintiff's solicitors wrote pointing out that the underlease of Mr. Moore was for 40 years only and that it was a tied lease, and asked if these defects could be remedied. The defendant's solicitors wrote the next day to say that the defects should be remedied as the Wenlock Company had agreed to free the lease and to join in the assignment. Correspondence passed between the parties, but on December 18 the defendant not having shown a good title to a free house for 65 years in himself, the plaintiff rescinded the contract and now claimed the £500 he had paid as deposit.

Mr. BLAKE ODGERS, Q.C., contended that the plaintiff was not bound to wait for the vendor to join with someone else in making a good title. The time for the completion of the contract was the time to be considered. It was not sufficient if the defect was cured before action. "*Forrer v. Nash*" (35 Beav., 167); "*Dobell v. Hutchinson*" (3 Ad. & E., 355); "*Weston v. Savage*" (10 Ch. D., 736); "*Brewer v. Broadwood*" (22 Ch. D., 105); "*In re Bryant and Barningham's Contract*" (44 Ch. D., 218); "*Bellamy v. Debenham*" (1891, 1 Ch., 412). In contracts for the sale of a publichouse time was of the essence of the contract. "*Day v. Lubke*" (L.R. 5, Eq., 336), "*Cowles v. Gale*" (L.R. 7, Ch., 12). The plaintiff was entitled to rescind on the ground that up to the date for completion it was never in the power of the defendant to convey the lease as specified in the agreement, nor had he then any power to compel the Wenlock Brewery Company to join in the assignment.

Mr. MCCALL, Q.C., contended that at the time the plaintiff contracted to sell, and at the time for the completion, the Wenlock Company were willing to join in the conveyance. The Wenlock Company were in this case principals to this contract and were always able and willing to convey. There was no necessity to go through the form of the Wenlock Company conveying to the vendor, and the vendor conveying to the purchaser. "*In re Bryant and Barningham's Contract*" (44 Ch. D., at p. 221), "*In re Head's Trustees and Macdonald*" (45 Ch. D., per Fry, L.J., at p. 317). At the conclusion of the arguments judgment was reserved.

Mr. JUSTICE HAWKINS, in giving judgment, said that in this action the question arose whether the plaintiff, who had agreed to purchase the lease of a publichouse, could recover the deposit made on the signing of the contract. The question really was whether or not on the day appointed for the completion the vendor was in a position to convey the property to the plaintiff. The contract was entered into on October 26, 1896, and was an agreement for the sale of a free house. The Wenlock Brewery Company were the lessors to the defendant, and the lease granted by them bound him to buy his beer from the company. The house was, therefore, a tied and not a free house, and this was shown by the abstract of title when it was sent to the vendee's solicitors. The brewery company's solicitors wrote saying that they would free the house and join in the assignment of the lease. But the company were never under any legal obligation to do so, nor did they ever do so in fact. December 17 was finally fixed as the day for completion. On that day there was no contract between the brewery and the defendant, and therefore on that day he was not in a position to fulfil the engagement into which he had entered. The day for completion was a day certain. The case of "*Cowles v. Gale*" (L.R. 7, Ch. App. 12), showed that on the sale of a publichouse as a going concern, time was of the essence of the completion of the contract. It

was hardly necessary for him to refer to the case of "*Forrer v. Nash*" (35 Beav., 167). That case laid down the law generally, but here there were circumstances that made a difference. If, when the day of completion arrived, those who sold were not in a position to give to the purchaser that which he bought, he could not be bound to complete his contract that day, and there was nothing to bind him to complete it later. On December 17 the defendant was not ready (though willing) to complete, and the plaintiff was not bound to pay the balance of the purchase-money but was entitled to get his deposit back. There must, therefore, be judgment for the plaintiff for £500 and on the counterclaim, with costs.

Q.B. Div. }
(Bigham, J.) }

1897.
Dec. 14.

THE BAHAMAS (INAGUA) SISAL PLANTATION (LIMITED)
V. GRIFFIN.*

Contract—Breach—Damages, measure of—Contract to subscribe for debentures.

In this action the plaintiff company sought to recover damages from the defendant for his breach of contract to subscribe for debentures of the plaintiff company. The defence was that the defendant, in applying for the debentures did so only as agent for a Mrs. Drinkwater, whom the defendant brought into this case by a third party notice; alternatively the defendant pleaded that the company had suffered no damages by his or Mrs. Drinkwater's failure to subscribe for the debentures. The defendant, who was a director of the company, counterclaimed for his director's fees, which had not been paid.

Mr. Hume Williams appeared for the plaintiff company; Mr. Upjohn, Q.C., and Mr. Arnold Jolly for the defendant; Mr. Cooper Wyld for the third party.

It appeared that in December, 1891, the defendant applied for and was allotted £1,000 £5 per cent. mortgage debentures in the plaintiff company. The debentures were payable by instalments, and were redeemable by drawings spread over 20 years. The defendant paid £100 on application, and a further £100 in September, 1895. Between December, 1895, and June, 1897, calls, amounting to £500, were made upon the defendant in respect of his debentures, but no part of this amount was paid. Evidence was given that, after the defendant's default, attempts were made on behalf of the company to get further debentures subscribed for by the public but, owing to the fact that the company was not then earning anything, no further debentures were applied for. With regard to the counterclaim for director's fees the chairman of the company said that he had proposed to the directors that they should forgo their fees until the financial position of the company improved, and the defendant did not dissent from this suggestion; but the chairman admitted that no agreement to this effect had been entered into with the company. No evidence was called for the defence, and the question as to the liability of the third party was not gone into.

Mr. UPJOHN, Q.C., for the defendant, contended that the company were at the most only entitled to nominal damages. He cited "*South African Territories v. Wallington*" (13 *The Times* L.R., 361 and [1897] 1 Q.B., 692).

Mr. HUME WILLIAMS, for the plaintiff company argued that if a lender made default in a loan, and the borrower, owing to want of credit, could not get an advance in the market, then the lender was liable in

damages to the extent to which he had made default. In "South African Territories v. Wallington" Lord Justice Chitty said:—"If the intended borrower, being a man of good credit, can readily obtain the loan from another person on the same terms, the damages would be nominal. If he cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, the damages would be greater and might be very substantial." The present case came within the principle there laid down, and there was no foundation for the suggestion that if the borrower was not a person of credit he had no remedy. In such a case his loss was all the greater.

MR. JUSTICE BIGHAM said that at the time the original debentures were issued the company had fairly good credit, and, out of an issue of £50,000 debentures £35,000 was taken up, on which about £23,000 had been paid. The defendant applied for, and was allotted, debentures to the extent of £1,000, on which he had paid £200. He then made default in paying calls to the amount of £500, and this action was brought to recover damages for his breach of contract. The case of "South African Territories v. Wallington" showed what was the measure of damages in such a case. It was not the amount of money which the defendant had promised to lend. It was only the difference between the rate of interest which the company had offered for the money and the rate which the company would have to pay in order to put it in the same position as if the defendant had performed his contract. But, in measuring the damages, it must be assumed that when the company applied elsewhere for an advance it still remained a company with ordinary credit. If, by reason of circumstances, the company had fallen into disrepute and had financial odour, the defendant was not responsible for that. His Lordship was satisfied that the company did lose its credit after the defendant's breach of contract, and the company's difficulty in getting the money at the rate which the defendant had undertaken to pay was not due to the defendant but was the fault of the company for falling into that position. The claim of the company in this action therefore failed. With regard to the counterclaim for director's fees, the defendant was entitled to recover the amount due at the date of the writ—that was, £100. His Lordship gave judgment for the defendant on the claim and on the counterclaim for £100, with costs. By consent the defendant's claim against the third party was withdrawn, no order being made as to costs between the defendant and the third party.

[Solicitors—Fowler and Co., for the plaintiff company; Marris and Brownjohn for the defendant; Thomas Durant for third party.]

Prob., Divorce, and Adm. Div. (The } 1897.
Right Hon. the President, Sir Francis } Dec. 14.
Jeune)

BEARDSLEY V. LACEY AND OTHERS.*

Probate—Revocation—Will—Codicil—Will destroyed by fire—Will and codicil admitted to probate.

This case was argued before the Court on December 10 and 13, 1897. In the course of the case the jury were discharged. The plaintiff, Mary Elizabeth Beardsley, sought probate of the contents of a will and also probate of a codicil thereto of the late Mr. Solomon Beardsley, who died on February 15, 1897. The defendants denied that the contents of the will

were contained in the draft set up by the plaintiff, and further alleged that the will had been revoked by being burnt with the intention of thereby revoking such portion of the codicil as purported to confirm the provisions of the will.

Mr. R. H. Pritchard appeared for the plaintiff; and Mr. H. Stevenson for the defendants.

MR. PRITCHARD, in opening the case, said that the will, the contents of which it was desired to prove, was dated December 30, 1891, and the codicil June 19, 1895. It appeared that on the day of the execution of the codicil, and after its execution, the testator destroyed his will under the belief that it was no longer necessary for the purpose of carrying out his wishes, but without any intention of revoking the same in any other way. The learned counsel's contention, therefore, was that in law the will was valid and subsisting. In the case of "Gardiner v. Courthope" (12 P.D., 14) the sole testamentary papers forthcoming at the death of the testatrix were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence. It was there held that though the codicil by its language was dependent on the will to which it belonged, and could not be construed without it, it ought to be admitted to probate, not having been revoked in any of the methods prescribed by the Wills Act.

THE PRESIDENT.—That is a very strong judgment of Mr. Justice Butt's.

MR. PRITCHARD.—Yes, my Lord. And I say in this case that the codicil is not dependent upon the provisions of the will. If the codicil is operative we do not care if the will is admitted to probate or not. As to what the codicil means, that is a matter for a Court of construction. Assume for the sake of argument that that Court says that the codicil does not dispose of all the property, then it will be necessary for us to come back to this Court. The testator having destroyed his will under a mistake of law, the doctrine of dependent relative revocation will be applicable. The case of "Perrott v. Perrott" (14 East, 440) is authority for that.

THE PRESIDENT.—I am not sure that the doctrine of dependent relative revocation does really apply. True, the testator destroyed the document, but surely there was no *animus revocandi* here.

MR. PRITCHARD.—That is the principle on which I say this case should be decided. I think, however, that the doctrine of dependent relative revocation goes further than your Lordship holds. "Clarkson v. Clarkson" (31 L.J., P. and M., 143, and 2 S. and T., 497) and "James v. Shrimpton" (1 P.D., 431) clearly go to show what amounts to an *animus revocandi*. In the latter case, the testator having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life. It was there held that the testator could not have intended, by the destruction of the codicil, to render his will inoperative, and the Court therefore granted probate of the will and of the codicil as contained in a draft from which the original was prepared for execution. It is no matter whether the destruction is under a mistake of fact or mistake of law.

MR. STEVENSON.—The true question that we have to decide is, Did the testator intend to revoke? If we look at the words in the codicil we find an express confirmation of the words in the will.

THE PRESIDENT.—It is clear the testator intended

*Reported by J. H. MURPHY, Esq., and G. HALL, Esq.,
Barristers-at-Law.

the effect of the will to stand although he burnt the will itself, for the codicil assumes throughout the existence of the will.

Mr. STEVENSON.—Yes, My Lord, but it was in existence at the time the codicil was executed.

The PRESIDENT.—Ah, that is true. Still, I do not see how the codicil can stand by itself, for you will not be able to look at the will unless it is admitted to probate.

Mr. STEVENSON.—The will was revealed within the meaning of the Wills Act is my contention. A man is bound by the words he uses in his will, and the question of mistake does not apply to the Wills Act. It is not permissible to admit oral evidence in explanation. With regard to the case of "Perrott v. Perrott" (14 East, 440), it is not applicable because it was decided prior to the Wills Act.

The PRESIDENT, in giving judgment, said that he was much obliged to the learned counsel who had argued the case for their assistance. The evidence showed that the will had been destroyed after the codicil had been made and read over, and it was then burnt, as the testator regarded it as needless, saying, as he did it, that it was no good. It was not necessary for this Court to decide what was the effect of the codicil. He quite agreed that the case of "Perrott v. Perrott" cited by counsel was very important, but of course it must be borne in mind that it was before the Wills Act. That statute, however, did but express the law as it stood before that Act was passed. The cases of "Clarkson v. Clarkson" (31 L.J., P. and M., 143) and "James v. Shrimpton" (1 P.D., 431) carried out this view, and he had therefore come to the conclusion that the contents of the will together with the codicil should be admitted to probate.

[Solicitors—Purkis and Co.; Atkinson and Dresser.]

Judicial Committee of the Privy Council } 1897.
(Lords Watson, Hobhouse, Davey, } Dec. 15.
and Sir R. Couch)

THE NEW ZEALAND LOAN AND MERCANTILE AGENCY
(LIMITED) V. CHRISTINA MORRISON.*

Privy Council Appeals—Victoria—Company—
Winding-up—Scheme of arrangement.

The Joint Stock Companies Arrangement Act, 1870 (33 and 34 Vict., c. 104), does not extend to the colonies.

This was an appeal from orders of the Supreme Court of Victoria of September 1, 1896.

Mr. Arthur Cohen, Q.C., Mr. Buckley, Q.C., and Mr. Tyrrell T. Paine were counsel for the appellants; Mr. Cozens-Hardy, Q.C., Mr. Upjohn, Q.C., and Mr. Lorence Ryland for the respondent.

LORD DAVEY, in delivering their Lordships' judgment, said on January 23, 1893, the respondent in Victoria placed £3,700 on deposit with the appellant company. That company was incorporated in England under the English Companies Acts, with its head office in England, but carried on business in New Zealand and the Australian colonies, including Victoria. On July 12, 1893, a creditor's petition was presented to the Court in Victoria for winding-up the company. A provisional liquidator was appointed, but no order was ever made on that petition, and there had been no winding-up of the company in Victoria. On the same day (July 12) the company itself presented a petition to the High Court in England, and on the 21st an order was made by that Court for the compulsory winding-up of the company. Subsequently a scheme of arrangement

was prepared and submitted to meetings of the creditors and contributories of the company and accepted by the requisite statutory majorities of creditors and contributories in compliance with the provisions of the English Joint Stock Companies Arrangement Act, 1870. By an order of April 13, 1894, the High Court in England sanctioned the scheme of arrangement, and declared it to be binding on all the creditors and contributories of the company and also on the official receiver and liquidator thereof. By that scheme it was provided that a new company should be formed with the same name to acquire the undertaking and property of the old company (*i.e.*, the present appellants) and to assume and provide for its liabilities in manner thereafter mentioned, and that the new company should pay to each unsecured creditor of the old company £12 10s. per cent. on the amount of his claim in cash, with interest capitalized to June 30, 1894, and for the remaining £87 10s. per cent. should issue to such creditor debenture stock. And it was further provided that forthwith after the scheme should have become finally binding on all parties each creditor of the old company should, subject to the carrying out of the scheme, hold his claim in trust for the new company, and release or deal with the same as the new company should direct. The new company was formed and was carrying on business in Victoria, and had acquired or had title to all the property of the appellant company. The respondent had due notice of the scheme and of the meetings of creditors to consider the same. On January 4, 1895, the respondent commenced an action in Victoria against the appellant company to recover her deposit of £3,700 and interest. By their defence the company stated the winding-up petition in Victoria, the winding-up order in England, the proceedings under the Arrangement Act, 1870, and the material provisions of the scheme, and submitted that the respondent was bound by the scheme as by a new contract, and that she had no longer any beneficial interest in or right to receive the money claimed by her. In her reply the respondent objected that the Joint Stock Arrangement Act had no force or effect in Victoria, and that the acceptance of the scheme by the three-fourths majority of creditors would not make it binding on her or be an answer to the action. Mr. Justice Hodges, after hearing the arguments on the points of law thus raised, adjudged that those paragraphs of the defence afforded no answer to the claim, and at the trial of the action before the Chief Justice judgment was given for the respondent. Both orders were affirmed on appeal by the full Court. The present appeal was against those orders. It was contended before their Lordships that the Arrangement Act, 1870, extended to all the colonies as well as the United Kingdom, and that the colonial Courts were therefore bound to take notice of the proceedings under that Act and give judicial effect to them. It was the intention of the Act (it was said) to bind all the creditors of the company, and the Act should be construed so as to give effect to that intention so far as possible, and as the Parliament of the United Kingdom could bind the colonies it must be assumed to have done so. The analogy of bankruptcy was referred to, and reliance was placed on a decision of the Court of Common Pleas in "Ellis v. M'Henry" (L.R., 6 C.P., 228). Their Lordships did not think that the Arrangement Act of 1870, when read by itself and detached from the other Companies Acts, did, either by express words or by necessary implication, extend to the colonies. That Act, however, could not be regarded by itself, but was only one of a collection of Acts together containing the statutory law relating to joint stock companies in the United Kingdom which were compendiously referred to as "the Companies Acts" and ordered to be read

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

together. It was impossible to contend that the Companies Acts as a whole extended to the colonies or were intended to bind the colonial Courts. The colonies possessed and had exercised the power of legislating on those subjects for themselves, and there was every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies and thereby overrule, qualify, or add to their own legislation on the same subject. It was quite true that the provisions of the Arrangement Act were expressed to extend to all creditors, and so they did to foreign as well as colonial creditors, but only when their rights were in question in the Courts of the United Kingdom. Their Lordships adopted what was said by Mr. Justice Holroyd on that point:—"I am quite willing to admit—indeed, I entertain no doubt—that the compromise spoken of in section 2 is one between a company and all its creditors or all of a particular class, that all are to be summoned to any meeting which the Court may order, and that the votes of all who attend either in person or by proxy are to be counted. 'All' means 'all,' wherever the creditors may be found, whether in the United Kingdom, or in the colonies, or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domiciled, will be bound by the result. But we are asked to say, looking at this one section only, that the same clause has a different import according as it is applied to foreign countries or to the colonies; that with respect to the former its operation is confined to the jurisdiction of the English Courts, while upon the latter it imposes a new law, and one in derogation of the legislative powers possessed by those colonies which enjoy self-government. It seems hardly probable that, if such was the purpose of the Imperial Parliament, it should have been expressed in a manner so ambiguous." Nor did their Lordships think that any assistance was to be derived from what had been held with regard to the application of the Bankruptcy Acts to the colonies. It had been decided that by the express words of the Bankruptcy Acts all the property, real and personal, of an English bankrupt in the colonies as well as in the United Kingdom was vested in his assignees or trustees. Their title must therefore receive recognition in the colonial Courts, from which it had been considered to follow that the bankrupt being denuded of his property by the English law was also entitled to plead the discharge given him by the same law. But how did that assist the appellants? They had to deal with the winding-up of a company, not with bankruptcy, and there was a material distinction between the effect of bankruptcy and that of winding-up. In the former case the whole property of the bankrupt was taken out of him, whilst in the latter the property remained vested in title and in fact in the company, subject only to its being administered for the purposes of the winding-up under the direction of the English Courts. Their Lordships were not called upon to criticize the decision in *Ellis v. M'Henry*, which, in their opinion, did not apply to the present case. If, as their Lordships held, the Arrangement Act, 1870, did not extend to the colonies, the proceedings in the English Court were for that purpose proceedings in a foreign Court, and could not be pleaded in Victoria as a defence to an action by a Victorian creditor, as was decided in England with reference to a French winding up in *Gibbs v. Société des Métaux* (25 Q.B.D., 399). One other argument was used which should be noticed. It was said that everybody who dealt with a corporation had notice of its origin and constitution, and contracted with it, subject to all the incidents which, according to the law of its constitution, might affect its liability upon its contracts. That argument was specious, but, when examined, was found to beg the question, or rather to

be the same point over again. The incident of the constitution of this company which was relied on was that it might be discharged from its liabilities by the order of an English Court. But it should be added "so far as the jurisdiction of that Court extends," and that brought them back to the same point. Their Lordships would, therefore, humbly advise her Majesty that the appeal be dismissed. The appellants would pay the costs of it.

[Solicitors—Paines, Blyth, and Huxtable, for the appellants; Stanley, Woodhouse, and Hedderwick, for the respondent.]

Judicial Committee of the Privy Council } 1897.
(Lords Watson, Hobhouse, Davey, and } Dec. 15.
Sir R. Couch)

PARSONS AND OTHERS V. GILLESPIE AND OTHERS.*

Trade Name—Imitation—Name of article—
"Flaked oatmeal"—Injunction refused.

This was an appeal from a judgment of the Supreme Court of New South Wales of November 6, 1896.

Mr. Moulton, Q.C., and Mr. Sebastian appeared for the appellants; Mr. Jenkins, Q.C., and Mr. A. J. Walter for the respondents.

LORD HOBHOUSE, in delivering their Lordships' judgment, said the question raised in the suit was whether a trade-mark or a trade name, which the plaintiffs (now appellants) claimed as their own, had been wrongly used by the defendants, who were respondents in the appeal. Until within the last few years the only method used in the colony of preparing oats for making porridge was by grinding them into fine meal or powder: but shortly before 1890 new processes were introduced, by which the oats were not ground into powder, but were crushed or flattened between rollers. In March, 1890, the plaintiffs perfected one of these processes, and called the product "Flaked Oatmeal." In June, 1890, they obtained registration of a trade-mark, which in the registrar's certificate was thus described:—"A lion rampant against a sheaf of corn, the background being filled with a landscape and a pair of balance scales. Below the lion is a scroll, upon which are the Latin words, *Iustus Esto Et Non Metus*. The trade-mark is surrounded with a double line in the form of a circle. Above the circle are the words 'Use Parsons', and below the circle are the words 'Finest Flaked Oatmeal.'" That trade-mark had ever since been used by the plaintiffs, and the commodity so marked had met with a large sale. From 1890 to 1896 several preparations of crushed or flattened oats, more or less resembling that of the plaintiffs, were put upon the market. Most of them were called "rolled oats," either simply or with some addition indicative of the maker. One was called "Oat Flakes," one "Wafer Oatmeal." None was called by the precise name of "Flaked Oatmeal." In 1894, the defendants produced a preparation of rolled or crushed oats, which they called "Rolled Oatmeal." That process was not satisfactory to them, and very soon they adopted another, by which the oats were first ground small and then the meal so obtained was steamed and passed through rollers to be flattened or flaked. The right of the defendants to use that or any other process as against the plaintiffs was not questioned, and the nature of the process was only important in its bearing on their use of the name "Flaked Oatmeal," which was questioned. In December, 1894, the defendants applied to register a trade mark for their then manufacture. The device they chose was something entirely different

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

from that of the plaintiffs; but they inscribed it with the words "Gillespie's Flaked Oatmeal"; the two latter words standing by themselves below the device. The plaintiffs raised objection to that, and the Registrar-General informed the defendants that they could not use the term "Flaked Oatmeal" as a prominent feature in their trade-mark, and that the plaintiffs, by their registration in 1890, had acquired the right to use these words. The defendants did not press for registration any further, but they put their goods on the market labelled with the same device and inscription or some slight imitation of it. In May, 1896, the plaintiffs instituted this suit against the defendants for an injunction and an account of profits and damages. They rested their case, not on the possession of the trade-mark, but on the right to exclusive use of the term "flaked oatmeal." They prayed "that the defendants, their servants and agents, may be restrained by the order and injunction of this Court from applying to any preparation, not being of the plaintiffs' manufacture, the term 'flaked oatmeal,' or from selling as 'flaked oatmeal' any preparation not being of the plaintiffs' manufacture." An interlocutory injunction was granted on these terms, but at the hearing the Chief Judge in Equity dismissed the suit with costs and directed an inquiry as to the damages sustained by the defendants by reason of the injunction. That was the decree from which the appeal was brought. There was nothing in the decree to prejudice the plaintiffs' right to their trade-mark. Neither in their statements nor in their prayer did the plaintiffs rest their case on the trade-mark, and the mere dismissal of their suit did not deny their right. But in his judgment the Judge went beyond the dismissal of the suit. He said that the suit was instituted to try the right of the plaintiffs to the trade-mark, and he expressed an opinion that the words "flaked oatmeal" ought not to have formed part of that mark. The appellants pointed out that the register was conclusive until altered in the way prescribed by the statute—*i.e.*, by a suit framed for the purpose. Their Lordships were not in a position to know what might have taken place in Court to give to the litigation a character which the pleadings did not give to it. They confined themselves to the decree appealed from, and they expressed no opinion on the question whether the plaintiffs might or might not use the term "flaked oatmeal" as part of their trade-mark in conjunction with a number of other matters. With those remarks their Lordships passed by the subject of trade-mark. The plaintiffs had no case, indeed they did not put forward a case, for complaint against the defendants on the score of the trade-mark, unless by virtue of the registration they had acquired an exclusive right to that portion of it which consisted of the term "flaked oatmeal." The defendants' trade-mark bore no resemblance to that of the plaintiffs as a whole. The question whether the defendants could use the term "flaked oatmeal" did not depend upon the trade-mark, but was part of the wider question whether the plaintiffs had by user identified the term with their goods so intimately that the use of it by another person had the effect of passing off his goods as the goods of the plaintiffs. That was the substantial ground on which the case of the plaintiffs had been argued at the bar. It would be convenient to state the principles of law by which the contention of the plaintiffs must be tested, and that could not be done better than was done by the learned Judge below in quoting the language used by Lord Herschell in "*Reddaway v. Banham*" (App. Cases [1896], p. 199). Lord Herschell there said:—"The name of a person or words forming part of the common stock of language may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explana-

tion or qualification by another manufacturer would deceive the purchaser into the belief that he was getting the goods of A when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances and in such manner as to put off his goods as the goods of the plaintiff." The plaintiffs then must show either that the term "flaked oatmeal" was not part of the common stock of language in the sense that it was not a term of description, but was of an arbitrary or fanciful nature invented by the plaintiffs, which the inventor might claim to have appropriated, or they must show that the term being originally a description of the article itself had come in practice to denote goods made by the plaintiffs. To both these points the plaintiffs had carefully addressed themselves. They maintained that the expression "flaked oatmeal" did not properly describe their own goods or those of the defendants, but was an artificial expression, fit for appropriation by any one who had hit upon it. Now, nobody could look at the plaintiffs' exhibit of their oatmeal without seeing that the word "flaked" was a correct description. The oats had been only partially reduced to powder and were presented in small, flattened morsels like flakes of snow. The term was one in common use for food-grains or other vegetable substances so treated by rolling or crushing—such as "flaked rice," "flaked barley," "flaked tapioca," "flaked cocoa," and so forth. But then it was said that the article was not "meal" because it was not ground to powder. Whether the word "meal" would by etymology or in the very strictest use of language be applicable to that which had passed through the mill but was only partially reduced to powder was a point as to which their Lordships thought that no nice inquiry need be made. It was a natural and obvious term to use for oats so treated; one which everybody would accept at once as appropriate enough; and probably everybody who breakfasted off porridge made from such a material would think and say that he was eating oatmeal porridge. Then it was contended that the product of the defendants was not oatmeal, and that their adoption of an inappropriate name showed an intention of trading on the reputation acquired by the plaintiffs. It seemed to their Lordships that the name as applied to the defendants' product was strictly appropriate, for they reduced the oats to powder, which was afterwards steamed, rolled, and so flaked. The plaintiffs had been reduced to contend on that point that because the defendants took away some 5 per cent. of the finest powder the rest was not oatmeal, and, further, that to roll or flake oatmeal was impossible. To support those two contentions they brought several witnesses in the Court below; but the Court rightly gave no weight to the evidence, which had been little insisted on there. Then had there been any such secondary use of the term as to identify it with the plaintiffs' manufacture? To prove that there had been the plaintiffs called a number of grocers who said that when customers asked for "flaked oatmeal" they supplied the plaintiffs' goods. That was a matter of course during the five or six years for which nobody except the plaintiffs purported to sell goods under that name. One witness, a miller, said in terms that between 1892 and the beginning of 1896 the words "flaked oatmeal" had got to mean the plaintiffs' manufacture. That seemed to their Lordships somewhat slender evidence to prove such a general association of the name of the product with the producer as to entitle the plaintiffs to say that the use of the name by another was an encroachment on

their rights. But supposing the evidence sufficient on that point, it fell far short of showing that the proceedings of the defendants were such as to cause confusion between their goods and those of the plaintiffs. There was no evidence that any buyer had got the defendants' goods when he desired those of the plaintiffs; nor that any seller had made confusion between the two. As for external resemblance of the packages or labels it had been shown before with reference to the trade-mark that there was nothing of the kind except in the use of the two disputed words. In fact the defendants could hardly have done more to show that the articles came from different makers. The result was that in their Lordships' judgment the defendants had done no more than they had a right to do in taking appropriate words of ordinary description to indicate the article which they made and sold, and that their action was not calculated to pass off their manufacture as that of the plaintiffs and was not proved in point of fact to have done so. Their Lordships would humbly advise her Majesty that the appeal should be dismissed. The appellants must pay the costs.

[Solicitors—Walker, Martineau, and Co., for the appellants; Snow, Snow, and Fox, for the respondents.]

Court of Appeal (Lindley, M.R.; } 1897.
Chitty and Vaughan Williams, L.J.J.) } Dec. 15.

IN RE COOPERS (LIMITED).*

Company—Winding-up—Voluntary winding-up
—Liquidator—Discretion as to employment of
solicitor.

This was an appeal against an order made by Mr. Justice Wright in Chambers. On August 25 last the shareholders of this company passed an extraordinary resolution for the voluntary winding-up of the company. The resolution appointed Mr. Edwin Barron Lumb to be voluntary liquidator, and it was also resolved "that Mr. G. J. Liddle continue to act as solicitor for the company and to act as solicitor for the liquidator in the winding-up." After Mr. Lumb's appointment he found that on August 16 (the day before that on which notice was given of the meeting of August 25) three assignments of debts due to the company were made to three creditors of the company as security for debts due to them by the company. One of these assignments was made to Mr. Liddle himself. Mr. Lumb consulted Messrs. Foss and Ledsam, other solicitors, as to the validity of these assignments, and was advised by them that they were all void, as being "fraudulent preferences." Mr. Lumb accordingly instructed Messrs. Foss and Ledsam to take proceedings for setting aside the assignments. He said that he did this because, as Mr. Liddle was party to one of the implicated assignments, it would be impossible for him to do adequate justice to proceedings to set them aside. Mr. Liddle claimed as a matter of right to be entitled by virtue of the resolution of the shareholders to act as solicitor in all matters in the liquidation. Mr. Liddle ultimately relinquished his own assignment. A summons was taken out by William Cooper, one of the contributories, asking for an order to remove Mr. Lumb from the office of liquidator and to restrain him from employing any other solicitor than Liddle in the winding-up of the company. Upon the hearing of this summons the learned Judge ordered Lumb as liquidator to convene a meeting of the company, under section 139 of the Companies Act, 1862, for the purpose of considering the question of the employment of Liddle to act as solicitor to Lumb as liquidator. And it was ordered

that the summons should stand over generally, with liberty to either party to restore, to enable Lumb to convene the meeting. The learned Judge expressed an opinion that there was no ground for removing the liquidator, but that the shareholders ought to be consulted about the employment of a solicitor. The meeting directed by the Judge was held on December 9, and the shareholders then passed the following resolution:—"The shareholders are of opinion that, as no extraordinary general meeting has been called since August 25 to discuss the question of changing solicitors, Mr. G. J. Liddle, who was appointed to act as solicitor to the liquidator of the company on that date ought to continue to act in the appointed capacity, and that the liquidator ought not to have employed any other solicitor. At the same time, the shareholders wish to express their satisfaction at the manner in which all other matters in relation to the winding-up by the liquidator have been carried out." Mr. Lumb appealed against the order of November 24.

Mr. LEVETT, Q.C., and Mr. AUSTEN CARTMELL, for the appellant, argued that under the Companies Acts the shareholders had no power to fetter the liquidator as to the employment of a solicitor, and that, no ground having been shown for the removal of the liquidator, the summons ought to have been at once dismissed with costs.

Mr. BUCKLEY, Q.C., and Mr. T. RIBTON, for Mr. Cooper, urged that the appeal was premature. There was nothing to appeal against now, the learned Judge not having made any order, but only having adjourned the hearing for the purpose of consulting the shareholders.

In answer to a question put by the COURT, Mr. LEVETT stated that Mr. Lumb intended to employ Mr. Liddle as his solicitor in the liquidation in all matters not connected with the assignments in question.

The COURT allowed the appeal.

The MASTER of the ROLLS said that this was one of those unfortunate disputes which brought discredit on voluntary winding-up. All that the learned Judge had done was to adjourn the hearing of the summons, and the COURT could not entertain the appeal unless they were satisfied that the learned Judge ought to have dismissed the summons with costs. The COURT thought that this was so. His Lordship did not intend to throw any doubt upon the power of the Judge to consult the shareholders with regard to matters in which they were interested, but, looking at the evidence in the present case, it was clear that the question was rather a creditor's than a shareholder's question. It was clear from the evidence that the company were insolvent, and there was no use in consulting the shareholders as to this question. The company resolved on a voluntary winding-up, and appointed Lumb liquidator on certain terms. His Lordship could see no evidence that he had attempted to repudiate the conditions on which he was appointed. He thought it undesirable that the business connected with the setting aside the three assignments should remain in Mr. Liddle's hands, and no one could say that Lumb was not justified in taking that view. Mr. Liddle was annoyed at this, and this summons was issued. Mr. Justice Wright thought there was no reason for removing Lumb, but he thought it desirable to consult the shareholders about the employment of a solicitor. If the company had been solvent there would have been good reason for consulting the shareholders. But in the actual circumstances this reason did not exist. The COURT was not saying anything to derogate from the power of the Judge to consult the shareholders, except with regard to a case in which the summons ought to have been at once dismissed. There were cases in which it would be wrong to adjourn the hearing of a summons, but it ought to be at once dis-

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

missed, and all further costs stopped. In his Lordship's opinion the present case was one of that kind, and the appeal ought to be allowed and the summons dismissed, so as at once to put an end to the incurring of further costs.

Each of the other learned JUDGES expressed his concurrence.

[Solicitors—Foss and Ledsam; Lovett and Liddle.]

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Dec. 15.

FOXWELL V. VAN GRUTTEN.*

Practice—Trial—Place of trial—Application to change—Assizes—Discretion.

This was an appeal from an order of Mr. Justice Day refusing to change the venue of the action from Cornwall to London. The Court had given the defendant leave to appeal on Monday last, as reported in *The Times* of yesterday. The action was brought to recover possession of an estate in Cornwall.

MR. HALDANE, Q.C., and MR. T. H. CARSON, for the defendant, now argued that the balance of convenience was in favour of the action being tried in London rather than at Bodmin. The principal questions in the action were questions of law, and if there was any issue of fact to be tried all the witnesses were persons who could attend more conveniently in London than at Bodmin.

MR. FOOTE, Q.C., and MR. DUKE, for the plaintiff, pointed out that the Assizes at Bodmin would be at the end of January, and that the action could be tried there without the delay which would certainly be occasioned if it were removed to London.

THE COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that *prima facie* the plaintiff was entitled to put the venue where he liked, and in an action of ejectment with regard to land in Cornwall *prima facie* Cornwall was the right place in which to try it. If it could be shown that there was a great balance of convenience in favour of trying the case elsewhere, that would be a ground for asking for an order for a change of venue. But, in his opinion, the defendant had altogether failed to show any such balance of convenience in this case. And, further than that, if the action were removed to London it certainly would not be tried for some months.

LORD JUSTICE RIGBY said he was of the same opinion, and he thought that the Court of Appeal ought always to require an overwhelmingly strong case before they interfered with the discretion of a Judge at Chambers as to the place where an action should be tried.

LORD JUSTICE COLLINS concurred, and only desired to add that, in his opinion, circuit cases should be tried on circuit.

Q.B. Div. (Grantham and } 1897.
Channell, J.J.) } Dec. 15.

THE WEST LONDON SYNDICATE (LIMITED), APPELLANTS,
V. COMMISSIONERS OF INLAND REVENUE, RE-
SPONDENTS.†

Revenue—Stamp duty—*Ad valorem* duty—
Amount payable—Contract for conveyance—
Stamp Act, 1891, sec. 59 (1).

This was a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp

Act, 1891 (54 and 55 Vict., cap. 80). On January 4, 1897, an instrument was presented on behalf of the West London Syndicate (Limited) to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument is dated March 19, 1895, and is an agreement under seal for the sale by Percy Thorne to the syndicate of, first, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor at Fischer's Hotel, 11, Clifford-street, New Bond-street, and the benefit of the licences and contracts and privileges of the vendor; secondly, the lease of the hotel, subject to the yearly rent of £964; thirdly, the household furniture, fixtures, and fittings; fourthly, the stock-in-trade and also cash in hand and book-debts. The consideration for the sale was the payment by the syndicate of the business debts of the vendor, and the sum of £4,250, of which sum £1,462 16s. 3d. was for furniture, stock-in-trade, and cash. Clause 6 of the agreement was this:—"The leasehold premises hereby agreed to be sold being only assignable with the consent of the landlords from whom the same are held, the vendor shall use his best endeavours to obtain the requisite consent for the assignment thereof to the syndicate or their assigns, and in the event of such consent not being obtained the vendor shall at the option of the syndicate execute a declaration of trust of the said leasehold premises in its favour." The Commissioners were informed by the solicitor to the syndicate that the debts were £1,335 8s. 4d., and that, therefore, the purchase consideration was £5,585 8s. 4d., including for lease and goodwill £4,085 8s. 4d., and that it was quite impossible to sever the goodwill from the lease itself because the goodwill was considered to be of no value, as it could not exist apart from the lease, but that without a covenant restricting the vendor from carrying on business the lease would be of less value by £400. The Commissioners called for the production of any assignment of the leasehold premises which might have been executed, and a declaration of trust bearing date March 21, 1895, by which the equitable interest in the leasehold premises became vested in the syndicate, was produced. The Commissioners invited the solicitor for the syndicate to present the declaration of trust for adjudication, so that the question of the proper stamp duty payable upon that deed might be considered and assessed by them in conjunction with any assessment to be made upon the instrument, but he declined to accede to this invitation, and stated that the amount of duty to be paid upon the declaration of trust was not then in question. The Commissioners, having regard to the provisions in sections 5 and 15 of the Stamp Act, 1891, were of opinion that, inasmuch as neither the sum of £4,085 8s. 4d. nor any other part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises so as to make that instrument chargeable according to its terms with *ad valorem* duty as a conveyance on sale, the whole consideration except the sum of £1,462 16s. 3d. apportioned by clause 2 of the agreement as the consideration for the furniture, stock-in-trade, and cash was to be regarded as applicable to the other property sold under the agreement. The Commissioners were, therefore, of opinion that the agreement was chargeable under section 59 (1) of the Stamp Act, 1891, with *ad valorem* conveyance duty on the said sum of £5,585 8s. 4d., less the sum of £1,462 16s. 3d. apportioned as aforesaid, making the net sum of £4,122 12s. 1d. The Commissioners accordingly assessed the *ad valorem* stamp duty of £20 15s. upon the agreement, being the *ad valorem* duty of 5s. for every £50 of the sum of £4,122 12s. 1d., payable under the head "Conveyance or transfer on

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

†Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

sale" in the 1st schedule to the Stamp Act, 1891, and they also assessed the fixed duty of 10s. in respect of the agreement for the sale of the said leasehold premises, furniture, stock-in-trade, and cash. The instrument has since been stamped in accordance with the assessment. The syndicate being dissatisfied with the assessment so far as it relates to the amount of the *ad valorem* duty have, in pursuance of the 13th section of the Stamp Act, 1891, required the Commissioners to state and sign a case setting forth the questions on which their opinion was required, and the assessment made by them. The questions for the opinion of the Court were:—(1) Whether the instrument was chargeable with the *ad valorem* duty of £20 15s., in accordance with the assessment of the Commissioners; (2) if not, with what amount of *ad valorem* duty the instrument was chargeable. By section 59 (1) of the Stamp Act, 1891, "Any contract or agreement made in England or Ireland under seal or under hand only . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property, excepting lands, tenements, hereditaments, or heritages, or property . . . locally situate out of the United Kingdom, or goods, wares, merchandise, or stock or marketable securities, or any ship or vessel . . . shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance or sale of the estate, interest, or property contracted or agreed to be sold."

Mr. A. T. Lawrence (Mr. Spearman with him) appeared for the appellants; the Attorney-General (Mr. Danckwerts with him) for the respondents.

The Court held that *ad valorem* duty was payable upon the amount of the book debts only.

MR. JUSTICE GRANTHAM, in giving judgment, said that the instrument was not the real conveyance on sale, but merely an agreement setting out what the parties intended to do in future. The stamp duty was payable upon the instrument which conveyed the goodwill, and not upon the bargain.

MR. JUSTICE CHANNELL concurred. The instrument was a contract for conveyance, but not a conveyance. Nor could it be said that it was an agreement for the sale of an equitable interest within section 59 of the Act, although the possible sale of an equitable interest was contemplated. The purchaser was at liberty to take, but was not bound to take, an equitable interest. As the instrument did not bind the purchaser, it was not a contract for the sale of an equitable interest. Nor was it a contract for the sale of any estate or interest in any property other than lands or goods within the meaning of section 59. The goodwill of a publichouse could not be severed from the enjoyment of the land. Nor had the parties treated it as separate from the land, although they had dealt with it in the instrument apart from the lease.

[Solicitors—A. E. Griffiths, for the appellants; The Solicitor for Inland Revenue, for the respondents.]

Q.B. Div. (Grantham and Channell, JJ.) } 1897.
Dec. 15.

REG. V. WIMBLEDON URBAN COUNCIL.*

Local Government—Burial Board—District Council—Right of ratepayer to inspect accounts—Application not made *bona fide* refused.

This was the argument of a rule directed to the Wimbledon Urban District Council, as the burial board for the district, to show cause why a writ of *mandamus* should not issue commanding them to permit Messrs. Ashurst, Morris, Crisp, and Co., the solicitors to

Richard Ernest Hatton, a ratepayer of the said urban district, to inspect, as his agents, the minute and account books kept by the council, as the burial board, and take copies and extracts from them.

Mr. G. Humphreys appeared to show cause against the rule, which had been obtained by Mr. Safford.

The affidavits on which the rule was granted showed that Mr. Hatton, a solicitors' managing clerk, was a ratepayer of the Wimbledon urban district. The council, who are the burial board for the district, propose to place an infectious diseases hospital on a piece of vacant land in their possession as burial board. In October last the council applied to the Local Government Board under section 233 of the Public Health Act, 1875, for leave to borrow £10,000 for the purpose. An inquiry was held, and the leave was granted on condition that the council obtained the leave of the Home Secretary for the utilization of the land for the purpose. Mr. Hatton stated that he was desirous of ascertaining, with other ratepayers, the circumstances under which the land was acquired, and whether it could be lawfully diverted for the purpose of the proposed hospital. He thereupon instructed Messrs. Ashurst, Morris, Crisp, and Co., as his solicitors, to make an application to inspect the said books and documents. Their application was refused on the ground that it must be made by the ratepayer alone. Messrs. Ashurst and Co. had appeared at the inquiry as solicitors on behalf of the Land Securities Company and Mr. Hatton and other ratepayers, and opposed the proposal of the council. The affidavit in opposition to the rule stated that the board thought the application was not made in good faith, but indirectly for the purpose of obtaining inspection of the books by Messrs. Ashurst and Co. on behalf of the Land Securities Company. No imputation was made upon the honour of Messrs. Ashurst and Co. The Metropolitan Burials Act, 1852, section 16, provides that entries of all proceedings of the board shall be entered in books, and true and regular accounts of all sums of money received shall be entered in other books. Section 17 provides that all such books shall at all reasonable times be open to the examination of every member of such board, churchwarden, overseer, and ratepayer without fee or reward, and they respectively may take copies of or extracts from such books.

The Court discharged the rule, holding that the Court ought not, as a matter of discretion, to grant the inspection asked for. There was no want of actual and real *bona fides*, but in a legal sense there was a want of *bona fides*, as the application was made for an indirect purpose. It was not for the benefit of Mr. Hatton, but for that of some other person.

Rule discharged.

[Solicitors—W. H. Whitfield, for the Council; Ashurst, Morris, Crisp, and Co., for the rule.]

Q.B. Div. } 1897.
(Bigham, J.) } Dec. 15.

DICKINSON V. BOWER.*

Bill of Exchange—Promissory note—Stamp—Stamp Act, 1891, sec. 33.

"In consideration of your advancing to M. and H. £250 on their joint and several promissory note, I undertake to pay £250 on demand, should their note not be met at maturity."

Held, that this did not constitute a promissory note within the meaning of sec. 33 of the Stamp Act, 1891.

This was an action brought to recover the sum of £250

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

under a contract contained in a document signed by the defendant in the following terms:—

"Dear Dickinson,—In consideration of your advancing to my friends, M'Kean and Holford, the sum of £250 on their joint and several promissory note, I undertake to pay such £250 on demand, should such promissory note not be met at maturity."

The facts were shortly as follows:—The plaintiff was a solicitor; the defendant was his client. The defendant several times asked the plaintiff to cash a promissory note for £250 for two friends of his, M'Kean and Holford. The plaintiff, to oblige the defendant, after some time consented to do so. The defendant assured him that his friends were perfectly safe, and agreed to guarantee the payment of the note. The document above set out was accordingly drawn up by the plaintiff and signed by the defendant at the same time as the £250 was handed over to the defendant. The promissory note for £250 was not met at maturity. The only defence raised was that the document sued on was a promissory note within the meaning of section 33 of the Stamp Act, 1891, and was insufficiently stamped. It was admitted that if it was a promissory note it was insufficiently stamped, and that the plaintiff would be precluded from suing on it. Section 33 of the Stamp Act, 1891, is in the following terms:—"(1) For the purposes of this Act the expression 'promissory note' includes any document or writing (except a banknote) containing a promise to pay any sum of money. (2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money."

Mr. BOWER appeared for the plaintiff and contended that the document in question was not a promissory note within the meaning of the Act. He referred to the following cases:—"British India Steam Navigation Company v. Commissioners of Inland Revenue" (7 Q.B.D., 165), and "Yeo v. Daw" (53 L.T., 125).

Mr. DALDY appeared for the defendant. He referred to the case of the "Mortgage Insurance Corporation v. Commissioners of Inland Revenue" (21 Q.B.D., 352, per Bowen, L.J., at p. 358).

The learned JUDGE, in giving judgment, said that he was sorry that the defendant had not thought fit to submit to judgment. He owed the money. He had no defence whatever on the merits, but had raised what he called a legal defence. In the opinion of the learned Judge that defence was bad; the document was not a promissory note, nor was it intended to be so by either party. It was a promise to indemnify the plaintiff in the event of his not getting the money which he had lent from the two persons who signed the note, and was only meant to apply so as to enable the plaintiff to get his money to the extent to which he might not be able to recover it from them. The document did not provide for the payment of a fixed sum, but for the payment of any sum that might turn out to be unpaid at the time the promissory note came to be met. The document was, therefore, not a promissory note either in intention or in fact, and the plaintiff was entitled to judgment.

computed—Bankruptcy Act, 1890, sec. 11 (2)
—Bankruptcy Rules, 1886, R. 90.

Rule 90 of the Bankruptcy Rules, 1886, does not apply to the service of a notice under sec. 11 (2) of the Bankruptcy Act, 1890.

This was an appeal by the claimant from an order of Mr. Justice Day at Chambers upon an interpleader summons, and raised a point as to the computation of time under the Bankruptcy Acts. On September 6, 1897, execution was levied for £62 4s. in respect of a judgment recovered by the plaintiffs against the defendant. On September 18 the defendant paid out the sheriff. On October 2 a receiving order was made against the defendant upon his own petition, and on the same day the Official Receiver sent a telegram to the sheriff stating that a receiving order had been made that day against the defendant, and that he claimed all moneys in the sheriff's hands paid by the defendant in respect of any execution. This telegram was received by the sheriff at 3 40 on the afternoon of October 2, which was a Saturday. The question was whether the telegram was not received too late, and whether, therefore, the 14 days during which the sheriff was to hold the money under section 11 of the Bankruptcy Act, 1890, had not expired. Subsection 2 of that section provides that, "where under an execution in respect of a judgment for a sum exceeding £20 the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall . . . retain the balance for 14 days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the Official Receiver . . . who shall be entitled to retain the same as against the execution creditor." By Rule 90 of the Bankruptcy Rules, 1886, "services of notices, orders, or other proceedings shall be effected before the hour of 6 in the afternoon, except on Saturdays, when it shall be effected before the hour of 2 in the afternoon. Service effected after 6 in the afternoon on any week-day except Saturday shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the following day. Service effected after 2 in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday." It was admitted that by section 141 of the Bankruptcy Act, 1883, the 14 days were to be computed exclusive of September 18. The Official Receiver contended that, as the 14 days did not expire until midnight of October 2, the notice was given in time, and that the sheriff was bound to hand over to him the proceeds of the execution, and that Rule 90 only applied to notices of procedure, and not to notices such as this. The execution creditors claimed the proceeds, contending that by Rule 90 the notice of the receiving order must be deemed to have been served on Monday, October 4, when the 14 days had expired. The sheriff interpleaded, and Mr. Justice Day ordered the sheriff to pay over the moneys in his hands to the execution creditors. The claimant appealed, and referred to "Curtis v. Wainbrook Iron Company" (Cab. and Ell., 351).

Mr. H. Reed, Q.C., and Mr. H. J. Turrell appeared for the claimant; Mr. Muir Mackenzie appeared for the execution creditors; Mr. R. Coventry appeared for the sheriff.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether the 14 days during which the sheriff had to hold the proceeds of the sale were cut down by Rule 90. The 14 days commenced to run on September 19.

Court of Appeal (A. L. Smith, } 1897.
Rigby, and Collins, L.J.J.) } Dec. 16.

LOLE AND ANOTHER V. BETTERIDGE—MALLAM,
CLAIMANT.*

Bankruptcy—Sheriff—Proceeds of sale—Notice of
bankruptcy petition—"Fourteen days," how

and, *prima facie*, did not expire until midnight of October 2. If section 11, subsection 2, of the Bankruptcy Act, 1890, were taken by itself, it was obvious that the notice of the petition was given within the 14 days, because at 3 40 p.m. on October 2 the sheriff received the telegram. Was that section cut down by Rule 90? In his opinion the rule only applied to notices of procedure, and did not apply to such notices as this. This part of the rules was headed, "Service and execution of process." All the rules in this part, including Rule 90, applied to procedure notices, and to nothing else. Therefore Rule 90 did not apply, and he agreed with the decision of Mr. Justice Grove in "*Curtis v. Wainbrook Iron Company*" (Cab. and Ell., 351), which, no doubt, had been acted upon ever since. There was another ground upon which this case might be decided. There was nothing in Rule 90 which said that a notice served after 2 p.m. on Saturday was a bad notice for that day. The rule merely limited an hour of the day for the purpose of computing the date from which the other party had to do an act or take a step. The rule treated the service of a notice in certain cases as postponed for a particular purpose. The appeal must, therefore, be allowed.

LORD JUSTICE RIGBY and LORD JUSTICE COLLINS concurred.

[Solicitors—Ashwell, Browning, and Tutin, for the claimant; Warren, Murlen, and Co., for the execution creditor; Rowcliffes, Rawle, and Co., for W. F. Blandy, Reading, for the sheriff.]

Q.B. Div. (Grantham)
and Channell, J.J.) }

1897.
Dec. 16.

LEWIS V. BURRELL.*

County Court—Practice—Pleading a statutory defence—Action on solicitor's bill of costs—6 and 7 Vict., c. 37, sec. 73.

This was an appeal from a judgment for the defendant by the Liverpool County Court Judge. The question raised was whether it was necessary for a defendant to plead as a statutory defence in an action on a solicitor's bill of costs in the County Court that the bill was not drawn up in the form required by the Solicitors Act, 6 and 7 Vict., c. 37, s. 73. At the action for the recovery of the bill of costs by Messrs. Herbert Lewis and Davies, solicitors, the point was taken that no proper signed bill of costs with details set out had been sent in, but no notice had been given of this defence.

Mr. BRYN ROBERTS appeared for the plaintiff. He referred to Order X., Rule 10, and 1 s. (a) of the County Court Rules. He said there was no case relating to this point under the Solicitors Act. There were, however, cases in respect to other Acts of Parliament which decided that notice must be given. He cited "*Conroy v. Peacock*" ([1897] 2 Q.B., 6), a case under the Employers' Liability Act where notice had not been given.

Mr. CRAWFORD appeared for the defendant, and urged that the solicitor was not prejudiced, because he had come supplied with authorities to show that the bill was sufficiently drawn out. The County Court Judge might, under section 87 of the County Court Act of 1888, have given leave to amend. It was very clear that the bill was not right. It only claimed a lump sum. The action was therefore wrong in its inception, as a solicitor was prohibited by the Solicitors Act, 6 and 7 Vict., c. 37, s. 73, from commencing the action unless the bill was drawn up in accordance with the Act. He admitted he

could not plead the ground of defence without mentioning the statute.

The COURT held that a statutory defence ought to have been pleaded, and therefore granted the application of the plaintiff for a new trial.

[Solicitors—Lloyd-George, Roberts, and Co., for Tudor Jones and Jones, for the plaintiff; Tatton and Collyer, for the defendant.]

Q.B. Div. (Grantham)
and Channell, J.J.) }

1897.
Dec. 16.

FANCETT V. BIERMAN.*

Pawnbroker—Pawning without authority—Right of pawnbroker to prosecute—Pawnbrokers Act, 1872, sec. 33.

This was a special case stated by a metropolitan magistrate raising a question as to the right of pawnbrokers to prosecute a person pawning goods with them without authority. At the Marlborough-street Police-court a complaint was preferred by Thomas Fancett against Ann Bierman under section 33 of the Pawnbrokers Act, 1872, for pawning with the appellants, J. B. Harrison and J. H. Cawdell, pawnbrokers, a certain coat, the property of one J. Lawrence, without his authority. The magistrate dismissed the summons. The facts were these. Fancett was manager to the pawnbrokers. On November 30 the respondent pledged a coat with them for £1 1s., which coat had been given to the respondent's husband to repair. She had no authority to pledge it. On a summons taken out by Joseph Lawrence, the owner of the coat, against the pawnbrokers, under section 40 of the Pawnbrokers Act, they were ordered to hand over the coat to him. This they had done. The complaint in question was then made against the respondent. The magistrate found that she had committed the offence, but he dismissed the summons on the ground that it was an attempt to apply section 33 of the Pawnbrokers Act to a state of things to which it was never meant to apply, the appellants having no right to give or withhold authority to the respondent to pledge the coat and not being injured by such pledging to which they were actually party. The magistrate thought that it was the party whose property was pledged who was the "party injured," and held that the appellants could not prosecute. The question was whether he was right in dismissing the summons. The section out of which the case arose was as follows:—"(33) If a person knowingly . . . pawns with a pawnbroker anything being the property of another person, the pawnbroker not being employed or authorized by the owner thereof to pawn the same, he shall be guilty of an offence against this Act, and shall be liable on conviction to forfeit any sum not exceeding £5, and in addition thereto any sum not exceeding the full value of the pledge. The forfeitures when recovered shall be applied towards making satisfaction thereout to the party injured."

Mr. Bucknill, Q.C., Mr. C. L. Attenborough with him, appeared for the appellants. No one appeared on the other side.

Mr. BUCKNILL argued that the magistrate was wrong. The person injured by the unlawful pawning was the pawnbroker. The owner of the coat could not be said to be the injured party for he had had it back.

The COURT adopted this view, and stated their opinion that the respondent ought to be convicted, and that the forfeiture imposed should be enough to make good the guinea lent by the pawnbrokers.

[Solicitors—Attenborough and Son, for the applicant.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Q.B. Div. (Lord Russell of)
Killowen, C.J.) }

1897.
Dec. 18.

LEWIS V. CLAY.*

Bill of Exchange—Promissory note—Signature obtained by fraud—"Holder in due course"—Bills of Exchange Act, 1882, secs. 20, 21, 29, 30, 38, 83, 84, 88, 89.

The facts of the case appear sufficiently in his Lordship's judgment.

Mr. Lawson Walton, Q.C., and Mr. Pollard were counsel for the plaintiff; and Sir Edward Clarke, Q.C., Mr. Carson, Q.C., Mr. H. Tindal Atkinson, and Mr. W. E. Hume Williams represented the defendant.

The LORD CHIEF JUSTICE, in giving judgment, said,—This is an action brought by the plaintiff as payee against the defendant to recover from him, as one of two makers, the amount of two joint and several promissory notes dated respectively June 15, 1896, one for £3,113 15s., payable three months after date, and the other for £8,000, payable six months after date. The name of the other joint and several maker on each promissory note is that of Lord William Nevill. It is admitted that the genuine signature of the defendant appears as maker on each of the promissory notes, which had been prepared in the plaintiff's office, and also that his genuine signature appears on two letters, one dated June 15 referring to the note of smaller amount, and one dated June 21, 1896, referring to the note of larger amount, authorizing the plaintiff to pay the proceeds to Lord William Nevill. The latter brought the promissory notes and letters to the plaintiff, who, it is admitted, gave value for them, and who is found by the jury to have taken them in good faith. The defendant contended that he was not liable on the ground that he had never been asked, and that he never intended to put his name on any bill or promissory note, or to take upon himself any contractual obligation or legal liability of any kind. He explained that he had just come of age in June, 1896; that he had known Lord William Nevill intimately for some years; that he and Lord William Nevill were members of the same Ascot party in that month; and that on Sunday, June 21, Lord William Nevill had come to his bed-room and asked him to witness some deed or document; that he produced a roll of papers covered up by blotting or other paper, in which there were four openings; that upon the defendant asking what the document was about, Lord William Nevill said he would show it if the defendant insisted, but he would rather not, for that it was a private matter, that he wanted a power of attorney, and that it had to do with his sister, Lady Cowley's marriage settlement, and to certain divorce proceedings then pending; that he (the defendant) did not insist on seeing the document, trusting to Lord William Nevill; that upon this the defendant signed his name, he believed four times, and he thought Lord William Nevill signed twice in the openings. He said he had signed his name with the single intention of witnessing the signature of Lord William Nevill. He added that up to that time he had had no reason to doubt the honour of Lord William Nevill, and that, so far as he knew, no one who knew Lord William had. The following questions were put to the jury, who gave the answer appended to each:—(1) Did the plaintiff take the promissory notes in good faith? [It is admitted he took them for value.] Answer.—Yes. (2) Is the defendant's account of the circumstances under which he signed his name substantially true? Answer.—Yes. (3) Was the defendant, in signing his name as he did, recklessly careless, and did he thereby enable

Lord William Nevill to perpetrate the fraud? Answer.—No; not under the circumstances. (4) Were the signatures to the documents given by the defendant in misplaced confidence in the statements of Lord William Nevill as to their nature? Answer.—Yes. (5) Did the defendant sign his name to be used by Lord William Nevill for any purpose he chose? Answer.—No. (6) Did the defendant attach his signature to the documents without due care? Answer.—No, not under the circumstances. I have now to consider in the light of these findings which of the parties is entitled to judgment. It is clear that the proof of the signature of the defendant to the promissory notes, coupled with proof of their delivery to the plaintiff under the apparent authority of the defendant, makes out a *prima facie* case for the plaintiff. Is it a conclusive case? Here two questions arise—(1) Is the defendant precluded or estopped from setting up the true circumstances under which his name came to appear on the documents in question? (2) If not, do those true circumstances afford an answer in point of law to the plaintiff's claim? As to the first question the defendant is not, in my judgment, estopped or precluded from setting up the actual facts upon any principle of law. Apart from statute such preclusion or estoppel can only arise (in circumstances like the present) where the defendant had so conducted himself that it would be contrary to natural justice to permit him to assume a position inconsistent with that which he had ostensibly occupied, or which he led others to believe he occupied, and upon which others had, misled by his conduct, been suffered to act. In the present case the suggestion on the part of the plaintiff is that the defendant had not used due care in signing his name, and that he had signed in misplaced confidence in Lord William Nevill. The jury have found that there was, in fact, no want of due care in the circumstances in signing his name as he did; but it was urged that the finding as to misplaced confidence was sufficient, and the authority of a distinguished American Judge in the case of "*Putnam v. Sullivan*" (4 Mass. Repts., p. 45, 1808) was cited. What does misplaced confidence mean? It may mean confidence placed where you know or ought to know it is not safe, or confidence placed where you have every right to believe it is safe, but where it is afterwards betrayed. The former, I think, is the case the learned Judge had in his mind, and the facts there may afford evidence of want of due care; but that clearly is not here the meaning attributed by the jury to misplaced confidence, for they have found that there was in the circumstances no want of due care on the part of the defendant. Taking the findings together they amount to this—that the defendant was in the circumstances guilty of no want of due care in placing confidence in the statement made by Lord William Nevill, and accordingly in signing his name as he did; and I decline to hold that the placing of confidence as here shown, which is afterwards betrayed, where it is not recklessly or negligently so placed, in any way precludes the defendant from setting up the true facts as a defence. I conclude, therefore, the defendant is not, upon any principle of law, estopped or precluded from setting up the true facts. How, then, is the plaintiff's case put? It was argued that whatever was the law before or apart from the Bills of Exchange Act, 1882, the facts here did not under that Act afford a defence as against a "holder in due course," which, it was said, the plaintiff was within section 29, and that the question must be determined by reference to that Act alone. I think this argument involves a misconception both of the plaintiff's position and of the scope and effect of the Act of 1882. It will be apparent from a consideration of the facts of the case that

*Reported by E. HARRINGTON, Esq., Barrister-at-Law.

the plaintiff was not a "holder in due course" at all, but that he was, in fact, simply the named payee of two promissory notes. Further, an examination of sections 20, 21, 29, 30, and 38 relating expressly to bills, and sections 83, 84, 88, and 89 relating to promissory notes, will make it quite clear that "a holder in due course" is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning of the Act. I desire to say here that, even if the plaintiff were "holder in due course," it would, in my judgment, make no difference in the result. But is the contention right that the Act of 1882 must alone be looked to? I think not. That Act was intended to be mainly a codification of the existing law, but it is not merely a codification Act, for some alterations of the law are clearly effected by it and it does not purport to be exhaustive, for by section 97 the rules of the Common Law (including the Law Merchant), save in so far as they are inconsistent with the express provisions of the Act, continue to apply. But I agree that in determining questions of liability on bills or notes it is proper to examine the Act before turning to the cases declaratory of the Common Law decided before that Act. It is unnecessary to set out the provisions of the Act and to comment in detail upon them. It is enough to say that there is nothing in the Act which prevents the defendant from setting up the defence that he never made the promissory note in question—which is the real defence here. It would, indeed, be strange if it did. For the purposes of the present case the question is precisely the same as if any other contract than one by promissory note had been written on the documents, to which the defendant was induced to sign his name—for instance, if it had been a contract of guarantee or suretyship. Then the question would have been—Did the defendant make the contract of guarantee or suretyship? Here it is—Did he make the promissory notes sued upon? The question, then, is, on the facts as they are now found to be—Did the defendant make the promissory notes in question? If he did not, then the finding of the jury that the defendant was not guilty of any want of due care establishes that he is not precluded from saying so. That there is a *prima facie* case on the plaintiff's evidence that he did, I have already said; but is that *prima facie* case rebutted and displaced by the defendant's evidence? According to that evidence it must, after the findings of the jury, be taken to be the fact that he thought he was witnessing a deed or document; that he was so told; that he had no idea of signing and was not asked to sign any bill or promissory note, or to undertake any contractual obligation of any kind. A promissory note is a contract by the maker to pay the payee. Can it be said that in this case the defendant contracted to pay the plaintiff? His mind never went with such a transaction; for all that appears, he had never heard of the plaintiff, and his mind was fraudulently directed into a different channel by the statement that he was merely witnessing a deed or other document. He had no contracting mind and his signature obtained, by untrue statements fraudulently made, to a document of the existence of which he had no knowledge cannot bind him. It is as if he had written his name for an autograph collector, or in an album. The case differs in no material respect from one in which a genuine signature is deftly transferred by delicate contrivance from one document to another, and so skilfully as to escape notice under ordinary examination. Or, again, if the body of the promissory notes had been fraudulently written above, and after his

signature had been made, it would have been forgery, and in such case it is clear no recourse could be had upon it. Can it make any difference as to resulting contractual obligation that the body of the note was without his knowledge filled up before he was fraudulently induced to put his name in the belief that it was something wholly different? I think not. In plain reason it must be said that the use to which the defendant's signature was applied was in substance and effect forgery, whether or not it amounted to the criminal offence of forgery. I think it well to point out that cases like the present differ widely from those in which the party sought to be charged has agreed and intended to enter into contractual obligation by bill or note but has been defrauded into agreeing, or been defrauded in the manner in which the bill or note has been dealt with. In such cases he is liable, on principle and authority, to any one who has dealt with the bill or note in good faith and for value. It was in argument admitted that the case of "*Foster v. Mackinnon*" (4 L.R., C.P., 704) is in point, and is an authority binding on me if the Bills of Exchange Act of 1882 has not altered the law as there declared. I find that the law has not been so altered. I see nothing in the Act to warrant the suggestion that it has been altered, and it is noteworthy that all the text-writers dealing with the Bills of Exchange Act, 1882 (including, indeed, the draftsman of the Act), treat that case as an existing authority. The facts in "*Foster v. Mackinnon*" were that an old man of feeble sight was induced—without, as the jury found, any negligence on his part—to sign his name on the back of a bill by the fraudulent statement that it was a guarantee which, in fact, he had undertaken to sign. The Court of Common Pleas (consisting of Chief Justice Bovill and Justices Byles, Keating, and Montagu Smith) held that he was not liable, and this in an action by what was then called a *bona fide* holder for value and without notice, of which "holder in due course" is now the legal equivalent. In these islands, cases in litigation of frauds such as that here practised are of rare occurrence, partly because of the existence and character of our stamp laws, but in the United States of America, where no such laws exist, there are many authorities dealing with points similar to that in the present case—"Douglas v. Matting" (4 Amer. Rep., 238, 1870); "*Taylor v. Atchison*" (5 Amer. Rep., 118, 1870); "*Whitney v. Snyder*" (2 Lans., 477, 1870); "*Walker v. Egbert*" (9 Amer. Rep., 548, 1871); and "*Griffiths v. Kellogg*" (20 Amer. Rep., 48, 1876). The great weight of United States authorities supports the view of the common law expressed by the English Judges. I have thought it right to say so much, but in truth these authorities are not necessary for the purposes of this case. They are all cases where the bills or notes had been negotiated to persons now called "holders in due course." It follows, if such a holder cannot in a case like the present recover, *a fortiori* that the plaintiff—who, as named payee, is one of the immediate parties—cannot recover. In the result, therefore, my judgment must be for the defendant, and the plaintiff must be enjoined from in any way dealing with the notes, and the same must be cancelled so far as they purport to be the notes of the defendant.

A stay of execution as to costs was granted, in view of an appeal.

Q.B. Div. }
(Darling, J.) }

1897.
Dec. 18.

HUTTLEY V. SIMMONS AND OTHERS.*

Trade Union—Inducing persons not to employ

*Reported by J. E. ALDOUN, Esq., Barrister-at-Law.

plaintiff—Conspiracy—“Allen v. Flood” (*ante*, p. 125) considered.

This case was tried on November 11 last. The plaintiff, a cabdriver, sued the defendant Simmons, who was the president of a strike committee of a trade union, and others, who were members of the same trade union, for damages sustained by the plaintiff in consequence of the defendants having induced a cab proprietor named Young to refuse to engage the plaintiff to drive a cab for him, or to let a cab to the plaintiff to be so driven. The statement of claim alleged that the defendants acted maliciously in this respect, and also that they conspired together and with others to induce Young not to employ the plaintiff nor permit him to hire or drive a cab. The learned Judge directed the jury that there was no evidence against any of the defendants except Simmons; that there was no evidence of a contract between plaintiff and Young or any other person to employ plaintiff to drive a cab or to let a cab on hire to plaintiff; that there was no evidence that the defendant Simmons did anything to prevent any other person than Young from employing plaintiff. In answer to questions left to them by his Lordship the jury found as follows:—(1) Did the defendant Simmons induce Young not to engage plaintiff to drive a cab for him or to let on hire to plaintiff a cab to be so driven? Answer.—Yes. (2) If so, did the defendant Simmons do this maliciously in this sense? Did he induce Young to refuse to employ plaintiff or to let a cab on hire to him for either of the following reasons:—(a) In order to injure plaintiff? Answer.—Yes. (b) Or to procure some indirect advantage for himself, the defendant? Answer.—No. (c) Or to procure such advantage for others for whom defendant was acting? Answer.—Yes. (3) Did the defendant Simmons conspire with others—with other members of the Cabdrivers' Union, for example—to induce Young not to employ the plaintiff nor to permit him to hire and drive a cab? Answer.—Yes; and the jury assessed the damages at £5. Upon these findings the learned Judge entered judgment for the defendants other than Simmons. With regard to the defendant Simmons, his Lordship reserved judgment, having regard to the fact that this case must depend, except as to the finding on the question of conspiracy, upon the decision of the House of Lords in the case of “Allen v. Flood,” which was then awaiting judgment on appeal to the House of Lords from the judgment of the Court of Appeal.

Mr. W. M. Thompson and Mr. Lambert Bond appeared for the plaintiff; Mr. Carson, Q.C., and Mr. Roskill for the defendants.

MR. JUSTICE DARLING delivered judgment this morning. Having stated the facts above set out, his Lordship proceeded:—I reserved judgment in order to save the parties the expense of an appeal from my judgment had I followed the decision of the Court of Appeal in “Allen v. Flood,” as I should have been bound at that time to do. The House of Lords gave judgment on the 14th of this month in favour of the appellant in “Allen v. Flood,” and that judgment binds me, as I understand it, to enter judgment in this case for the defendant Simmons upon every finding of the jury except that regarding conspiracy by the defendant. Nothing in this case which was done by the defendant would have amounted to an actionable wrong, except it were done maliciously in the sense defined by the Court of Appeal and found by the jury in this case, and I take the House of Lords to have now decided that the existence of a bad motive in the case of an act which is not of itself illegal will

not convert that act into a civil wrong for which reparation may be due. This case, however, although in a great measure governed by the decision of the House of Lords in “Allen v. Flood,” is not concluded by that judgment. For in this case the jury have found that the defendant conspired with others to induce a person not to employ the plaintiff nor to permit him to hire and drive a cab. Upon the question thus raised, the judgment in “Allen v. Flood” is, I humbly conceive, of no authority, although Lord Shand in his judgment makes the following observations in this connexion:—“The case was not presented by the learned Judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of the Mogul Steamship Company, and was there held to be lawful. Combinations for no such object, but in pursuit really of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful; but this case raises no such question.” With every respect for this expression of his lordship's opinion on this matter, I am bound to observe that, by his own confession, this is merely *obiter dictum*; and therefore I must look elsewhere for authority. Now I take it to have been established by the judgment of the House of Lords in “Allen v. Flood” that (conspiracy apart) nothing proved to have been done by the defendant in this case amounted to an actionable wrong. Does, then, his having conspired with others to do those things render such otherwise innocent acts illegal and wrongful, so as to give plaintiff a right of action against him? I think I am bound by authority to come to a contrary conclusion. In the case of “The Queen v. Warburton” (L.R. 1, C.C.R., 274), Cockburn, C.J., delivering the judgment of the Court, says:—“It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful—i.e., amount to a civil wrong.” From the statement of the Court that it is enough if these acts do amount to a civil wrong, it is to be inferred that there would be no illegal conspiracy did those acts not amount to a civil wrong at the least. Now it is true that the judgment there was pronounced in a criminal case; but in the well-known case “The Mogul Steamship Company v. McGregor,” Lord Coleridge, C.J., speaks thus:—“It cannot be, nor indeed was it denied, that in order to found this action there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike, whether the combination is the subject of an indictment or the subject of an action” (21 Q.B.D., at p. 549). This question is, moreover, to my mind, concluded by the very learned and admirable judgment of Pales, C.B., in “Kearney v. Lloyd” (L.R., Ireland, 27 Q.B., and Ex. Div., 268), which is to the effect that conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff. In this case it appears to me that I am bound by the decision of the House of Lords to hold that none of the acts done or agreed to be done gave the plaintiff any right of action for injury in law to any legal right of his, and, therefore, my judgment must be for the defendant.

Judgment for defendant Simmons.

[Solicitors—G. Jolly, for the plaintiff; Pattinson and Brewer, for the defendants.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) }

1897.
Dec. 20.

ELLIS V. POND AND ANOTHER.*

Stockbroker—Agreement to carry over—Sale in breach of agreement—Loss by broker of right to indemnity.

Judgment of Mathew, J., varied.

This was an appeal by the defendants from the judgment of Mr. Justice Mathew upon further consideration after the trial of the action with a special jury. There was also an application by the defendants for a new trial in respect of the counterclaim. The action was brought by Mr. Welbore Stuart Ellis, a stockbroker, to recover £8,551 losses alleged to have been incurred by him in respect of purchases and sales of stocks for and on behalf of the defendants, and for commission. The losses occurred owing to the sale of a large quantity of Metropolitan District Railway stock by the plaintiff to a dealer or jobber, at the price of 25, the stock having been bought at an average price of about 30. The sale took place on November 19, 1896, and the defendants contended that the sale on that day was unauthorized by them, and that the plaintiff in accordance with the understanding between him and them ought not to have sold the stock till November 26, the next settling day. It appeared that the defendants, having formed an intention to carry out a scheme for the construction of a deep level electric railway under the line of the Metropolitan District Railway Company, determined to buy large blocks of the stock of that company. The defendant Pond accordingly approached the plaintiff, informed him of the scheme, and instructed him to make purchases of District Railway stock on the Stock Exchange. The plaintiff made large purchases of that stock, and Mr. Pond paid him certain sums of money as cover, the stock being carried over from time to time. On November 19 the plaintiff, being then liable to dealers on the Stock Exchange for a large amount of stock, and thinking that he had not received as much cover as he was entitled to, closed the account by effecting a sale of the stock as above stated, having on the previous day given Mr. Pond notice of his intention to do so. The defendants, by way of counterclaim, claimed damages for breach of duty on the part of the plaintiff. The learned Judge left certain questions to the jury, which with their answers were as follows:—(1) Did the plaintiff agree not to sell the stock before November 26?—He did. (2) Did the defendants, when they employed the plaintiff as their broker, or at any other time, agree to give cover to any and what amount?—There was no agreement at first, but the defendants afterwards admitted the plaintiff's right to cover. (3) Did the plaintiff agree to give the defendants notice before he closed the account, and was the notice he gave reasonable?—There is no evidence of any agreement to give the defendants notice, but we consider the notice was unreasonably short. (4) Did the plaintiff in selling the stock act in good faith and with proper care and skill? He did not. (It was admitted that this merely meant that the sale was a wrongful one, there being no suggestion of bad faith, fraud, or collusion.) (5) If the stock had not been disposed of to Mr. Smith (that is on November 19) for what amount could the plaintiff have sold it?—£28. (6) Did the plaintiff, as broker for the defendants, agree with the defendants to assist them in carrying out the scheme of the Electric Railway?—Yes. (7) Did he fail to do so?—No. The learned Judge, after hearing argument, gave judgment for the plaintiff for £4,151, such sum repre-

senting the amount which would have been due to the plaintiff if he had sold the stock at 28. He also gave judgment for the plaintiff on the counterclaim.

Mr. Lawson Walton, Q.C., and Mr. H. Tindal Atkinson appeared for the defendants.

Mr. Asquith, Q.C., and Mr. C. C. Scott (Mr. Whately with them) appeared for the plaintiff.

The COURT, having taken time to consider, delivered judgment to-day, varying the judgment of the Court below, Lord Justice Rigby dissenting. The Court also dismissed the application for a new trial.

LORD JUSTICE A. L. SMITH read the following judgment:—The first question raised upon this appeal is whether a stockbroker who in the ordinary course of business upon the Stock Exchange has rendered himself personally liable to a jobber upon the purchase of stocks on behalf of a principal, and who has contracted for good consideration with that principal that the stocks shall be carried over and not sold before the then next settling day, loses his right of indemnity against his principal if before that day he in breach of his contract sells the stocks against his principal. The broker does not dispute that he is liable to his principal for the damages the latter may sustain by reason of his breach of contract, but he insists that, although he has broken his contract with his principal, he is still entitled to be indemnified by him from the liability he is under to the jobber. Taking the findings of the jury which are not impeached, and the other proved or admitted facts of this case, they may be stated as follows:—The plaintiff is a stockbroker upon the London Stock Exchange and the defendant Pond (I omit the syndicate) was his client. It is unnecessary to go into the purposes for which the stocks were purchased; it is sufficient to say that prior to November 10, 1896, the plaintiff, as broker, had purchased heavy amounts of stock for the defendant, and upon that day, which was a settling day, the position of matters was this. The plaintiff then held a large amount of the stock so purchased for the defendant, which had been closed by the plaintiff at the request of the defendant, and paid for by the plaintiff by his own or borrowed money. There was also at this date stock of the value of £35,000 nominal still open which the plaintiff as broker had previously purchased for the defendant. There was also stock amounting to £14,000 nominal which the plaintiff purchased upon that day, November 10, 1896, for the defendant at his request, but not paid for. This £35,000 of stock the defendant was desirous of having carried over at the then current price of the day—viz., 29½, till the next settling day, and this was the price at which the £14,000 stock had been purchased by the plaintiff for the defendant on that day. In these circumstances the plaintiff for good consideration agreed with the defendant that the £35,000 of stock should be carried over until the next settling day, and he further agreed that none of the stocks above mentioned should be sold before the next settling day, which was November 26, 1896. Upon November 19, 1896, however, the plaintiff for his own purposes sold the stocks at 25, and in so doing did not, as the jury have found, act in good faith and with proper care and skill. The learned counsel on either side agree that the not acting in good faith as found by the jury meant that the sale was not in the honest exercise of a right, in other words, that it was a wrongful sale against the defendant. If these stocks had not been sold until November 26, 1896, as had been agreed, they would have realized 28. Upon November 24, 1896, which it will be seen was two days before the next settling day, the plaintiff issued his writ in this action against the defendant, and the endorsement thereon claimed to recover £8,551—balance of moneys due in respect of stocks and shares bought and sold by the plaintiff for

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

the defendant at his request, and he took proceedings thereon under Order XIV. for summary judgment, which, however, were not successful. As regards the stocks which the plaintiff purchased for the defendant and closed at request of the defendant by paying for them with his own or borrowed money, in my judgment he is entitled to sue the defendant for money paid by the plaintiff at his request, and as to these stocks the plaintiff is entitled to recover the difference between what he paid for them and what they would have realized upon November 26, 1896. The case of "*Duncan v. Hill*" (L.R., 8 Ex., 242) in the Exchequer Chamber shows that this is so. See the point as to the £1,688 in that case. But, although this is so, the defendant is entitled to the damages he has sustained by reason of the plaintiff selling these stocks before November 26, 1896, in breach of his contract with the defendant—"*Lacey v. Hill, Seringgeour's Claim*" (L.R., 8 Ch., 921). I now come to the claim of the plaintiff against the defendant to be indemnified by him against the difference between the price at which the £35,000 of stock was carried over—viz., 29½—and the price it would have realized upon November 26, 1896, and also for indemnity against the difference between the price at which the unpaid-for stock of £14,000 was purchased and the price it would have realized upon that day. That the broker (the plaintiff) made himself personally liable to the jobber in respect of these stocks is undoubted, his obligation being that if upon the settling day he did not pass to the jobber the name of a purchaser willing to take the stocks at the contract price he (the broker) would indemnify the jobber against any difference or loss the jobber might sustain thereby. It cannot be denied that down to November 19, 1896, the defendant was under liability to the plaintiff to indemnify him against the claims of the jobber should he (the defendant) break his contract with the plaintiff, and what this contract was I will state in a moment. I do not doubt that if the plaintiff had upon November 19, 1896, rightfully sold against the defendant, although it was before the settling day of November 26, 1896, he would have been entitled to be indemnified by the defendant for the difference between what he then sold at and what, if anything, he had to pay the jobber, for the defendant would upon this hypothesis have renounced the further performance of his contract with the plaintiff, and the plaintiff would then, upon the authority of such cases as "*Hochster v. De la Tour*" (2 E. and B., 678) and "*Frost v. Knight*" (L.R., 7 Ex., 111), have been entitled to treat the contract as at an end and to sell against the defendant, and be indemnified by him against any difference there might be between the then selling price and the price contracted to be paid to the jobber. But this, upon the findings of the jury, is not what the plaintiff has done. He has before the next settling day wrongfully sold against the defendant, and he now asks the defendant to indemnify him against the consequences, not of his rightful, but of his wrongful, sale. When this case is understood it will, I think, be found to be the case of an agent asking his principal to indemnify him against the consequences of his own wrong. If the old money count of money paid at the defendant's request had been resorted to by the plaintiff to recover the difference, the answer of the defendant would have been, "You never paid these differences to the jobber at my request, for what you are suing me for are differences arising out of your having acted directly contrary to my request," and thus this count could not be supported by proof. I now assume a claim founded upon a contract to indemnify, which is the only other claim the plaintiff has as regards the £35,000 and £14,000 of stock. First of all, what is the contract of a buying principal with the broker? In my judg-

ment his contract is that if the broker will purchase shares for him he (the principal) will upon the settling day take up and pay for the stock so purchased by the broker, and that if he does not he (the principal) will indemnify the broker from the claim of the jobber. This, in my opinion, is the contract between a buying principal and the broker. In an action for indemnity by the broker he must aver and prove a promise by the defendant to indemnify him against loss occasioned to him by reason of his (the defendant) not performing his contract with the plaintiff, that is, as before stated, not taking up and paying for the stock upon the settling day; and secondly, he must aver and prove by way of breach that the defendant refused or neglected to perform his contract in that behalf, whereby the plaintiff has been damaged. If the plaintiff does not establish that the defendant has refused or neglected to perform his contract with him, in my judgment he clearly fails in his action for indemnity, for it is only upon proof of such refusal or neglect that the right to indemnity arises. Now, how can the plaintiff prove that in this case the defendant has refused or neglected to take up and pay for the stock upon the settling day, when he has not done so? Upon November 19, 1896, that is, seven days before the settling day, upon which the defendant first came under obligation to the plaintiff to take up and pay for the stock, the plaintiff, in bad faith and without proper care and skill, had sold against him to a person named Smith, and upon November 24, 1896, two days before the settling day, he had brought the present action for the £8,551, showing unequivocally that, as far as he was concerned and was able to bring it about, the transaction between him and the defendant was at an end, and that when November 26, 1896, came, no stock whatever would be tendered to the defendant, as in fact it was not. It was not before the settling day that the broker had to pass a name of a purchaser of the stock to the jobber, and it was perfectly open to the broker upon that day to pass the name of Smith. By selling to Smith stock of similar amount to that in respect of which the plaintiff had contracted with the jobber to pass to him the name of a purchaser upon the settling day, the broker (the plaintiff) by passing Smith's name performed his contract with the jobber, subject of course to his liability to make good to the jobber any difference there might be between the contract price and that agreed to be paid by Smith. That the contract with the jobber was thus fulfilled appears to me clear, and he had no claim or remedy whatever against the defendant, the original principal. The real truth is, when the broker (the plaintiff) sold against the defendant upon November 19, he substituted Smith as purchaser in the defendant's place, and by passing Smith's name to the jobber, the broker's contract with him was performed. It appears to me that the plaintiff altogether fails to show that the defendant refused or neglected to perform his contract with the plaintiff, for by the plaintiff's own wrongful act the defendant has been prevented from performing it, and consequently an action for an indemnity in this case cannot be supported. The case of "*Duncan v. Hill*" is a direct authority that there is no implied promise by a buying principal to his broker that he will indemnify him from the consequences of his own wrong. If I had come to a contrary conclusion I should not have thought anything of this point, under the peculiar circumstances existing as to the £8,000 being brought into Court by the defendant, that there could only have been a declaration for an indemnity and not judgment for the amount of the deficiency. For the reasons above, in my judgment the defendant is entitled to have judgment entered for him upon the plaintiff's claim for indemnity, and as regards the stocks which

were open and not paid for upon November 10, 1896. As to the second question, the application for a new trial raised upon the defendant's counterclaim for £25,000 against the plaintiff—viz., for not assisting the defendant in carrying out the scheme of the electric railway, I am of opinion that it should be refused. The jury had to consider, first, whether such a promise was made; secondly, what was the meaning of it, if made; and thirdly, whether the plaintiff had done all that he had promised to do under the vague term "to assist." They have found that he promised to assist, and that he did so. Upon the evidence read to the Court, I can see that the jury were well warranted in this last finding—viz., that the plaintiff had performed his promise. Down to a certain period, the plaintiff manifestly did assist the defendant; and it may well be that the jury thought by what he had done in the circumstances which existed that he had amply fulfilled his promise. The result is that the appeal as to entering judgment for the defendant for that part of the claim above mentioned must be allowed, and the appeal as to the new trial must be refused.

LORD JUSTICE RIGBY read a judgment to the effect that the judgment of Mr. Justice Mathew was right, and that the appeal should be dismissed.

LORD JUSTICE COLLINS read a judgment to the same effect as that of Lord Justice A. L. Smith.

[Solicitors—Rooper and Whately, for the plaintiff; Rores, Pattisson, and Bathurst, for the defendant.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.J.J.) }

1897.
Dec. 21.

UNITED GUTTA PERCHA COMPANY (LIMITED) V. WELCH
AND CO.*

Practice—Order XIV.—Leave to defend—Matter
of defence or counter-claim.

This was an appeal from an order of Mr. Justice Day, giving the plaintiffs leave to sign final judgment under Order XIV. The defendant, who was an electrical engineer, bought goods under a contract of sale from the plaintiffs, who were a company carrying on business in Scotland, out of the jurisdiction of the High Court, and were in liquidation. One of the terms of the contract was that the plaintiffs should deliver the goods to the defendant properly packed with a view to their being sent abroad. The plaintiffs having brought this action to recover the price of the goods, the defendant alleged that the goods had not been delivered properly packed, and claimed to deduct the sum which he had spent in having them properly packed. Mr. Justice Day, on the hearing of the plaintiffs' application for summary judgment under Order XIV., said that the defendant's complaint was a matter of counter-claim, and not of defence, and that the plaintiffs were entitled to judgment in this action, leaving the defendant at liberty, if he thought fit, to bring another action against the plaintiffs for breach of contract. It was now argued on behalf of the defendant that the plaintiffs' breach of duty with regard to a matter which was part of the contract was, on the authorities, a matter of defence, and that the defendant ought not to be obliged to prove in the liquidation of a company out of the jurisdiction.

Mr. Montague Lush appeared for the defendant; Mr. Addleshaw for the plaintiffs.

The COURT held that the plaintiffs ought not to have been allowed to sign summary judgment, and that the defendant ought to be allowed to defend the action.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Q.B. Div. (Wright and }
Kennedy, J.J.) }

1897.
Dec. 21.

IN THE MATTER OF THE MUNICIPAL ELECTIONS
(CORRUPT AND ILLEGAL PRACTICES) ACT, 1884—IN
THE MATTER OF THE ELECTION FOR THE SCHOOL BOARD
FOR LONDON (WESTMINSTER DIVISION), EX PARTE
KYD AND OTHERS.*

Election Law—School Board—Application for
relief—Rule as to costs of opponents to success-
ful application.

On November 23 last an application was made to the Court on behalf of David Hope Kyd and certain other persons, candidates for the election for the School Board for London, for relief under section 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 and 48 Vict., c. 70). The relief was prayed in respect of the holding by the applicants of a meeting for the purpose of procuring their election upon premises known as St. George's Institute, Little Grosvenor-street, on part of which intoxicating liquors were supplied to a workmen's club. The application was made upon the ground of inadvertence and was granted. A full report of the proceedings appeared in *The Times* of November 24. Mr. Spokes, who opposed the application on behalf of one of the other candidates, applied for costs against the applicant. That question was reserved by their Lordships.

MR. JUSTICE WRIGHT, in granting costs against the applicant, said that the Court had reserved the question of costs in order to see if there were any general rule on the subject. Cases had been brought to their notice, but no general rule had been shown. Where the illegal practice was not serious, it did not seem to them that the opponents of the application for relief ought to have their costs. But where the illegality was serious, it was to the interest of the public not to prevent such matters from being brought forward. The illegality was serious in this case, and costs would therefore be allowed.

MR. JUSTICE KENNEDY concurred. He said that whenever a case was a serious one the freest inquiry ought to be encouraged to see that the Act had been observed.

Mr. S. H. Day appeared for the applicant.

[Solicitors—Tillards, for the applicant; Radford and Frankland, for the respondents.]

Q.B. Div. (Vaughan Williams, L.J.) }

1897.
Dec. 21.

NEALE V. MITCHELL AND CO.†

Settlement—Marriage with deceased husband's
brother—Failure of trusts.

"Chapman v. Bradley" (4 D., J., and S., 71)
and "Pawson v. Brown" (13 Ch.D., 202) dis-
tinguished.

This was an action which had been referred from Birmingham by his Lordship for further consideration, to enforce an equity of redemption of a mortgage of some licensed premises known as the Queen's Head, Smethwick, Staffordshire.

Mr. A. T. Lawrence, Q.C., with Mr. Leslie, appeared for the plaintiff; Mr. A. R. Jelf, Q.C., with him Mr. Montague Lush and Mr. Hugo Young, for the defendants; Mr. Cracroft held a watching brief.

This case arose under the following peculiar circumstances. In 1852 the mother of the plaintiff, whose first husband had died intestate, mortgaged the premises to one Bailey, of whose mortgage the defendants are transferees. In 1852 the mother, before going through the form

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.
†Reported by A. E. RIPLEY, Esq., Barrister-at-Law.

of marriage with her deceased husband's brother, executed what purported to be a settlement of her property, subject to the said mortgage, by which it was reserved to herself and her heirs until the "solemnization of the then intended marriage," with limitations thereafter to herself for life and then to her two younger sons; but it gave no life interest for the intended husband nor any provision for the children of the union in prospect. In 1852 she went through a form of marriage with her deceased husband's brother, and died in 1894. The plaintiff, her eldest son, now said that he had been kept in ignorance of the contents of this settlement until her death, and brought this action to enforce his rights as his mother's heir-at-law.

Mr. LAWRENCE asserted that the plaintiff was heir-at-law of his mother, and claimed as such an equity of redemption of the mortgaged premises. He did this relying on the first provisions of the settlement of 1852, inasmuch as no legal marriage had taken or could ever have taken place. The plaintiff, having had no notice of the contents of the settlement, could not be accused of standing by in any way. He had taken the first opportunity offered him of asserting his rights. In support of his contentions the learned counsel quoted "Ramsden v. Dyson" (1 L.R., Eng. and Ir. App., p. 129); "Willmott v. Barber" (L.R., 15 Ch. Div., p. 96); "Pawson v. Brown" (L.R., 13 Ch. Div., p. 202); and "Chapman v. Bradley" (4 De Gex, Jones, and Smith, p. 71).

Mr. JELF, for the defendants, contended that the settlement was a good deed in so far as it operated as a voluntary conveyance; that in the case of "Chapman v. Bradley" (*supra*) the Judges had looked into the intention of the parties; that in this case the intention of the parties to secure the property to the children of the first marriage, free from the influence of the second husband, was manifest; and that the dependence of the deed on the fulfilment of the unlawful condition, deliberately contemplated and arranged for, was not material.

Mr. MONTAGUE LUSH, following, maintained that the words "intended marriage" in the deed, not being "intended legal marriage," were the pivot on which the case turned; that the total absence of any provision for the husband or children of the second union prevented the deed being regarded as in any sense an ordinary marriage settlement. He distinguished the cases of "Chapman v. Bradley" and "Pawson v. Brown" (cited above) from the present one, as in those the intention was that legal marriages should be completed, and provisions for their results were made. This could not possibly have been contemplated in the present case. It remained, therefore, that the condition referred to was inoperative, and the deed a voluntary settlement.

Mr. LAWRENCE having replied,

His LORDSHIP drew the attention of the learned counsel to the judgments of Lords Cairns and Hatherley in the case of "Dorin v. Dorin" (L.R., 7 Eng. and Ir. App., p. 568), saying that they seemed to provide him a precedent for looking at the facts of the case, and admitting evidence, if any, that the parties in the present case could not have contemplated marriage.

Mr. LAWRENCE pointed out that the impossibility of the intention was very much greater in "Dorin v. Dorin" than in the present case, that further it was a case of a will, and would therefore be construed more widely in favour of the intention of the testator.

His LORDSHIP, in delivering a considered judgment, said that Mr. Lawrence, on behalf of the plaintiff, claimed the reconveyance of the property, subject to the mortgage, as the heir-at-law of his mother. He had therefore only to deal with the construction of the deed which purported to be a marriage settlement, and

there was no rule of law or public policy which prevented his giving to the document what he believed to be the meaning contemplated by the parties. In the cases where the word "children" was used in such documents it was necessary as a rule to understand that legitimate children were meant, but in the case of "Dorin v. Dorin" (*supra*), where the prospect of legitimate offspring was not possible, the construction was different. With this ruling in his mind and believing that the widow intended to marry her deceased husband's brother, and that she was perfectly aware that it would not be a legal marriage, he came to the conclusion that both parties knew what they were doing when they executed this deed. This enabled him to distinguish the cases of "Chapman v. Bradley" and "Pawson v. Brown," as in each of them one of the parties believed in the validity of the settlement, and therefore exact effect had to be given to the actual wording; but here he would give effect to what in his opinion was the intention of the parties, and to which, moreover, he believed the plaintiff was an assenting party, by giving judgment for the defendant with costs.

Q.B. Div. (Hawkins and } 1897.
Channell, JJ.) } Dec. 21.

RISHTON V. MAYOR OF HASLINGDEN.*

Local Government—Streets—Apportionment of expenses of sewerage—Private Street Works Act, 1892 (55 and 56 Vic., c. 57)—"Street"—"Repairable by the public at large."

This was a special case stated by magistrates of the borough of Haslingden upon the hearing of objections to a provisional apportionment of the expenses proposed to be incurred in sewerage a street in the borough under the Private Street Works Act, 1892 (55 and 56 Vic., c. 57).

Mr. Lochnis appeared for the objector, the appellant; Mr. Temple Franks for the authority.

The case was argued on December 10 and 11, and the Court took time to consider their judgment. The objections raised before the justices were that the street did not form part of a street within the meaning of section 5 of the Act; secondly, that it was not repairable by the inhabitants at large; and, lastly, that the street had already been sewered to the satisfaction of the sanitary authority. The magistrates had decided in favour of the authority that the street was not a highway repairable by the inhabitants at large. They did this on the following amongst other grounds—namely, that the surface of the street was the only original soil and the width only 8ft. 6in. They considered also from the position of the street, which ran parallel to a street called Pleasant-street, that it was a mere passage or back street used by the tenants of the houses in Pleasant-street. They were further of opinion that the sewer laid down was faulty, and the houses were not properly drained by it. The other material facts of the case sufficiently appear in the judgment of the Court, consisting of Mr. Justice Channell and Mr. Justice Hawkins, which was this morning delivered by Mr. JUSTICE CHANNELL to the following effect:—This was a case stated by magistrates. The appellant Rishton had duly objected to being charged with a proportion of the expenses of sewerage a street called Back Pleasant-street in Haslingden. The magistrates decided against him subject to the case. The objections were—(1) that the street was a highway repairable by the inhabitants at large; (2) that it had already been

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

sewered to the satisfaction of the authority. The case stated that Back Pleasant-street was formed between 1806 and 1816, and was then and has remained always open at both ends into old highways, and that the streets and buildings have existed in their present condition and position for 70 years at least, and there was an express admission that, since its formation, Back Pleasant-street had been used by foot passengers without interruption. The case then set out the evidence and the magistrates stated certain reasons for coming to the conclusion that it was not a highway repairable by the public, and they submitted two questions for the Court:—(1) Were we right in overruling the objection taken on behalf of the appellant that the *onus probandi* was upon the respondents to show that Back Pleasant-street was a street within the meaning of the Private Street Works Act, 1892, and that they had failed to do so; (2) were we justified upon the evidence in holding that Back Pleasant-street is not a highway repairable by the inhabitants at large? The first question was not very important. The *onus probandi* clearly was on the respondent, but as evidence on both sides was now before the Court it was not necessary to consider what would have been the effect of the respondent's evidence if it had stood alone. In the second question the magistrates asked whether they were justified in finding as they did. That meant was there any evidence on which they could so find. If the matter had been open to the Court they would probably have found that Back Pleasant-street had been a highway not only for foot passengers but also for carts and carriages. It was a very strong fact that it was from the first a thoroughfare open at the ends to old highways. The fact that no repairs had been done by the public was a matter of small weight having regard to the nature of the place, and the suggested repairs at private expense were only clearing of refuse away and other small matters. If it was a highway before 1835 it would be repairable by the inhabitants at large without any formalities being gone through to take it over. But that whole question was not open to the Court, and as there was evidence of one case of a horse and cart being stopped, and as upon the question of carriage-way the fact that the public had not repaired was a much stronger piece of evidence than it was in reference to a footway, the Court could not hold that there was no evidence upon which the magistrates could find that this was not a public carriage-way. Upon the question whether it was a public footway the admissions were conclusive, and there was nothing in the evidence inconsistent with that. The points alleged to justify the finding of the magistrates that there was no public footway before 1835—namely, the absence of proof of public repairs, the suggested proof of private repairs, and the original construction of the passage in question really favoured the view that the street was a public footway. The private repairs were not proved even in the view of the magistrates, and the absence of public repairs was accounted for by the nature of the place. The case must, therefore, be dealt with on the footing that prior to 1835 it was a public footway. That being so, and there having been no addition to the old footway, the Court were of opinion that the place in question was not a street within the definition in the Act. It was not like a case where, there being an old footway, a new street had been formed by throwing into it more land. On that ground, therefore, the appeal must be allowed, and it became unnecessary to decide the other questions, whether the urban authority could declare themselves not satisfied with the sewerage of Back Pleasant-street, or whether the case came within the doctrine of "Bonella v. Twickenham Board" (20 Q.B.D., 63). It seemed to the Court that it was, in fact, sewerage,

although imperfectly, and that as there had been no change in it for 70 years and the authority had been satisfied with it ever since they became an authority they could not say they were now dissatisfied. The case of "Handsworth Local Board v. Taylor" ([1897] 2 Ch., 442, note) only seemed to apply to a growing street. Thus in the present case if there had been new buildings fronting this street the authority might have said they had never been satisfied with the sewerage of the street which it had become. The necessity for the sewer now proposed had not arisen from any change of things in the street, but from a new general system of sewerage of the district having been recently adopted. If this view were correct the appeal should be allowed on this ground also, but the Court had not very fully considered it, and the judgment was based upon the ground that the place in question was not a street within the meaning of the Private Street Works Act, 1892, being a footway repairable by the public at large.

MR. JUSTICE HAWKINS had added a note at the end of the judgment saying he entirely concurred in it.

[Solicitors—T. H. Philpots, for Whitaker and Hibbert, for the appellant; Harrison and Davies, for Musgrave, for the authority.]

Consistory Court of London (Dr. Tristram,
Q.C., Chancellor of the Diocese of
London) 1897.
Dec. 23.

ST. PAUL, CAMDEN-SQUARE.*

Ecclesiastical Law—Ritual—Lighted candles on
the re-table (see *ante*, p. 85)—Supplementary
judgment.

In this case, in which the Chancellor recently granted the Rev. George Tiley, the vicar of St. Paul's, Camden-square, a faculty for placing two lights on the re-table at early celebrations only in that church,

The CHANCELLOR now delivered the following supplementary judgment.—Subsequent to the delivery of my judgment in this case, Mr. Meakin, the respondent, made an application for the insertion in the faculty authorizing two lights to be placed on the re-table of a proviso that they should be removed from the re-table after each early celebration and not replaced there during the later services except when required for the purpose of giving light. I directed the application to be made formally in Court. As it was held in the case of "Westerton v. Liddell" (Moore's Spec. Reports, 187, Lond., 1857) that candlesticks with candles in them were lawful ornaments for a Holy Table, the insertion of such a provision would be on this as well as on the ground of inconvenience objectionable. My order will be that a faculty issue to the petitioners to place two candlesticks with candles in them on the re-table; and being satisfied on the evidence that it was the wish of many of those who attended the early celebrations and was objected to by none, that the candles should be lighted at such services when not required to give light, I, in the exercise of my discretion, decline to order a proviso to be inserted in the faculty prohibiting their being lighted at such celebrations when not required to give light. But being satisfied on the evidence that their being lighted at the later services in the church, when not required to give light, would give great offence to many members of the congregation attending such services, I order a proviso to be inserted in the faculty that they shall be only lighted at the later celebrations and the later services in the church when required to give light. My reason for making the order in these terms is as follows:—

*Reported by W. J. SCULSLEY, Esq., Barrister-at-Law.

In "*Martin v. Mackonochie*" (see L. R., 2 A. and E. 116) Sir Robert Phillimore in the *Archies* held that two lighted candles, though not required to give light, if not used ceremoniously, might be lawfully placed, as church ornaments, on the Holy Table during the service at the time of the Holy Communion for the signification "that Christ is the very true light of the world." The Judicial Committee of the Privy Council, on appeal, held that two lighted candles, when not required for light, were unlawful as ornaments upon a Holy Table. Archbishop Benson in the Bishop of Lincoln's case ([1891] P., 9) held that it was open to this Court to reconsider this question on new materials brought before it and in particular the decisions of two common law Judges in 1628 and 1629 at the Durham Assizes, who both held on an indictment of Mr. Cosins (afterwards Bishop Cosins) that the burning of lighted candles on the Holy Table when not required to give light was no breach of the Act of Uniformity. The Judicial Committee on appeal (in reference to his Grace's decision on this point) said "it was matter for grave consideration how far the Archbishop's elaborate exposition of the history of the question, and in particular the decision of the two learned Judges, had afforded new materials for consideration since the decision of the Board in '*Martin v. Mackonochie*,' but that the charge against the Bishop of Lincoln—there being no evidence that he was a party to placing the lights there or that he had used them ceremoniously, and they not being under his personal control—did not raise the same question, and that it was therefore unnecessary for the Board then to decide it. There being a conflict between the judgments of the two Archiepiscopal Courts and the Judicial Committee on this question, I consider it to be my duty, as a Judge in a Court of first instance, not to discuss and determine which of the three superior Courts have arrived at a correct solution of the question, but to make an order in such terms as will enable either of the parties to this suit to bring the question before the Judicial Committee for its final determination. If it shall be ultimately determined by the final Court of Appeal that lighted candles on a Holy Table when not required to give light, though not used ceremoniously, are not lawful Church ornaments, then I ought in my order to have inscribed a proviso prohibiting their being lighted on such occasions. But if the decisions of Sir Robert Phillimore and Archbishop Benson are upheld, then my order in its entirety should be upheld. For Church ornaments, the use of which is not prescribed by the rubrics or canons, or which are not of necessity subsidiary to the performance of Divine service, ought not by law to be introduced into a church for the purpose of decoration without the sanction of a faculty, and the Ecclesiastical Judge in giving or withholding his sanction to the faculty is bound to exercise a judicial discretion. In my judgment it would be an unwise exercise of his discretion to sanction the introduction of any such ornament that would give offence to parishioners and might in result induce them to withdraw from the services in their parish church. It is for this reason that I insert the proviso in the second part of my order, prohibiting the candles being lighted when not required to give light at any service in this church subsequent to the early celebrations, and I give no decision on the question whether the lighting of the candles when not required for light at the early celebrations is legal or not legal. I make no order as to costs.

The CHANCELLOR added:—I leave the question of light undecided. I do not give them leave to light and I do not prohibit them.

Mr. MEAKIN intimated that he should appeal.

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.J.J.) Jan. 11.

LEEDS AND HANLEY THEATRE OF VARIETIES (LIMITED).
V. BROADBENT.*

Contract—Mortgage deed—Construction—Payment of interest—"Punctually," meaning of. Decision of Kekewich, J. (*ante*, p. 117), reversed.

This was an appeal by the defendants from a decision of Mr. Justice Kekewich, dated December 10 last, and reported in *The Times* of the following day; also *ante*, p. 117. The defendants were the owners of a theatre. In February, 1897, they sold the theatre to the plaintiffs for £10,500, out of which sum it was agreed that £7,000 should remain on mortgage. A mortgage to secure payment of that amount, with interest payable half-yearly, was accordingly executed by the plaintiffs in favour of the defendants. The deed contained a proviso that payment of the principal money thereby secured should not be required by the mortgagees until the expiration of three years, computed from the date of the deed, if in the meantime every half-yearly payment of interest should be "punctually" paid. The deed contained no express power of sale, and accordingly the provisions as to a sale contained in section 20 of the Conveyancing Act, 1881 (44 and 45 Vict., c. 41), were applicable. The first half-year's interest on the £7,000 became due on August 15, 1897, and on August 16 one of the defendants, Broadbent, by whom the matter was transacted, not having received a cheque, wrote to the secretary of the company asking for immediate payment. In reply, the secretary stated that the letter should be submitted to the directors at their meeting on the Friday following. Mr. Broadbent, being dissatisfied with this reply, gave notice calling in the mortgage at the end of three months. The letter was acknowledged, but no cheque sent, and on August 24 Mr. Broadbent wired threatening to issue a writ unless the interest was remitted that day, and the result was that a cheque was then sent, not by the company, but by a gentleman who had an interest in the company's property. The defendants having expressed their intention of holding by the notice and requiring payment accordingly, the plaintiffs brought this action and now moved for an injunction to restrain the defendants from selling or advertising for sale the premises comprised in the mortgage and from otherwise in any manner enforcing the same. The main question argued was whether the payment of interest nine days after it became due—viz., on August 24 instead of on the 15th—was a "punctual" payment within the meaning of the proviso, or whether "punctually" ought to be construed literally. It was decided by Mr. Justice Kekewich that the delay of nine days not being unreasonable there had been no default in punctual payment, and consequently that the notice given by the defendants was bad and there must be an injunction to restrain them from acting on it.

The defendants appealed.

Mr. A. J. ALLEN (Mr. Bramwell Davis, Q.C., with him), for the appellants, relied on "*Hicks v. Gardner*" (1 Jurist, p. 541); Mr. Warrington, Q.C., and Mr. Church were for the respondents.

Their LORDSHIPS were unanimously of opinion that the appeal must be allowed. They considered that the parties must be taken to have meant what they said—namely, that if the half-year's payment of interest was paid on the day upon which it became due the principal money should not be called in; and that, as the interest was not paid until nine days later, the notice calling in

the mortgage debt was validly given. The injunction granted by the learned Judge in the Court below was accordingly dissolved.

[Solicitors—Goodale, Hobson, and Co., for Butterworth and Co., Swindon, for the respondents; George B. W. Digby.]

Court of Appeal (Chitty
and Collins, L.J.J.) }

1898.
Jan. 11.

THE CANNON BREWERY COMPANY (LIMITED) V. NASH.*
Landlord and Tenant—Tenancy, length of—
Agreement—Construction.

This was an appeal by the defendant from an order of Mr. Justice Day at Chambers. The defendant became tenant to the plaintiffs of a publichouse on January 15, 1897, under an agreement of that date, which provided that the term should be for one year certain and so on from year to year unless or until the tenancy thereby created should be determined by either party giving to the other 28 days' notice in writing, such notice to expire at any period of the year without any reference in respect of such notice to the time of entry, the date of the agreement, or the commencement of the tenancy. On October 13, 1897, the plaintiffs gave the defendant 28 days' notice to quit, and at the expiration of the 28 days they brought this action to recover possession of the premises. Upon an application for judgment under Order 14 Mr. Justice Day gave the plaintiffs leave to sign final judgment. The defendant appealed.

Mr. Woodfin appeared for the defendant; Mr. A. H. Spokes appeared for the plaintiffs.

The COURT allowed the appeal.

LORD JUSTICE CHITTY said that this was a simple question of construction. The tenancy was for one year certain. The contention of the plaintiffs would make that one year uncertain. The words as to giving notice were not applicable to the first year, but only to the period after the expiration of that year. This view was in accordance with the decision in "*Doe v. Green*" (9 A. and E., 658). The order must therefore be discharged.

LORD JUSTICE COLLINS concurred. The agreement provided for two things—first, a tenancy for a year certain, and, next, an uncertain term after the first year. [Solicitors—Boulton, Sons, and Sandeman, for the plaintiffs; S. E. Lambert, for the defendant.]

Chan. Div. }
(Kekewich, J.) }

1898.
Jan. 11.

KAYE V. CROYDON TRAMWAYS COMPANY.†
Company—*Ultra vires* Act—General meeting—
Sale of undertaking to new company—Remu-
neration to directors—Compensation—Dis-
sident shareholders.

This action was brought by a shareholder in the above-named company on behalf of himself and other shareholders, claiming an injunction to restrain the company and the directors from carrying out an agreement for the sale of the company's undertaking to the British Electric Traction Company (Limited). By the agreement it was provided that in addition to the purchase money of £30,543 the traction company should pay a sum of £3,230 to the officers

of the tramways company, viz.—£1,230 to the chairman, £500 to the secretary, and £500 to each of the directors—as compensation for the loss of five years' remuneration for their services. The purchase money was calculated so as to pay off the preference shareholders in full, and to repay 60 per cent. of the capital to the ordinary shareholders, the traction company taking over the debenture debt and the contracts, engagements, and liabilities of the tramways company. It was contended that the purchase money was inadequate, but the main ground of complaint was the provision for the payment of a lump sum to the officers of the tramways company. On behalf of the defendants it was said that the time was approaching when, under the provisions of the Tramways Act, 1870 (33 and 34 Vict. c. 78), the Corporation of Croydon, as the local authority, would be entitled to purchase the undertaking of the tramways company, and that the corporation would exercise their power of purchase and refuse to grant a lease unless the line were relaid and electric traction provided, and that the price which the tramways company would receive on the basis of the decision of the House of Lords in the "*Edinburgh Street Tramways Company's case*" (L.R. [1894], A.C. 456) was very considerably less than the sum which the traction company was prepared to pay, and would probably leave no return whatever to the ordinary shareholders. A resolution confirming the agreement was, notwithstanding the opposition of the plaintiff, passed at an extraordinary general meeting of the company duly convened. It was, however, alleged that the notice convening the meeting did not sufficiently call attention to the terms of the purchase, and to the fact that under the agreement the shareholders in the tramways company would be liable to defray the costs of their liquidation.

Mr. Bramwell Davis, Q.C., and Mr. Bradford appeared for the plaintiff, and Mr. Warrington, Q.C., and Mr. Rowden for the defendants.

MR. JUSTICE KEKEWICH said that if this agreement were binding on the dissident shareholder it must be on the ground that the extraordinary general meeting of the company had adopted it so as to be binding on him; and for that purpose it was necessary that the Court should be satisfied not only that the matter was one which could properly be brought before the meeting, but that it was, by advertisement or otherwise, duly brought to the attention of the shareholders. His Lordship referred to section 71 of the Companies' Clauses Consolidation Act, 1843, which merely requires that the notice of meeting should specify the "purpose" for which it is called. Though the section expressly said that only the purpose was to be specified, regard must be had to all the circumstances, and what would be a sufficient notification of the purpose in one case might not be so in another. In the present case the notice appeared to be wanting in precision and erroneous. The notice stated that the price to be paid would pay off the preference shareholders and return 60 per cent. to the ordinary shareholders. But from the sum which was calculated at the rate of 60 per cent. there would have to be deducted certain costs and expenses, and there was no guarantee in the agreement that the 60 per cent. should be returned intact. Again, the terms of the notice as to the taking over of liabilities by the purchasing company did not show whether the selling company would or would not remain in any way liable or whether there would be a complete novation. The notice also stated that as the directors of the purchasing company were desirous of having the management in their own hands the directors and secretary had agreed to retire on being paid a lump sum for their loss of office. As a matter of fact, they were to receive a

* Reported by W. F. BARRY, Esq., Barrister-at-Law.
† Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

very large sum, which was, in truth, a considerable percentage on the sum which was to be paid to the ordinary shareholders, but the notice did not give any information as to the amount. It was said that the agreement was read and explained at the meeting, but his Lordship was not satisfied upon the evidence that this was so, or, at all events, that the shareholders had any reason to suppose that so large an amount was to be paid. Assuming that it was *intra vires* of the meeting to pass such a resolution, yet as the proper notice to enable that to be done was not given, it seemed to his Lordship that there was sufficient reason for holding that the resolution was not binding on the dissentient shareholder. It did not, however, seem to be right to dispose of the case solely on that ground, or without advertent to the question which had been raised whether the lump sum could properly, by any means or after any notice, be voted, not as remuneration for services actually rendered in the past, but as compensation for loss of office in the future. His Lordship proceeded to deal with the law on this subject, and, after referring to the case of "*Hutton v. West Cork Railway Company*" (L.R., 23 Ch.D., 654), came to the conclusion that, under circumstances such as existed in the present case, it would have been beyond the powers of the company, as against a dissentient shareholder, to pass a valid resolution voting to their officers remuneration which was not required for the benefit of the company, and that therefore it was impossible for the directors and secretary to make such provision for their own benefit. His Lordship therefore granted an injunction.

[Solicitors—Walter Webb and Co.; Hugh C. Godfray.]

Q.B. Div. (Wright }
and Darling, J.J.) }

1898.
Jan. 13.

EX PARTE THE INCORPORATED LAW SOCIETY—IN RE A SOLICITOR.*

Solicitor—Misconduct—Striking off rolls.

The Court refused to strike a solicitor off the rolls merely on the production of an order of the Court at the Cape of Good Hope striking him off the rolls.

This was an application by Mr. Hollams on behalf of the Incorporated Law Society to strike off the rolls a solicitor whose name had been struck off the rolls by the Court at the Cape of Good Hope on February 29, 1896. It was stated that the solicitor was admitted as a solicitor in this country in 1880, and in July, 1884, had been suspended from practice for two years for appending a commissioner's name to an affidavit. The Court at the Cape had struck him off the rolls because it appeared in an action brought against him that he had misappropriated funds of a certain club. The solicitor had come to England and had had notice of this motion, but did not appear.

Mr. HOLLAMS said there was a certain amount of novelty about the application to strike a solicitor off the rolls in England simply by means of the production of the order of the Court at the Cape, but he submitted that it was sufficient on the analogy of the old practice when there were the three Courts of Queen's Bench, Common Pleas, and Exchequer. Then each Court acted on the mere production of an order made by one of the other Courts striking a solicitor off the rolls. He cited the case of "*Re John Collins*" (18 C.B., 272), and pointed out the great inconvenience it would be if it should be necessary to prove all the

facts which had taken place in a distant colony before the Incorporated Law Society in this country.

The COURT, however, refused the application.

MR. JUSTICE WRIGHT said no one could complain of the Incorporated Law Society making the present application, but the Court could not grant it. There was no precedent for it. The comity existing between the old Courts of co-equal jurisdiction—each accepting the order of the others as sufficient grounds for striking off the rolls—was not an analogy which governed this case. This application went far beyond that. How could this Court, for instance, define what description of Court was to be considered of importance enough to have their orders acted on in this way? In foreign Courts and in small colonies it could not be said what rules prevailed. In the present case the facts on which the order was made by the Court at the Cape were not at first hand before the Court. The affidavit of the president of the Incorporated Law Society at the Cape afforded hearsay evidence only as to what happened in the action. Further, the Court here could not say whether the punishment awarded was the punishment which a Court in this country would inflict. The fact simply that a colonial Court had inflicted it was not sufficient. If the Court here had the facts properly brought before them they might act.

MR. JUSTICE DARLING concurred. The analogy set up was no analogy. The three Courts sitting all at Westminster Hall, acting on the same well-known principles and dealing with the same solicitors for the most part, could very properly act on the production of the order of one of the others. But it would be quite a different thing for this Court to act on the order of a distant colonial Court. If the facts on which the order was made were brought before them the Court would with great deference consider the action of the colonial Court and exercise their discretion.

[Solicitor—The Solicitor to the Incorporated Law Society.]

Court of Appeal (Lord Halsbury, L.C., } 1898.
Chitty and Collins, L.J.J.) } Jan. 14.

MILSON V. BECHSTEIN.*

Damages—General damages—Breach of contract
—Amount of damages reduced by Court of Appeal.

This was an application by the defendant for judgment or a new trial in an action tried before Mr. Justice Lawrence and a special jury; reported in *The Times* of October 23. The plaintiff, a pianoforte and music seller carrying on business in Bath, claimed damages against the defendant, a pianoforte manufacturer carrying on business in Berlin and London, for breach of an agreement; he also claimed an injunction. The defendant pleaded that there was no breach of the agreement and counterclaimed for damages for an alleged breach of the agreement by the plaintiff. The agreement in question, dated April 27, 1885, gave the plaintiff the sole agency for the sale of Bechstein pianos in Dorset, Somerset, and Wilts, and in Bristol and in the district of Clifton. This was subsequently modified by the omission of Dorset. Clause 2 of the agreement was as follows:—"The said Carl Bechstein will not, either by himself or his representatives in England, appoint any other agent for the sale of the Bechstein pianofortes in the said districts." Clause 3:—"In case any pianofortes shall be sold by Carl Bechstein from his London depot to any person residing in the said districts, or to professors of music or other persons intending to send the same to the said districts, then the account of the said Francis Henry Milson with

*Reported by H. HUMPHREY, Esq., Barrister-at-Law.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

the said Carl Bechstein shall be credited with the same amount of profit or difference between wholesale and cash prices as would have accrued to the said Francis Henry Milsom if such pianofortes had been sold through him direct." Clause 4:—"The said Francis Henry Milsom agrees on his part to use his best endeavours to sell the Bechstein pianofortes and also to advertise the same throughout the said districts to such extent and in such way as shall in his discretion seem to him most advantageous for effecting the sale thereof." It appeared that between January and March, 1897, the defendant supplied 19 pianos to Messrs. Duck, Son, and Pinker, who were pianoforte dealers in Bath and Bristol, telling them that they could not be agents as there was an agency running, but that he would supply them with pianos. The plaintiff wrote to say that if Messrs. Duck were supplied as customers and not as agents he would not object if he incurred no liability and received 10 per cent. on each piano as his commission. The defendant wrote to say 10 per cent. was too much. In August of this year the plaintiff was given six months' notice to terminate the agency. The plaintiff's case was that Messrs. Duck were in reality made agents for the defendant, and it was a breach of the agreement to supply trade rivals of the plaintiff; that the plaintiff had spent large sums in advertising these pianos; and that he was entitled to £164 4s. 6d. as his commission on the pianos sent to Messrs. Duck and further substantial damages for breach of the agreement. For the defendant it was contended that clause 3 of the agreement applied to a case like this, that there was no breach of the agreement in supplying Messrs. Duck, and that even if it was a breach the damages could not be more than 10 per cent. commission on these 19 pianos. The jury found a verdict for the plaintiff for £614 4s. 6d., and the learned Judge granted an injunction.

Mr. T. W. Chitty (Mr. J. Lawson Walton, Q.C., with him) appeared for the defendant; Mr. R. M. Bray, Q.C. (Sir Edward Clarke, Q.C., with him), appeared for the plaintiff.

THE LORD CHANCELLOR said he was of opinion that the plaintiff was entitled to recover damages from the defendant for breach of contract. With regard to the construction of the agreement he concurred in the view which had been set before the Court by counsel for the plaintiff, and which had been adopted by the learned Judge at the trial. The only question which now arose was as to the amount of damages. The jury, over and above the amount which the plaintiff was shown to have lost in consequence of the particular sales of pianos which had been proved at the trial, gave the plaintiff £450 as general damages. He was puzzled to know in respect of what that sum of damages was given. This was not like those cases of slander in which it had been held that general damages might be awarded, on the ground that it was impossible for the plaintiff to give evidence as to what particular customers had been prevented from coming to deal with him. The rule which had been there followed did not seem to him to be applicable to this case. In his opinion there was no evidence which justified the jury in drawing the inference that the plaintiff had suffered any damage beyond that which had been specially proved. He thought, therefore, that the plaintiff was not entitled to the £450 damages, and that they must reduce the damages to £164. There would be no costs on either side.

LORD JUSTICE CHITTY said he agreed with the Lord Chancellor on the question of the construction of the agreement, and he also thought that the £164 damages covered all profits which would have accrued to the plaintiff from customers who had been intercepted.

LORD JUSTICE COLLINS concurred.

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } Jan. 14.

JAMIESON AND CO. V. JAMIESON.*

Trade Name—Similarity of name of trader—Injunction refused.

The Court will not restrain a man from trading in his own name except where he uses his name in such a way as to pass off his goods as the goods of another.

This was an appeal of George Jamieson, the defendant in the action, from a judgment of Mr. Justice Byrne restraining him from using certain labels for harness composition on the ground that they were calculated to induce the public to believe that his composition was the composition of the plaintiffs, who traded under the name of Jamieson and Co. It appeared that Aberdeen was an important centre of the harness composition trade, and that all manufacturers there sent it to England for sale, and further that there were, and had been for many years past, at least four firms in the trade using in one form or another the words "Jamieson" and "Aberdeen"—viz., the plaintiffs, Jamieson and Co., the defendant, George Jamieson, Peter Jamieson, who was the largest manufacturer in the trade in Aberdeen, and James Jamieson. The harness composition manufactured at Aberdeen and elsewhere was in a large number of instances sold in round white tins of a special size, surrounded by white labels with ordinary black letterpress. Some years ago Peter Jamieson arranged with the plaintiffs, Jamieson and Co., that they should add to their label by writing across the front their firm's name and placing at the back a representation of their trade mark of a horse, and thenceforward the plaintiffs had distinguished their goods in this way. Peter Jamieson also arranged with George Jamieson, the defendant, that the latter should print his name in full on the face of his label, and he had ever since done so. At the trial Mr. Justice Byrne found in favour of the plaintiffs and granted an injunction. He found that the rival labels were calculated to be mistaken for each other; but he also based his decision upon certain conduct of the defendant in his earlier business career. The defendant appealed from this decision.

Mr. ASTEBURY, Q.C., and Mr. WAGGETT, for the defendant George Jamieson, contended that the action was nothing less than an attempt to prevent him trading at Aberdeen under his own name; and, further, that the evidence did not warrant the findings of the Judge below either as to deception by the labels or misconduct on the part of their client.

Mr. EVE, Q.C., and Mr. DALDY, for the plaintiffs, argued in support of the judgment.

THE COURT allowed the appeal.

THE MASTER of the ROLLS said that the case was an extremely important one, not only to the parties themselves, but to business people in general. It was necessary not to lose sight of the exact point which arose for decision. In effect, the action was an attempt to restrain a man from carrying on business in his own name simply. His Lordship would not say that that could never be done. It had been done in "Holloway v. Holloway" (13 Beav., 209), and there were other cases in which a man having the same name as a well-known trader had been laid hold of by some one who wanted to appropriate to himself the business of such trader. That, of course, could be stopped. But the jurisdiction of the Court to restrain a man from trading in his own name ought to be exercised with great care, and a man ought not to be restrained

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

merely because there were other people in the same trade of the same name who had acquired a reputation. Something more was requisite—viz., that he should have used his own name in such a way as to pass off his goods as the goods of another. That had been laid down as law by Lord Justice Turner in "*Burgess v. Burgess*" (3 D.M. and G., 896), and had been expressly adopted by Lord Halsbury in the recent case of "*Powell v. Birmingham Vinegar Brewery Company*" (14 P.R., 720) (the *Yorkshire Relish* case). The Court, therefore, had to be satisfied that this defendant had been selling his goods as the goods of the plaintiffs. Of course, it was more difficult for a plaintiff to make out his case when a man was carrying on business in his own name. Here the plaintiffs had done up their goods in a particular form, but that form was common to the makers and sellers of harness composition, not only in Aberdeen, but everywhere else. It was generally sold in plain white tin boxes surrounded by white labels. That was not peculiar to the plaintiffs; but there was something peculiar to them. In consequence of the complaints of one Peter Jamieson, who was the first person named Jamieson to start the harness composition trade in Aberdeen, the plaintiffs assumed certain marks which distinguished their boxes from all other boxes. So far as the boxes and the wrappers themselves were concerned there was nothing to distinguish the plaintiffs' from Peter Jamieson's; but the plaintiffs put upon their boxes two distinguishing features—viz. (1) their signature written across the label and (2) the device of a horse. Therefore it was not true to say that the distinguishing feature of the plaintiffs' goods was the name "*Jamieson*" or "*Jamieson of Aberdeen*." That increased the difficulty of the plaintiffs' case. An examination of the get up of the defendant's goods showed that it was similar to the plaintiffs' in all those respects in which the plaintiffs' was similar to the get up of other persons in the trade, but so far as related to the distinguishing features of the plaintiffs' goods there was no similarity at all. It was said that the defendant was bound to take extra precautions because he happened to bear the same name as the plaintiffs, but there was no authority for restraining the use of a man's own name in his trade unless he has done something to pass off his goods as the goods of another. The evidence failed to show that the defendant had been trying unfairly to obtain the plaintiffs' trade, and there was no ground for the injunction. The learned Judge below had not given sufficient weight to the fact that the features in which the defendant's goods resembled the plaintiffs' were features common to the trade. The appeal should be allowed.

LORD JUSTICES RIGBY and VAUGHAN WILLIAMS gave judgment to the like effect.

[Solicitors—Van Sandau; Honey and Mellersh.]

Q.B. Div. (Wright) 1898.
and Darling, JJ.) Jan. 14.

IN RE WILLIAM ROBERT DAVIES, A SOLICITOR—IN THE
MATTER OF THE SOLICITORS ACT, 1888.*

Solicitor—Misconduct—Acquittal by Law Society
—Conviction by the Court.

This was an application made on behalf of Mr. Merick Meredith Williams, of Dalbeattie, N.B., surgeon, to strike off the name of Mr. William Robert Davies, a solicitor, of Dolgelly, in the county of Merioneth. There had been an inquiry before the Statutory Committee, but they did not appear on this application, having found that though the conduct of the solicitor

was extremely reprehensible they were able to receive his explanation and did not find him guilty of professional misconduct.

Mr. Foote, Q.C. (Mr. Carson, Q.C., with him), appeared for the complainant; Mr. Asquith, Q.C. (Mr. S. T. Evans with him), for the respondent.

The facts were of a very unusual description. There was a charge of conspiracy, but as a conspiracy that had been negatived by the committee, and the Court acted on the facts stated by the committee. The charge of conspiracy was that the respondent conspired with Robert Nanney Williams and Sarah Williams to suppress the will of Ann Hartley, which came into his hands in July, 1893, by which will the complainant was entitled to a moiety of certain estates of which Robert Nanney Williams and Sarah Williams were in possession, and that the respondent assisted them to deal with the estates as if they were solely entitled to them, from July, 1893, till March, 1896. The respondent was admitted in 1869. The material facts were these:—Robert Nanney Hartley, a large landowner near Dolgelly, died intestate in April, 1860, and one-half of his estates went to his daughter, Ann Hartley, and the other to the heir of his second daughter—namely, Thomas Humphrey Williams, the eldest brother of the complainant. Ann Hartley died on February 24, 1886, as it was supposed intestate. Mr. T. H. Williams then entered into possession of her moiety as heir-at-law. He died without issue in March, 1891, having by his will left one part of the above-mentioned estates to his wife, Sarah Williams, and the other part called the Llwyn estate to his second brother, Robert Nanney Williams. Each took possession of their respective estate. On March 28, 1896, the complainant was summoned to the death-bed of his brother, Robert Nanney Williams, by a telegram from Mr. Davies, the solicitor. He came, and was then informed by Mrs. Nanney Williams, his sister-in-law, that a will made by Ann Hartley had been discovered. Next day the complainant called on Mr. Davies about the matter, who told him that he could not act for him, as he was acting for the other side, and advised that there should be a settlement. Robert Nanney Williams died on April 2, 1896. On April 9, at an interview between the complainant and his solicitor, Mr. Davies, Ann Hartley's will was produced, by which it appeared that the complainant was entitled to a legacy of £1,000 and to her estate after the life interest of her eldest brother, Thomas Humphrey Williams, who had died in 1891 and who was named executor. The will was prepared by Mr. Griffith Jones Williams, a solicitor, of Dolgelly, and was dated November 19, 1868. The will was proved in solemn form after a defence had been put in and withdrawn, and the complainant then entered into possession under the will of the undivided moiety of the estate. The defence that was attempted to be raised was that Ann Hartley was of unsound mind. Mr. Davies, the solicitor, had known of the existence of Ann Hartley's will since 1893. The circumstances under which he had obtained it were these:—A Mr. Charles Millard, who had succeeded to the practice of Mr. Griffith Jones Williams, acted as solicitor for some years to Robert Nanney Williams and his wife. He died in January, 1892. Mr. Davies then acted for his widow in winding up his affairs and bought his practice. The will of Ann Hartley was contained in a sealed packet. Mr. Millard had told his wife this. Shortly after Mr. Millard's death Mr. Robert Nanney Williams told the widow that he did not wish this parcel of papers to be given to any local solicitor, and Mrs. Millard retained them. In July, 1893, she had occasion to open the packet for another purpose, and found the will. Mrs. Millard went to see the respondent and told him she had been advised

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

by her solicitor to open the will and give it to the executor, whoever he might be; whereupon the respondent asked to see it, and said that as he acted for Mrs. Sarah Williams, who was the executrix to the executor named in the will, he was the proper person to take it. Accordingly she gave it to him. On July 27 Mr. Davies replied to a friend of Mrs. Millard's who had written to him that she ought not to have taken away the documents belonging to her late husband's clients, and on no account ought she to have made herself acquainted with their contents, but that she need not be afraid of any criminal proceedings against her for concealing the will. He added, "She may, however, work much mischief by improperly disclosing the contents of these documents"; and on the same day he wrote to Mrs. Millard to the same effect, saying, "It would be a serious wrong for you to divulge to anybody except to such as Mr. L. and myself, who know our duty, anything you know of their nature or effect." The document was kept in Mr. Davies's safe from that time until 1896. Mr. Davies stated before the committee that he showed the will to Mr. Robert Nanney Williams, and explained its effect, urging him to communicate the matter to the complainant and his sisters, who were all beneficiaries under it. He also showed it to Mrs. Williams, who said she was very ill, and she objected to having any communication with the complainant, that Ann Hartley was not in a condition to make a will, and that he was to do nothing at present. Mr. Davies also mentioned the will to the trustees of the will of Mr. Thomas Humphrey Williams, who said they would do what Mr. Robert Nanney Williams advised. Among the arrangements which had taken place with regard to dealing with the property was one where a sale had been arranged for a piece of land for a school to the school trustees. A clause was inserted in the proposed contract that the title should commence with the will of Thomas Humphrey Williams, dated 1874, and the purchaser should assume that at the date of his will and of his death he was seised with fee simple of the property sold. The trustees, however, refused to accept this. It was said on behalf of Mr. Davies that the clause was put in by him in order that the trustees might refuse to accept, and that he urged Mr. Williams to allow him to draw out an abstract of title and so make known the existence of the will. Mr. Williams, however, would not consent. A further matter was this. In 1894 a summons was issued by a creditor in the Chancery Division to administer the estate of Mr. Thomas Humphrey Williams. The defendants were Mrs. Sarah Williams, the executrix, and the trustees of the will. Mr. Davies acted as their solicitor, and an order was made on Mrs. Williams to file an affidavit of the real and personal estate. In it she swore "I have set forth in the third schedule hereto the particulars of all the real estate which the said testator was seised or entitled to at the time of his death." That schedule comprised the whole of the estates, including those in which, under Ann Hartley's will, Thomas Humphrey Williams had only a life estate. Mr. Davies pointed out that this was wrong, but Mr. Williams said the affidavit must say that he died possessed of all. Mr. Davies's case was that he had no right to disclose the existence or nature of the will without his client's consent, and he consulted counsel. The opinion from him was that his proper course as a professional man was to inform his clients that they ought to make known the fact of the will, and unless they gave him authority to do so he should decline to act further for them in the matter. It was stated that after receiving the advice he did nothing further in respect of the property affected by the will.

Mr. FOOTES said that the letters showed that the respondent intended to keep the will secret; not perhaps for ever, but for an indefinite period. At the time he received the will he might have thought, very reasonably, that he was entitled to the custody of it, being the solicitor to the executrix and the executor of Ann Hartley. As a matter of law, however, as one of them had failed to prove the will, the persons entitled to it were the beneficiaries, and one of them might procure administration with the will annexed. It should be noted that the will was not brought to him by one of his clients, but by a stranger, the widow of a former solicitor. No one could say that a solicitor should disclose anything that his client might have told him as to the past. But he ought not to agree to go on acting for him when a fraud was being carried out. Further positive concealment of a document was evident here.

Mr. ASQUITH (for Mr. Davies) referred to "*In re a Solicitor*" (1894 1 Q.B., 254), to show that the decision of the statutory committee ought not to be disturbed. The solicitor honestly believed that his client was entitled to the document. If he had been right in that he was not entitled to disclose the contents without the leave of his clients. He had told his clients and the trustees, but could induce them to do nothing. It was not unreasonable that he should write to Mrs. Millard to keep the matter secret, at any rate before he had received the instructions of his client. As to the affidavit in the action to administer estate of T. Humphrey Williams where Mrs. Sarah Williams was the defendant, the proceedings were originated at the suit of a creditor. She was to disclose the whole of the estate, against which the creditor had a claim. Mrs. Williams then made an affidavit of all the property, which she, as executrix, was seised of or entitled to at the time of the testator's death. Thomas Humphrey Williams was really owner in fee of half, and if the missing will was right was life tenant of the rest. The statement would not prejudice the interest of the creditor. Both clients were very old and ill. The solicitor went to counsel for advice. The opinion was given on October 23, 1895, that if the clients would not give him leave to disclose the will the solicitor should cease to act for his client. It should be noted that the solicitor had not taken any action in the matter after the date of this opinion. Lastly, the solicitor had not obtained any profit out of the transaction. He tried to induce his clients to disclose the will.

The COURT directed that Mr. Davies should be suspended from practice for two years.

Mr. JUSTICE WRIGHT referred to the case of "*In re Crowdy*" (11 *The Times* L.R., 406 [1895]) as showing that the Court had jurisdiction to deal with the case even though the committee had not convicted the respondent. The learned Judge could understand well the view of the committee. The solicitor was a man possessed of an honourable record hitherto, but he had fallen into a false position which became worse as time went on. He thought that no personal interest induced the solicitor to follow the line of conduct which was detailed in the report, but the fact of a man doing wrong without a bad motive did not justify him. It would be a slur on an honourable profession to allow it to be thought that a solicitor would advise and assist his client to commit perjury. A solicitor could not tell a client to omit a material document in his affidavit of documents. It was the solicitor who settled what documents were to be mentioned. A solicitor could not shelter himself behind his client. The other point did not appear to the learned Judge so strong. The effect of the solicitor's conduct in locking up the will in the safe and concealing it was that for three years the complainant was kept out of an income of

perhaps £1,000 a year. The sentence would be that he must be suspended from practice for two years and pay the costs of the inquiry and the motion.

MR. JUSTICE DARLING was of the same opinion. The Court could not possibly take a more lenient view than they had taken. The responsible and respectable position of Mr. Davies was rather an aggravation of the matter. His own clients might be encouraged in their dishonest course by the fact that it was not at once denounced by a person in the position that he was. Mr. Davies not only concealed the fact that there was a flaw in his client's title, which might perhaps be excusable in a solicitor, but he was content to take active steps which would enable them to dispose of the property. His client did it to defraud another. Mr. Davies not only did not tell what he knew, but he was from day to day doing things which should enable the matter to be more effectively concealed. He prepared, also, what he knew would be a perjured affidavit. He pointed out that it was false, but when the lady insisted he did not refuse to act. His conduct the committee described as reprehensible. The learned Judge went further, and thought it deserved punishment at the hands of the Court, which had to see that their officers did not enable persons to commit crimes. For a period of two years Mr. Davies had concealed the will. He then took the opinion of counsel. A person holding the position of Mr. Davies should have known at once what to do. The moment he found the will and any intention to conceal it he should have refused to be a party to it at all. Further, when they were going to sell a piece of the estate he put in a clause calling on the purchaser to assume a thing which he (Mr. Davies) knew to be false. It was said this was done to prevent his client from committing a fraud. That was a very Machiavellian form of policy. A solicitor, under these circumstances, should have acted more simply and straightforwardly.

On the application of Mr. EVANS the order was made to run from the 1st of March.

[Solicitors—Clayton, Sons, and Fergus, for the complainant; T. D. Jones.]

Q.B. Div. (Day and)
Lawrance, J.J.)

1898.
Jan. 14.

DAVIES V. EVANS.*

Licence—Death of holder of licence—Power to grant licence to tenant of house so left unoccupied—9 Geo. IV., c. 61, sec. 14.

This was an appeal, by case stated, from the Court of Quarter Sessions for Cardiganshire.

MR. S. T. EVANS appeared for the appellant; the respondent was not represented.

The appellant applied at the special licensing sessions for Cardiganshire, under 9 Geo. IV., c. 61, s. 14, for a licence in respect of the Maesglas Arms, Dihewid. 9 Geo. IV., c. 61, s. 14, provides:—That if any person duly licensed under the Act shall die, and in certain other contingencies whereby the licensed premises become unoccupied, the justices shall have power to grant a licence to the heirs or administrators of the person so dying, or to the tenant or occupier of a house having become so unoccupied. In August, 1896, a licence was granted in respect of the house in question to Mary Evans. On November 14 Mary Evans died, leaving no personal representatives or heir-at-law. The landlord took possession of the premises and put the appellant in as tenant. Mary Evans owed money to a beer merchant, who upon her death entered the premises and took possession of and sold her effects, applying

the proceeds in liquidation of his debt. He handed over the licence to the appellant. The appellant's application was refused by the justices, who were of opinion that they were entitled to treat the application as an application for a new licence, and that they, consequently, had an absolute discretion. On appeal the Quarter Sessions held that they had no jurisdiction to grant the licence because the case did not come within 9 Geo. IV., c. 61, s. 14.

MR. S. T. EVANS contended that the appellant was a tenant of a house which came within the provisions of 9 Geo. IV., c. 61, s. 14. He cited "*Baldwin v. the Justices of Dover*" [1892] 2 Q.B., 421.

Their LORDSHIPS allowed the appeal.

[Solicitor—John T. Lewis, for D. Pennant Jones, Aberayron, for the appellant.]

Court of Appeal (Chitty)
and Collins, L.J.J.)

1898.
Jan. 15.

IN RE LONDON SCHOOL BOARD ELECTION PETITION (CHELSEA DIVISION)—LORD MONKSWELL AND OTHERS (PETITIONERS) V. THOMPSON (RESPONDENT).*

Election Law—School Board—Claim for a recount—Municipal Corporations Act, 1882, sec. 87—Practice.

This was a petition brought under section 87 of the Municipal Corporations Act, 1882, questioning the recent election for the School Board for London, Chelsea Division. The petition was presented against the return of Mr. William Whittaker Thompson, on the ground that he was not duly elected by a majority of lawful votes. The petition alleged (*inter alia*) that certain votes counted for the respondent were erroneously received by the returning officer as good votes, and that certain votes given in favour of Mr. Leslie Morton Johnson were erroneously rejected or counted for the respondent or some other candidate by the returning officer, and that these votes ought to be added to Johnson's votes; and the petition claimed a recount of the votes recorded in favour of the respondent and Johnson respectively, and that it might be declared that the respondent was not duly elected and that Johnson was duly elected. Mr. Justice Kennedy at Chambers made an order under section 93, subsection 7, of the Municipal Corporations Act, 1882, that the case raised by the petition should be stated as a special case, and that the votes recorded in favour of Johnson and of the respondent respectively be recounted, and that the result of the recount be stated in the special case. From that order this appeal was brought by the respondent Thompson, it being contended on his behalf that the votes for all the candidates should be recounted, as it might appear upon a full recount that the respondent was still elected even though he should have received a smaller number of votes than Johnson. It appeared that there were five vacancies and eight candidates in the Chelsea Division, and that in the return made by the returning officer the name of the respondent, Thompson, stood fifth in the list with 13,221 votes, and that the next name in the list was that of Johnson, with 13,218 votes. The fourth name in the list was that of Viscount Morpeth, with 13,292 votes. A preliminary objection was taken last Wednesday, when the appeal first came on for hearing, that no appeal lay, but the Court overruled this objection (see *The Times* of Thursday last). When the appeal came on to-day,

LORD JUSTICE CHITTY said that he was a voter in the Chelsea Division, and LORD JUSTICE COLLINS said that he was also a voter in that division.

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.
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Counsel on both sides, however, waived any objection to the constitution of the Court upon that ground.

Mr. YARBOROUGH ANDERSON, for the respondent Thompson, in support of the appeal, contended that the petitioners had to prove, first, that the respondent was not duly elected by a majority of lawful votes; and, secondly, that Johnson was duly elected. In other words, the petitioners undertook to prove that the respondent was not among the first five candidates. To recount the votes as between the respondent and Johnson for the purpose of showing that Johnson received more votes than the respondent would not show that the respondent was not duly elected, because the petitioners contended that they were entitled to fake votes which had been counted for one or more of the first four candidates in the list, and add them to Johnson's votes, if they ought properly to have been counted for Johnson. The result might be that the respondent would get more votes than some of the first four candidates on the list, and therefore it did not follow that upon this recount he would not be entitled to be elected, even though Johnson should receive more votes than he did. The recount as ordered would be nugatory, and so there ought to be a recount of the votes given for all the candidates. He was willing, in order to save expense, to have a recount of the votes as between the candidates placed fourth, fifth, and sixth on the list.

Mr. S. H. DAY (Mr. Willoughby Williams with him), for the petitioners, contended that the position of the respondent and Johnson alone could be affected by this recount. There was no petition against the other candidates elected and their election could not be questioned. The petitioners had limited their petition to a claim for a recount of the votes as between the respondent and Johnson, and they took the risk of the recount turning out to be nugatory. The proper course for the respondent was to take the point upon the special case after the recount. It was a question of law for the Divisional Court upon the special case, and that was the proper tribunal to decide it, and not this Court upon an interlocutory application.

Mr. YARBOROUGH ANDERSON, in reply, said that it would be very inconvenient to have a recount that probably would turn out to be quite useless and a mere waste of time. [LORD JUSTICE COLLINS.—If upon the recount the respondent has a majority over Johnson, he wins. If, on the other hand, Johnson has a majority over the respondent, then, if your contention is right, the respondent wins, because it has not been shown that he is not among the first five candidates on the poll. If, therefore, you are right upon this last point, you do not want what you now ask for, as it is "heads you win, tails Johnson loses."]

The Court dismissed the appeal.

LORD JUSTICE CHITTY said that the petitioners, who claimed a recount, alleged that Johnson, who was sixth on the list of candidates, was duly elected, and that the respondent was not duly elected, and they claimed the respondent's seat. A recount of the votes recorded in favour of the respondent and Johnson had been asked for and directed. The petition for the recount had been advisedly framed in that way, and the petitioners by their counsel objected to having its scope extended so as to embrace the votes given for the first four candidates. Counsel for the petitioners said that the first four candidates were not affected by the petition, that their seats were safe, and that the only question raised by the petition was as to the votes given for the respondent and Johnson, and he insisted upon the order as it stood. That being so, the order ought to be affirmed for these reasons. The Court would leave open the question of law raised by the respondent—namely, whether, even, supposing the result of the recount to

show that Johnson received more votes than the respondent, that would displace the respondent without recounting the votes given for the other candidates so as to see whether those other candidates got more votes than the respondent. The Court would leave open every question of law, but they held the petitioners to their limited inquiry, so as to preclude them from asking in the Divisional Court for any wider inquiry than that now directed.

LORD JUSTICE COLLINS said that he was of the same opinion, and he thought it better not to add anything, because he desired to leave every question of law open.

Q.B. Div. }
(Mathew, J.) }

1898.
Jan. 15.

PECK AND CO. V. HINDES (LIMITED).*

Patent—Action for infringement—Statute of Monopolies, 21 Jac. I., c. 3.

In this action, which was reported in *The Times* of the 14th inst., the jury found for the defendants on the questions of fact left to them by his Lordship, and a point of law arising under the Monopolies Act, 21 Jac. I., cap. 3, was reserved for argument on Friday last, and at the conclusion of the arguments his Lordship reserved his judgment until to-day.

Mr. Bousfield, Q.C., and Mr. W. Neill appeared for the plaintiffs; and Mr. J. Fletcher Moulton, Q.C., Mr. Lewis Edmunds, Q.C., and Mr. T. M. Stevens for the defendants.

HIS LORDSHIP, in giving judgment, said that this was an action to recover damages for proceedings against the plaintiffs, alleged to have been taken in bad faith by the defendants, Hindes (Limited), for infringement of their patent rights. The patents were for a small article of domestic use, hair curlers. There were two patents, one originally granted to a person named Careless, and one to a person named Ainsworth. The action brought by Hindes (Limited) against Messrs. Peck and Co. failed, because the patent granted to Ainsworth, which was the foundation of that action, contained two claims, one of which was bad and the other good, and the patent being bad in part they could not succeed. It was alleged by Peck and Co. that the defendants knew when they brought that action they could not win it, and other points were raised to show that it was not honest litigation. The question as to Ainsworth's patent had previously arisen in an action for infringement against a person named Singleton. That action had failed and had been compromised, because it was found out that there was this flaw in Ainsworth's patent. It was quite clear that the flaw could be removed. It was alleged that Messrs. Hindes had given orders for the necessary steps to be taken for accomplishing this object. Owing to a mistake no formal disclaimer had been filed, but Messrs. Hindes proceeded with the action against the plaintiffs under the impression that the instructions given to their solicitors had been acted upon. They were wrong, and the action failed, and Messrs. Peck and Co. brought the present action. The jury had heard the case fully discussed, and had come to the conclusion that there was no bad faith on the part of Messrs. Hindes. There was another point behind—a point which, his Lordship said, was being raised for the first time in a Court of law. It was this; there was an ancient statute passed in the reign of James I., the Statute of Monopolies, and the plaintiffs contended that the defendants were

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

within the terms of that statute and were subject to the penalties imposed by it. The point surprised him because *prima facie* it was wholly inconsistent with a fundamental axiom of the common law that an action may be brought without fear of penal consequences and only subject to the liability of having to pay the costs. It was said that with regard to letters patent for a new invention a new rule of law was supplied by this statute. On behalf of Messrs. Hindes it was argued that the statute had no operation as to new inventions, but dealt only with letters patent and other documents had on the face of them and bad at common law. His Majesty King James I. in 1610 had submitted to the pressure applied by his subjects and had issued a Royal declaration that in future there should be no more monopolies or grants which should interfere with the fair course of trade. The Statute of Monopolies was passed in the 21st year of James I., and it reminded the King of his declaration. The first section [declared monopolies and similar grants to be contrary to the laws of the realm and void. The second section declared that all monopolies should be examined, heard, tried, and determined according to the laws of the realm. The Act intended to force patentees and monopolists to come before a Court of law to have the question determined as to whether their patents or monopolies were good. Section 4, on which the plaintiffs based their case, enacted that if any person should be hindered, grieved, disturbed, or disquieted by occasion or pretext of any monopoly or letters patent he should be able to recover three times the damage he had suffered and double costs. It was said that this was the position in which Messrs. Hindes were placed, because they had hindered, grieved, and disquieted the plaintiffs. By section 6 letters patent for a new manufacture granted to the first and true inventor were excepted from the operation of the statute. It had been ingeniously argued for the plaintiffs that the letters patent referred to in section 6 must be taken to be valid letters patent, and that, as Ainsworth's patent was not a valid patent because of the flaw in it, therefore the proviso did not apply to it. Section 6 did not say anything about valid letters patent. Having regard to the object of the Act it was unnecessary to insert such a provision. His Lordship was clearly of opinion that the Act could not be construed in that way; it referred to invalid and improper exercises of the prerogative. On behalf of Messrs. Hindes it was said that, even if the statute meant valid letters patent, their letters patent were valid. It was clear that this was so. There was a flaw in their patent and it was in consequence in a state of suspended animation, but by disclaimer of the bad part it could be put right. Subsection 9 of section 18 of the Patents, &c., Act of 1883 said that on a patent being amended by disclaimer the amendment should for all purposes be deemed to form part of the specification. Therefore, the patent in question was a valid patent—that is, it was capable of being set right, and gave to Messrs. Hindes their rights as if it had been without blot or flaw. Messrs. Hindes therefore succeeded and the Monopolies Act did not apply. He therefore gave judgment on the whole case for the defendants, with costs.

Court of Appeal (Chitty) } 1898.
and Collins, L.J.J. } Jan. 17.

GOWER V. COULDRIDGE AND OTHERS.*

Practice—Parties—Joinder of defendants—Separate causes of action—O. 16, r. 4—"Sadler v. Great Western Railway Company" ([1896] A. C., 450).

This was an appeal from an order of Mr. Justice Day's. The action was one for damages and was brought against three defendants, Coulldridge, Newman, and Maw, directors of a company called Richard Spurgeon (Limited). The plaintiff complained that he had been induced to take 500 shares in the company by untrue statements contained in a prospectus issued by the three defendants, and that such shares had turned out to be worthless. He also alleged that the defendants were liable by virtue of the Directors' Liability Act, 1890. He also charged the two defendants Coulldridge and Newman with conspiracy. On the application of the defendant Maw an order was made by Master Butler directing that the part of the statement of claim which related to conspiracy should be struck out, or that the plaintiff should elect whether he would proceed with the causes of action which he alleged against all three defendants or with the cause of action which he alleged against Coulldridge and Newman only. On the appeal of the plaintiff Mr. Justice Day reversed the order of the Master. The defendant Maw appealed to the Court of Appeal.

The Hon. M. M. Macnaughten appeared for the defendant Maw; Mr. Arthur Pellow appeared for the plaintiff.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE CHITTY read the following judgment:—In this action the plaintiff seeks to recover damages for the loss he has sustained by taking shares in the company called "Richard Spurgeon, Limited." He does not claim any injunction. There are three defendants, all of whom are alleged to be directors of the company. In accordance with the modern system of pleading the plaintiff in his statement of claim sets forth facts from which it appears that he has three distinct causes of action. Stated shortly they are as follows. The first is a fraudulent conspiracy by two of the defendants, viz.:—Newman and Coulldridge, to promote and form the company to buy a worthless business and to induce the plaintiff to take and pay for the shares which he in fact took. Although there is a statement that the defendant Maw joined in the promotion of the company, it is clear that he is not charged with being party to the conspiracy. This was admitted by the plaintiff's counsel. The second is a statutory liability founded on the Directors' Liability Act, 1890, in respect of statements in the prospectus issued by all three of the defendants. The third is false and fraudulent representations in the prospectus, also charged against all the defendants. The action, then, is founded on three distinct torts or wrongs committed, as to the second and third, by the three defendants, and, as to the first, by two only. In these circumstances the defendant Maw, objecting to the joinder of the first cause of action with the other two, took out a summons, on which the Master made an order, in substance directing the plaintiff to elect whether he would proceed with the action on the first cause against the defendants Newman and Coulldridge only or on the second and third causes against the three defendants. On appeal the learned Judge in chambers reversed the Master's order, and allowed the action in its present form to proceed against all three defendants. The appeal is by Maw from the Judge's order. At the bar the plaintiff's counsel elected, if the Court considered that the Judge's order could not be sustained, to strike out from the statement of claim all the allegations relating to the fraudulent conspiracy, and to proceed with the action on the second and third causes only. In my opinion the Judge's order cannot be sustained. The case is entirely governed by the decision of the House of Lords in "Sadler v. Great Western Railway Company" ([1896] A. C., 450), where it was held that claims for damages

against two or more defendants in respect of their several liability for separate torts cannot be combined in one action. The plaintiff's counsel endeavoured in vain to distinguish that case from the present. He referred to Orders 16 and 18 and various rules under those Orders, and suggested that the lords who took part in the decision did not deal with the rules. The suggestion is wholly inadmissible. The rules were necessarily before the House and present to the minds of those who advised the House. The decision lays down a principle applicable to the present system of procedure on the subject, and governing all the rules bearing on the question. It would be idle, therefore, for this Court to enter upon a discussion of the rules or of any of the authorities relating to them other than Sadler's case. In the case before us the cause of action founded on the fraudulent conspiracy is an entirely distinct and independent cause; it is wholly separate from the second and third causes. I hold then that the defendant Maw is entitled, as a matter of right, regard being had to plaintiff's election at the bar, to have all the allegations relating to the conspiracy struck out from the statement of claim, and the order will be to that effect. No question, therefore, arises as to the exercise of any discretion by the Court on the ground of embarrassment to the defendant Maw. Had that question arisen, I should have arrived at the same conclusion. The costs of the appeal and of the summons both before the Master and the Judge must be the costs of the defendant Maw in any event.

LORD JUSTICE COLLINS concurred.

Q.B. Div. (Day and)
Lawrance, J.J.) }

1898.
Jan. 17.

GAYFORD V. CHOULER.*

Trespass—Damage, to grass—24 and 25 Vict.,
c. 97, sec. 52.

Mr. W. H. Stevenson appeared in this case, which was one stated by justices of Nottingham on an information under section 52 of 24 and 25 Vic., c. 97, against the appellant for unlawfully, wilfully, and maliciously damaging certain grass to the amount of 6d. The question whether there was any criminal remedy under that section for trespass to grass was raised. The facts were that on July 12 the defendant and two other gentlemen went for a ramble in the parish of Chilwell along the bank of the river Trent, and there, walking three abreast, made a short cut across a pasture field where the grass was up to their knees and was good and very thick and deep. They passed two large notice boards with the words "No road" on them. The farmer in whose possession the field was saw them, went to them, and said to the defendant, "You have no right here." Defendant said, "We are doing no harm. I know the law of trespass as well as you. I shall not turn back. If you wait half-an-hour you will see me come back. I shall continue to come across as often as I like." They all three continued walking abreast across the field. The damage done by the defendant was to the amount of 6d. There were some cattle in the field and had been for some time. The defendant did not claim any right of way. It was, however, stated that a former tenant had not raised any objection to people walking over the field. It was contended before the magistrates that the alleged trespass of merely walking over grass was not such a wilful or malicious act of damage as was contemplated by section 52 upon which the information was founded, and also that no actual damage could have been or was done by the trespass and that the justices had no jurisdiction, and that the only remedy for such a trespass

was a civil one and not a criminal one. The justices held that damage to the amount of 6d. had been occasioned by the defendant, and ordered him to pay 6d. for the damage. They also inflicted a fine of 6d., and directed him to pay 14s. for costs. Section 52 of 24 and 25 Vic., c. 97, provides for the punishment by imprisonment for two months or a £5 fine of any one who shall "wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided." Section 24 makes it an offence punishable with imprisonment for a month or fine of 20s. "to unlawfully and maliciously destroy or damage with intent to destroy any cultivated root or plant used for the food of man or beast."

Mr. STEVENSON contended that in order to constitute an offence under section 52 there must have been an intention to commit injury or damage. Here there was no such intention, as all that was wanted was to take a short cut. He cited "Gardner v. Mansbridge" (19 Q.B.D., 217) and "Eley v. Little" (50 J.P., 308), and urged that section 52 only applied to the real estate itself and not to a product growing on the land. The conviction was therefore bad, as injury to the grass was not injury to the real estate. It could not be contended that while a man could only be imprisoned under section 24 for one month for damaging cultivated plants, he was to be liable to two months under section 52 for damaging uncultivated products of real estate.

The COURT upheld the conviction.

Mr. JUSTICE DAY said the justices were right. It was a question of law on the facts found by them, which were that there was no claim of right of way along the line trespassed upon set up by the appellant; that there were notice boards at each side of that part of the field trespassed on; and also that the appellant persisted in going along after the respondent had told him he had no right to do so, the appellant also saying he should come back the same way and go on the field as often as he liked. The justices were satisfied upon the evidence given, as well as upon their own knowledge of what the effect of such a trespass must have been upon grass of that description. They found as a fact that the grass was long and thick, that it was trespassed on and trodden down for a length of 130 yards by the appellant, and that he must have done and did some actual damage to the grass, for which 6d. as sworn to by the respondent, was a reasonable compensation for the injury. There was, therefore, some damage done, and a man must be taken to have intended the natural consequence of his conduct. The appellant had therefore wilfully or maliciously committed an injury within the section. The justices were entitled to convict.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Field, Roscoe, and Co., for Parker Woodward, for the appellant.]

Court of Appeal (A. L. Smith,)
Chitty, and Collins, L.J.J.) }

1898.
Jan. 18.

THE QUEENSLAND NATIONAL BANK V. THE PENINSULAR
AND ORIENTAL STEAM NAVIGATION COMPANY.*

Ship—Bill of lading—Carriage of specie—Warranty that the specie room is reasonably fit to resist thieves.

Decision of Mathew, J. (13 *The Times* L.R., 500), affirmed.

This was an appeal from the judgment by Mr. Justice Mathew, taking commercial cases (reported in 13 *The*

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Times Law Reports, 500; 2 Com. Cas., 228). The action was brought to recover £5,000 damages for the loss of 5,000 sovereigns which were being carried on board the defendants' steamship *Oceana* from Port Jackson to London. The plaintiffs, under a bill of lading, shipped ten boxes, each containing 5,000 sovereigns, on board the *Oceana* to be delivered at Lloyds Bank, London. The bill of lading contained exceptions (*inter alia*) of loss by robbers or thieves by sea or land, defects, latent or otherwise, in hull or its appurtenances, or from any act, neglect, or default whatsoever of the pilot, master, mariners or other servants, or of the agents of the company. The boxes in question were placed in the bullion room, and during the voyage the bullion room was broken open and one of the boxes was stolen. The plaintiffs in their statement of claim alleged that there was an implied warranty that the *Oceana* had such a bullion room as to make her a fit vessel for the carriage of bullion, and that the bullion room was so defective that the vessel was not fit for the carriage of bullion. It was ordered that, before the questions of fact were tried, the preliminary question of law should be determined whether there was any warranty by the defendants under the bill of lading that the room in which the bullion was stowed was so constructed as to be reasonably fit to resist thieves. There was nothing in the bill of lading referring to a bullion room, but it was admitted that the *Oceana* had a bullion room and that the plaintiffs knew it. For the purposes of this argument it was assumed that the bullion room was defective. Mr. Justice Mathew held that there was an implied warranty in the bill of lading that the bullion room was in a reasonably fit condition to resist thieves, and decided the preliminary question in favour of the plaintiffs. The defendants appealed.

Mr. Joseph Walton, Q.C., and Mr. R. M. Bray, Q.C., appeared for the defendants; Mr. Scrutton (Mr. J. Lawson Walton, Q.C., and Mr. A. H. Chaytor with him) appeared for the plaintiffs.

The following cases were referred to:—"Maori King v. Hughes" ([1895], 2 Q.B., 550); "Tattersall v. National Steamship Company" (12 Q.B.D., 297); "Steel v. State Line Steamship Company" (3 App. Cas., 72); "Stanton v. Richardson" (L.R., 9 C.P., 390).

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that there were very large exceptions in the bill of lading, and, apart from an implied warranty, the defendants would in all probability have an answer to the claim by showing that the loss was caused by thieves. The question, however, was whether upon this bill of lading there was an implied warranty that the bullion room in which the gold was placed was reasonably fit to resist thieves. It seemed to him that the foundation of Mr. Justice Mathew's judgment was this, as stated by that learned Judge:—"I assume, for the purpose of my decision, that the vessel in question, the *Oceana*, like others of her class, was furnished with a receptacle for bullion and valuables, usually called a specie room; and that the contract in the bill of lading was entered into with the knowledge and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading." That assumption, upon which the learned Judge based his judgment, brought the case within the decision in the "*Maori King v. Hughes*." In his (the Lord Justice's) opinion that assumption was fully borne out by the admissions made during the argument in the Court below. It was argued that there was no implied warranty that the bullion room was reasonably fit to resist thieves. The parties contracted on the footing that there was a bullion room. What was a bullion room for? Not to

resist the waves or fire; it was for the purpose of securing the gold in it from thieves. It was said that gold could be carried in other parts of the ship. That was not the issue raised before Mr. Justice Mathew. The question was whether there was a warranty that the bullion room was, at the time when the ship started, reasonably fit to resist thieves. Upon the authorities which had been referred to, in his opinion there was such a warranty.

LORD JUSTICE CHITTY concurred. The bullion room was in the contemplation of the parties at the time they made the contract, and the learned Judge was justified in making the assumption of fact which he did. What was a bullion room for? The peril from thieves was the great peril to which cargo of this class was exposed. In his opinion the proper question was whether the bullion room was reasonably fit to resist thieves. For instance, it must not be an old packing case. It must be reasonably fit for the special purpose for which a bullion room was used.

LORD JUSTICE COLLINS concurred. When they introduced into this case the fact that both parties contemplated when they entered into the contract that the bullion should be carried in the bullion room, it led to this, that the bullion room should be a reasonable bullion room. In his opinion, that implied that the bullion room should be reasonably fit to resist thieves. A packing case was not enough, because it was not strong enough. The standard of strength was its reasonable capability of resisting thieves.

[Solicitors—Waltons, Johnson, Bubb, and Wharton, for the plaintiffs; Freshfields and Williams, for the defendants.]

Chan. Div. } 1898.
(North, J.) } Jan. 18.

IN RE FETHERSTONHAUGH'S ESTATE.*

Settled Land Acts—Tenant for life—Heirlooms
--Application to sell refused.

This was an application by the tenant for life of Uppark-mansion, Sussex, for the sanction of the Court to the sale of heirlooms at the mansion-house under the Settled Land Act, 1882. The late owner of the estate, Miss Fetherstonhaugh, by will settled the Uppark estate and other property on persons who were strangers in blood to her. The applicant, Colonel Keith Turnour-Fetherstonhaugh, was the first tenant for life. His children took no interest, and on his death the property was limited to the Hon. Arthur Vesey Meade (the second son of the Earl of Clanwilliam) for life, with remainder to his children successively in tail male, with remainder to the other younger sons of the Earl of Clanwilliam and their children in a similar way. Miss Fetherstonhaugh bequeathed all the furniture, china, pictures, and other articles at Uppark as heirlooms, and expressed a desire and intention that every tenant for life should reside at the mansion. She died in 1896. The china, of which there was an extensive and valuable collection, four pictures, and the most valuable part of the furniture, which included a considerable quantity of articles of good periods, had been submitted to Mr. Woods, the well-known auctioneer, of the firm of Christie, Manson, and Woods, for valuation. He had valued the whole of these at about £18,000, and a selection of what he considered as the more valuable articles he estimated as likely to produce £15,000. The tenant for life now asked the sanction of the Court to the sale of the selected articles and the investment of the proceeds for the benefit of the inheritance. Evidence was adduced on his part to show that, owing to the heavy periodical succession duty

*Reported by D. FITCALIN, Esq., Barrister-at-Law.

payable over eight years, amounting to more than £600 a year, annuities charged on the estate, and the expenses imposed upon him in keeping a herd of deer and maintaining the place, even with the addition of some private income he would have only about £2,000 a year and would not at present be able to reside at the mansion. It was maintained on his behalf that, looking at the benefit of himself and the persons interested in remainder, it would be better that he should be put in the position of being able to reside than that the mansion should be either untenanted or let.

Mr. Swinfen Eady, Q.C., and Mr. Edward Ford were for the applicant; Mr. J. Cozens-Hardy, for trustees, supported the application; the Hon. Charles Macnaghten, Q.C., and Mr. Bryan Farrer, for the next tenant for life, opposed.

MR. JUSTICE NORTH, referring to the well-known comments of Lord Esher in Lord Radnor's case (45 Ch. D., 415) on the power of a tenant for life with the consent of the Court to sell even heirlooms contrary to the intention of a settlor, that the tenant for life was not intended to act "capriciously, selfishly, or dishonestly," said that there was no imputation on the applicant that he was acting capriciously or dishonestly or selfishly in the sense that the application was not made under a *bona fide* belief that it would be for the benefit of the parties interested, taken as a whole, that the articles should be sold, and he should be able thereby to live at the mansion if the selected articles were sold and produced the estimated price. Probably only some four-fifths of that would be netted, or about £12,000. That when invested would not produce a very large income; but it might be that the addition would enable Colonel Fetherstonhaugh to reside at the mansion. Looking, however, at the interest of all these to come after as well as that of the applicant, his Lordship did not consider that it was right that these heirlooms should be sold, and he dismissed the application. He directed the trustees to pay the costs of all parties out of the estate.

[Solicitors—Coe, Robinson, and Dennes, for the applicant and trustees; Nicholl, Manisty, and Co., for the tenant for life in expectancy.]

Chan. Div. ?
(Stirling, J.) }

1898.
Jan. 18.

AJELLO V. WORSLEY.*

Trader—Injurious advertisement—Advertising plaintiff's goods for sale at less than cost price—Injunction refused.

This case raised a somewhat interesting and important question, viz.—whether the plaintiffs, who were piano manufacturers, were entitled to restrain the defendant, a dealer in pianos, from advertising the plaintiffs' pianos for sale at less than cost price without in fact having any of such pianos in his possession. The plaintiffs carried on their business in London. They made and supplied to their customers pianos of various classes, among others being a class of piano which they called the "Britannia model," and sold to the trade at the price of 15 guineas; "Class 2," which they supplied to the trade at 17 guineas; and "Class 6a," which they described in their price lists as "upright grand, iron frame, check action, trichord" pianos, and sold to the trade at the price of £23 10s. The defendant was a furnishing contractor carrying on business in Manchester. In the early part of 1895 the plaintiffs supplied to the defendant the following pianos at trade prices:—Two pianos of Class 2, one of Class 6a, and two Britannia models, the last two

forming part of an order for 12 pianos of that class, an order which the plaintiffs, in consequence of some dissatisfaction on their part with an advertisement issued by the defendant, refused to complete. On February 22, 1896, the defendant published in the *Manchester Evening News*—a newspaper having a large circulation in Manchester and the neighbourhood—an advertisement in the following form. It was headed "Great sale of pianos at Worsley's—hundreds of bargains on view—pianos by all the great makers." After some particulars of pianos, chiefly second-hand, the advertisement continued, "New instruments at Worsley's, a fine upright grand by Ajello, iron frame, check action, trichord, price 15 guineas, or 15s. per month." Similar advertisements were afterwards inserted in late issues of the same paper, and in other newspapers also. The object of this action was to restrain the continuance or repetition of such advertisements. The plaintiffs' contention was that the piano described in the defendant's advertisements corresponded with their pianos of Class 6a, which were sold to the trade at £23 10s., that the announcement that one of these pianos could be purchased at the retail price of 15 guineas was calculated to do them serious injury with their customers and in their trade generally, and that the publication of such an advertisement was an actionable wrong. The case was argued in March last, when his Lordship thought that the decision of the House of Lords in the then pending case of "Allen v. Flood" might have some bearing upon the question before him; he accordingly postponed his judgment until the decision in "Allen v. Flood" (reported *ante* p. 125) should have been made known.

Mr. Graham Hastings, Q.C., and Mr. John Cutler, Q.C., appeared for the plaintiffs; and Mr. Grosvenor Woods, Q.C., and the Hon. C. Macnaghten, Q.C., for the defendant.

MR. JUSTICE STIRLING, in giving judgment, after stating the facts and referring to the nature of the advertisements, said that he thought that a number of the public on reading them would be led to believe that the defendant had in stock and for sale at the price of 15 guineas a new instrument made by the plaintiffs which might properly be described as an upright grand with iron frame and check action and trichord. The defendant, on cross-examination, had, in fact, admitted that the meaning of the advertisement was that he had the new instruments in stock. It was further admitted that at the dates of the several advertisements complained of the defendant had no piano of the plaintiffs' manufacture in stock; consequently the advertisements in the sense in which the public would, in his Lordship's opinion, naturally understand them were untrue. It was established by the evidence that the plaintiffs' had suffered damage by reason of the advertisements. It was proved that certain of their customers, who were retail dealers in pianos, declined to give them any further orders on the ground that, buying as they did the plaintiffs' lowest-priced pianos (Britannia model) at 15 guineas they could not sell new pianos of the plaintiffs' at the price advertised by the defendant; and that so long as these advertisements continued the public, believing that they could be supplied with the plaintiffs' pianos by the defendant at the price he advertised, would refuse to deal at higher prices. The defendant stated that it was his practice in business to advertise for sale articles in which he dealt, and in order to attract the public to select goods which had been for some time in stock and offer them at low prices yielding little or no profit while other goods were offered at prices which yielded considerable profits, that in the commencement of 1896 he began to advertise pianos in this way, and that he had

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

in stock at that time a piano of the plaintiffs' of the Britannia model class, that he selected it among others to be offered at a low price, and that the advertisement was intended originally to refer to that particular piano. His Lordship then considered the evidence and said that it must be taken that the defendant began the publication of the advertisements complained of at a time when he had in stock a Britannia model piano of the plaintiffs' manufacture, but continued to advertise it for sale long after that piano had in fact been sold and had not been replaced by any other piano of the plaintiffs' manufacture. Under these circumstances, continued his Lordship, the plaintiffs at the trial asked for an injunction restraining the defendant from advertising for sale any of the plaintiffs' pianos unless he had in his possession a piano of the plaintiffs' manufacture and of the class advertised. By limiting their claim to an injunction so limited they virtually admitted that if the defendant had in his possession a piano of the plaintiffs' manufacture and of the class advertised he might offer it for sale at any price he chose. It was obvious that the owner of any property was entitled to sell or dispose of it for such consideration as he might see fit, and either at a profit or at a loss. His Lordship took it to be settled by "*Allen v. Flood*" (reported *ante* p. 125) that the motive of the owner for so acting could not be inquired into. He further thought that, as a general rule, any person might sell or offer for sale at any price whatsoever goods of which he was not the owner, but which he expected or hoped to acquire. It was expressly provided by section 5 of the Sale of Goods Act, 1893, that "the goods which form the subject matter of a contract for sale may be either existing goods owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract for sale"; and these last mentioned goods were in the Act designated by the convenient term "future goods." If a seller might contract to sell future goods, he must be at liberty, as the first step to such a contract, to offer them for sale; and there was nothing to prevent him making the offer by advertisement or any other lawful way. Again, it seemed that he was entitled to make the offer at any price he chose, whether remunerative or not, and it might be worth a trader's while to sell some goods at a loss so long as he was able to sell other goods at a countervailing or more than countervailing profit. In all this his Lordship assumed that the seller was acting honestly; if what he did was tainted with fraud he might be guilty of an actionable wrong. An illustration was afforded by the case of "*Richardson v. Sylvester*" (L.R., 9 Q.B., 34). There the defendant advertised to let a farm of which he was not the owner and which he knew he had no power to let; the plaintiff saw the advertisement and visited and inspected the farm with a view of becoming the tenant. It was held that the plaintiff might maintain an action to recover the expenses to which he had been put and which were thrown away. In the present case the plaintiffs had in the autumn of 1895 refused to supply the defendant with any of their pianos, and they continued such refusal down to the commencement of the action. The defendant, therefore, could not get from the plaintiffs directly any of their new pianos; but he might by indirect means have acquired new pianos of theirs upon terms which would not, indeed, enable him to sell them at a profit, but which need not have involved a ruinous loss. If, then, the defendant had seen fit to advertise that he was prepared to supply new pianos of the plaintiffs' manufacture of the Britannia model type, he would have been within his legal rights. It was said, however, that the advertisement actually published contained two misrepresentations—first, that the pianos

to which they related (being, according to the defendant's own statement, of the Britannia model type) were described "upright grand . . . iron frame, check action, trichord"; and, secondly, that such pianos were in the possession of the defendant at the several dates when the advertisement appeared. As regards the first, his Lordship had already said, in considering the evidence, the description was not inaccurate; and in argument the main stress was laid on the second. In his Lordship's judgment this misrepresentation did not make the advertisement fraudulent; and in order that a misrepresentation might be actionable it must not merely be untrue, but cause damage to the person who complained of it. The question then arose, Was the damage complained of by the plaintiffs attributable to the misrepresentations of fact contained in them? It appeared to his Lordship that this question must be answered in the negative, for an advertisement such as the defendant might legally have issued would have produced precisely the same consequences and been followed by the same damaging results. No decision in support of such an action as the present was cited in argument. What was mainly relied on by the plaintiffs' counsel was a passage from the judgment delivered by Lord Bowen in the Court of Appeal in "*Mogul Steamship Company v. M'Gregor*" (23 Q.B.D., 578). His Lordship did not think it necessary to inquire whether the law as laid down by the House of Lords in "*Allen v. Flood*" imposed any limitation or qualification on the view there expressed, and in his opinion the present case did not fall within those in which damage was caused by misrepresentation within the meaning of the Lord Justice. The class of cases which he probably had in his mind was that of which "*Ratcliffe v. Evans*" (L.R. [1892], 2 Q.B., 524) was an example—viz., where the defendant had intentionally published an untrue statement regarding the plaintiff's business, and thereby had in the ordinary course caused damage to the plaintiff. Here the untrue statement related to the defendant's own business; and, as might be pointed out, if it affected the plaintiffs' business at all, it did not affect it exclusively, for every music-dealer in the neighbourhood of Manchester who happened at the time to have had a piano of the plaintiffs' in his shop suffered damage as well as the plaintiffs. However, for the reasons already given, his Lordship thought the damage was not caused by the misrepresentation contained in the advertisement, and consequently the action failed and must be dismissed.

[Solicitors—Fritchard, Englefield, and Co.; Ralph Raphael.]

Chan. Div.	}	1898.
(Stirling, J.)		Jan. 18.

BRUCE V. LOWENFELD.*

Contract—Agreement—Construction—Privilege of advertising on all programmes "sold" within a theatre.

In this case the plaintiff, who is the owner of a long lease of the Prince of Wales Theatre, sought to obtain an injunction restraining the defendant, his under lessee, from interfering with him in the distribution among the visitors to the theatre of programmes containing advertisements. It appeared from the statement of counsel that the plaintiff had let the theatre for a term of years to the defendant at a rent of £500 a month, and that, by agreement between the parties, the defendant had let to the plaintiff what is known in theatrical parlance as the "front of the house"—that was to say, Mr. Bruce was to have the management of the refreshment-rooms, bars and cloak-rooms, the

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

supply of programmes, the sale of books and music, and the right to take the customary fees in respect of these matters. The consideration for the granting of these privileges to the plaintiff was the payment by him of a sum of £25 a week and a moiety of the profits made under the agreement. By the terms of the agreement the plaintiff was to have the sole and exclusive privilege of advertising and letting spaces for advertisements "upon all the programmes sold within the theatre," but the defendant was to be at liberty to give seven days' notice to the plaintiff of his desire to discontinue the charging of fees to visitors for cloak-room accommodation or the supply of programmes, and upon the giving of such notice certain consequences were to follow. The defendant had in fact given such notice. Disputes had arisen between the parties, who took different views as to the true construction of the agreement, the contention of the defendant being that, as the plaintiff had no right, after the receipt of the notice to discontinue the charging of fees, to "sell" programmes at the theatre, and as the agreement by its terms only contemplated the issue of advertisements upon programmes "sold," therefore the plaintiff had no right to continue the practice of advertising upon the programmes. The plaintiff alleged that the defendant had interfered with him in the distribution of programmes containing advertisements, and that, as he was bound by contracts to a considerable amount for the insertion of such advertisements in the programmes, he would be seriously injured if he were prevented from performing those contracts, and he accordingly asked for an injunction against the defendant. There were other questions in dispute under the agreement, but the principal point related to the supply of programmes. The plaintiff had obtained an interim injunction last week, and he now moved for a continuance of that order.

Mr. Upjohn, Q.C., and Mr. G. Cave were for the plaintiff; and Mr. Jenkins, Q.C., and Mr. Sargent for the defendant.

MR. JUSTICE STIRLING came to the conclusion, for the purposes of the motion, that the defendant was not entitled to insist that the programmes supplied by the plaintiff should not contain advertisements. Having regard to the terms of the whole agreement, however, he thought there was a question for the trial, and upon the balance of convenience that there should be an injunction in accordance with the notice of motion. The plaintiff would give the usual undertaking in damages, and also an undertaking to keep an account until the trial of the moneys received by him in respect of the advertisements.

Q.B. Div. (Day and)
Lawrence, J.J.)

1898.
Jan. 18.

ASHWORTH V. WELLS.*

Damages—Measure of—Sale of orchid—Breach of Warranty.

This was an appeal from the Manchester County Court. The facts were these:—The plaintiff, an amateur orchid-grower on a large scale, had bought an orchid at a sale of the defendant's collection of orchids by Messrs. Protheroe and Morris on June 26 and 27, 1895. The orchid was warranted by the defendant to be a *Cattleya Aeklandiae alba*, a very great rarity, if not unique. It had never flowered while in possession of the defendant, and it turned out after two years' cultivation by the plaintiff to be not an *alba* or white *Cattleya*, but the ordinary purple one, which was only worth 7s. 6d. The plaintiff then brought an action for damages. The defendant admitted liability and paid

into Court 20 guineas and two guineas for interest, which he said was sufficient. The County Court Judge thought that the sum paid in was enough, and gave judgment for the defendant. He also found that if the orchid had been really an *alba* it would have been worth more than £50 at the time of the sale.

Mr. C. A. Russell, Q.C. (Mr. Tweedale with him), appeared for the plaintiff; Mr. Montague Lush for the defendant.

MR. RUSSELL cited "*Randall v. Raper*" (E.B. and E., 84), "*Peterson v. Ayre*" (13 C.B., 353). He referred to section 53 (2) of the Sale of Goods Act, 1893. He said the County Court Judge was wrong in thinking that enough had been paid into Court. He practically had only given back to the plaintiff the amount he had paid. He should have considered the value at which the orchid would have arrived by this time. The claim was reduced to £50 in order to give jurisdiction to the County Court to try the case.

MR. MONTAGUE LUSH said that as the sale of the orchid had taken place at a largely-attended auction the price given was the real market price. It was wrong to assume that if the orchid had been a white one it would have flowered by this time. It might never have flowered at all. On the question of measure of damages he cited "*Clare v. Maynard*" (6 A. and E., 519), "*Williams v. Reynolds*" (6 B. and S., 495). The claim by the plaintiff was speculative, as no one had ever seen a white orchid of this class.

The COURT held that the matter must go back to the County Court Judge.

MR. JUSTICE DAY had come to this conclusion with considerable reluctance. He thought that the plaintiff's real cause of complaint was that he had had to pay the costs of the County Court action. The defendant admitted that he was wrong in his warranty. The plaintiff had spent time and trouble and money in cultivating the *Cattleya*. The Judge of the County Court had apparently considered nothing but the original price of 20 guineas. It was very likely that if the orchid had been a white orchid it might have been worth more than £50, but it was only speculation, after all, because such a thing as a white orchid of this particular species was really unknown. The matter should go back to the County Court Judge.

MR. JUSTICE LAWRENCE said he did not disagree with his learned brother in sending the case back, though he thought that the Court had sufficient material to decide the case themselves. The true measure of damages was not the difference between the contract price of the orchid and the price at which it would sell now, but, putting it generally, the measure was the difference in value of the thing sold with the defect warranted against and the value of the thing without the defect. Here the evidence was all one way. If the orchid had been what it was represented it would have been worth perhaps £100. If the County Court had jurisdiction to deal with that amount the plaintiff might recover the difference.

[Solicitors—Grundy, Kershaw, Saxon, and Samson, for Grundy, Kershaw, and Co., for defendant; Bodington and Ball, for plaintiff.]

Court of Appeal (A. L. Smith,)
Chitty, and Collins, L.J.J.)

1898.
Jan. 19.

REG. V. THORNTON AND OTHERS, JUSTICES—EX PARTE LACON AND CO.*

Licensing Acts—Licence—Removal of a licence—Licensing Act, 1872, sec. 50.

Decision of the Divisional Court (13 *The Times* L.R., 507) affirmed.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

This was an appeal from a judgment of a Divisional Court (Mr. Justice Cave and Mr. Justice Ridley) making absolute a rule for a writ of *certiorari* to quash an order made by the licensing justices for the Wandsworth division, reported 13 *The Times Law Reports*, 507. The order in question granted a licence to George Coulson Lacey in respect of 2, Abercrombie-street, Battersea, for the sale of beer, wines, and spirits, to be consumed off the premises. Lacey was, at the time of the order, licensee of the Five Ales public-house, which was next door to 2, Abercrombie-street. A beer off-licence had been granted in respect of the Five Ales before 1890. In 1890 a new off-licence was granted to the licensee of the Five Ales, who had arranged to take the cellar of 2, Abercrombie-street, in respect of this new cellaring. All access to the cellar from No. 2 was closed, and an entrance was made from the Five Ales. In 1897 Lacey gave notice of his intention to apply for a new licence for the whole of 2, Abercrombie-street, and at the hearing offered to give up the Five Ales licence if the new one was granted. The justices granted the licence on those terms. A rule nisi for a writ of *certiorari* to quash this order was obtained by Messrs. Lacom and Co., a firm of brewers, who were the reversioners of the lease of the Five Ales. The grounds on which the rule was obtained were that the justices had no jurisdiction to make the order, because it was in effect an order of removal under section 50 of the Licensing Act, 1872, and Lacey had not complied with the requirements of the section, and, further, that Lacey was not at the time of the general annual licensing meeting the real resident owner and occupier of the premises as required by law. Section 50 of the Licensing Act, 1872, provides that an application for the removal of a licence shall be made by the person desiring to be the holder of the licence when removed; that notice shall be given in the same manner as notice of an application for a new licence; that a copy of the notice shall be personally served on the owner of the premises from which the licence is to be removed; and that the justices shall not make an order unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom the justices shall determine to have a right to object to the removal. The Divisional Court were of opinion that this was a case of removal, and made the rule absolute. Lacey appealed.

Mr. Bosanquet, Q.C., and Mr. J. C. Earle appeared for Lacey; Mr. Lawson Walton, Q.C., Mr. Foote, Q.C., Mr. Bodkin, and Mr. Travers Humphreys for Lacom and Co.; Mr. Avory and Mr. Edwardes Jones for the justices.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said this was in substance a removal of a licence, and therefore the provisions of section 50 of the Licensing Act, 1872, applied. As those provisions had not been complied with, the order was rightly quashed.

LORDS JUSTICES CHITTY and COLLINS concurred.

[Solicitors—W. W. Young and Son, for Lacey; Wellington Taylor, for Lacom and Co.; Corsellis, for the Justices.]

Chan. Div. } 1898.
(North, J.) } Jan. 20.

IN RE SWEETING, A SOLICITOR.*

Solicitor—Costs—Taxation by client.

On a taxation of a solicitor's bill of costs at the instance of a client there cannot be taken into ac-

count costs incurred during a period when the solicitor had no certificate.

This was a summons for a review of taxation, raising a short point under the Solicitors Act, 1874, which, curiously, has for all these years never called for an actual judicial decision. The question was whether in the taxation of a solicitor's bill, in consequence of the clients having obtained the common order for delivery of a bill of costs, taxation thereof and delivery up of documents in the hands of the solicitor, the solicitor could bring into the bill items in respect of business done during a period he had not taken out his certificate. The solicitor had delivered a bill which comprised charges in respect of business done for his clients during a period in which he had no certificate. The clients objected to having the costs in respect of that part of the business included in the bill. The taxing master, however, considered that he was bound by a decision of "*In re Jones*" (L.R., 9 Eq., 63) under the older Solicitors Act of 1843 to the effect that, though the solicitor's remedy by action for his costs (incurred during a period he had no certificate) was barred, the debt was not destroyed, and the solicitor on a taxation procured by his client was entitled to have these costs taken into account. The client took out this summons for a review of the taxation. The 26th section of the Act of 1843 provides,—"No person who is an attorney or a solicitor shall sue, prosecute, or defend any action or suit or any proceedings in any of the Courts aforesaid without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid"; while the latter part of the 12th section of the Act of 1874 (the statute now in force) enacts,—"No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as a solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever."

Mr. A. Rowden was for the clients; Mr. T. B. Napier for the solicitor.

MR. JUSTICE NORTH held that the decision of "*In re Jones*" (L.R., 9 Eq., 63), on which the taxing master acted, had been superseded by the Act of 1874, the provisions of which in respect of an uncertificated solicitor were much more stringent than those of the earlier Acts. His Lordship referred to "*Fowler v. Mommouthshire Railway and Canal Company*" (4 Q.B.D., 334), a case on the present Act, where it was held that the successful party in litigation could not get from the defeated party in costs anything in respect of his solicitor's costs incurred during a period the solicitor had not a certificate, contrary to a decision under the old law. His Lordship said it would be a strange thing if the client could not recover from his opponent costs he might be forced to pay if the solicitor insisted on a lien and he had to resort to an order for taxation. His Lordship also referred to the comments of Lord Esher in the case of "*Kent v. Ward*" (70 L.T., 612) on the present position of an uncertificated solicitor, to the effect that a solicitor could not make any one liable to him in respect of solicitor's business done while he was uncertificated. In his Lordship's opinion, the charges incurred during the period the certificate had not been taken out did not constitute a debt or matter which ought to be brought into the bill for taxation, on which the clients had submitted to pay.

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

He directed the taxation to be reviewed and the items incurred during the period in question to be discarded. [Solicitors—Greig, Meikle, and Briggs, for the applicants; Sweeting, for the respondent.]

Q.B. Div. (Day and)
Lawrance, J.J.)

1898.
Jan. 20.

CARTER V. CLARKE AND OTHERS.*

Master and Servant—Employers' Liability Act—"Plant"—Defective condition—Hold of vessel not properly ventilated—Negligence of person in superintendence.

This was an appeal from the Lewes County Court. The action was brought by the plaintiff to recover damages for personal injuries under the Employers' Liability Act, 1880, and resulted in judgment for the plaintiff. The defendants, Messrs. Stephenson Clarke and Co., were under a contract to supply coal to the London, Brighton, and South Coast Railway Company. They shipped the coal at Cardiff, in vessels belonging to the London, Antwerp, and Continental Navigation Company, to be carried to Newhaven. On March 26, 1897, an explosion of gas took place on board one of the vessels so used, by means of which the plaintiff, who was a man employed in unloading the vessel, received the injuries complained of. The plaintiff was one of a gang of men employed by a man named Wicks, who was employed by the defendants to provide a gang for the purpose of unloading the vessel. The action was brought originally against Messrs. Stephenson Clarke and Co. Subsequently the shipowners were joined as defendants. The particulars of demand alleged that the explosion was caused "by reason of a defect in the condition of the ways, works, machinery, or plant" used by the defendants, under subsection 1 of section 1 of the Act, and further, "by reason of the negligence of a person in the service of the defendants who had superintendence intrusted to him," and "of a person to whose orders or directions the plaintiff was bound to conform." Under subsections 2 and 3 it was proved that the vessel was not provided with proper ventilators; that it was ordinarily ventilated by opening the hatches during the voyage, but that, in this case, owing to rough weather, it had not been possible to open the hatches. On her arrival in port the hatches were removed, and the men immediately went into the hold with their lanterns and the explosion took place.

The action against the shipowners was dismissed, but the learned JUDGE gave judgment against Messrs. Stephenson Clarke and Co., holding that the vessel was part of their "plant" and that it was defective in not being properly ventilated.

Mr. Joseph Walton, Q.C., and Mr. J. E. Bankes appeared for the appellants, Messrs. Stephenson Clarke and Co.; Mr. Boxall for the respondent, the plaintiff in the action; and Mr. Laing for the shipowners.

Mr. JOSEPH WALTON, Q.C., contended that the vessel was not "plant" used by Messrs. Stephenson Clarke and Co. He cited "Brannagan v. Robinson" ([1892] 1 Q.B., 344) and "Simpson v. Burrell" (23 Rettie, 500).

Mr. BOXALL contended, on behalf of the plaintiff, that his claim was good under subsections 2 and 3 of the Act. Wicks, he said, knew that the vessel had no ventilators. He knew also that it contained Welsh coal, and a kind of coal particularly liable to generate gas, and that the hatches had not been opened during the voyage. Notwithstanding that knowledge, he

allowed the men to go down as soon as the hatches were removed. He was therefore clearly guilty of negligence.

MR. JUSTICE DAY, in dismissing the appeal, said that the ship must, for the purposes of the action, be considered as plant used by the defendants Messrs. Stephenson Clarke and Co. The development of gas in a vessel not provided with ventilators was what might be expected. It had not been possible to open the hatches during the voyage. It was, therefore, negligence on the part of the stevedore to permit the men to approach the hold with lighted lamps immediately after the hatches had been removed.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Lowless and Co., for the appellant; Prince and Co., for the respondent; Botterell and Roche, for the shipowners.]

Q.B. Div. (Day and)
Lawrance, J.J.)

1898.
Jan. 20.

MILLARD V. WASTALL.*

Local Government—Smoke nuisance—Notice to abate—Validity—Public Health Act, 1875.

This was an appeal, by case stated, from the decision of justices, dismissing an information under the Public Health Act, 1875, section 91, and the following sections, charging the respondent with committing a nuisance by permitting black smoke to be discharged from a chimney not being a chimney belonging to a dwelling-house. A preliminary objection was taken to the information that the notice on which it was founded did not set out the works required to be done to remedy the nuisance. The objection was allowed, and the information was dismissed. Section 94 provides that the notice shall be a notice requiring the person causing the nuisance "to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

MR. F. LOW, for the appellant, contended that it was not in all cases necessary to specify in the notice works to be done in order to abate the nuisance, because in many cases, as in the present, no works were necessary.

The respondent was not represented.

MR. JUSTICE DAY, in allowing the appeal, said that it was not necessary for the local authority to invent works to be done by persons whom they required to abate a nuisance. All that was required in the present instance was that the respondent should refrain from using such coal as caused the emission of black smoke from his chimney.

MR. JUSTICE LAWRENCE said that it was no more necessary to prescribe works to be done to abate a nuisance of black smoke than it was to abate a nuisance caused by keeping a pig.

[Solicitors—Meredith and Co., for Hubbard, Rams-gate.]

Q.B. Div. }
(Kennedy, J.)

1898.
Jan. 20.

HOWDEN AND CO. V. THE STEAMSHIP NUTFIELD COMPANY (LIMITED).†

Ship—Charterparty—General average—Wages of crew while vessel detained in port through stress of weather—Right of shipowner to retain general average contribution as against charterer.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

†Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

This was an action brought to recover a sum of money which the defendants, as owners of the steamship Nutfield, had recovered in general average in respect of expenditure on wages and provisions in ports of refuge in the following circumstances. By a charterparty dated November 12, 1896, the defendants agreed to let and the plaintiffs to hire the steamship Nutfield for the term of four to six months, charterers' option (with a full complement of officers, seamen, engineers, and firemen), on the following conditions. The material clauses of the charterparty were as follows:—"1. That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel; also for all engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service. That the charterers shall provide and pay for all the coals, fuel, port charges, ballast, pilotages, agencies and commissions, and all other charges whatsoever, except those before stated. 2. That the charterers shall pay for the use of the said vessel at the rate of £850 per calendar month. 6. Payment to be made monthly in advance. 7. That the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or in otherwise complying with the same. 11. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than 24 working hours, the payment of hire shall cease until she shall be again in an efficient state to resume her service; and should she in consequence put into any other port than that to which she is bound the port charges and pilotage at such port to be borne by the steamer owners; but should the vessel be driven into port or anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. 12. That should the vessel be lost any freight paid in advance and not earned shall be returned to the charterers. . . . Average as per York and Antwerp rules, 1890." Rule XI., read with rule X., of the York and Antwerp rules, 1890, provides that "when a ship shall have entered or been detained in any port in consequence of accident, sacrifice, or other extraordinary circumstances which render that necessary for the common safety, the wages payable to the master, officers, and crew, together with the cost of maintenance of the same during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed on her voyage, shall be admitted as general average." The Nutfield loaded a cargo of steel rails at Antwerp for Rio de Janeiro. Bills of lading were given for the cargo which provided that general average should be according to York and Antwerp rules, 1890. The plaintiffs received the whole freight on the rails in advance. In the course of her voyage to Rio the Nutfield was compelled, owing to stress of weather and accidents to the cargo, to put into Southampton, Plymouth, and Vigo, at each of which places she remained for a number of days, during which under the terms of the charterparty hire continued to run, and the defendants had to pay for the wages and provisions of the captain and crew. At the end of the voyage a general average statement (which was admitted in evidence) was made up, under which the expenditure in respect of wages and provisions during the period of detention at the three ports of refuge was contributed to by the contributing interests—namely, the ship and the cargo as increased in value by the payment of freight in advance.

The plaintiffs claimed to be entitled to the contribution so received by the defendants.

Mr. T. E. Scrutton appeared for the plaintiffs; Mr. F. Laing appeared for the defendants.

At the conclusion of the argument, his Lordship reserved judgment.

The learned JUDGE, in giving judgment, said that the case raised a novel and curious point. The plaintiffs had to make out that they were entitled either by virtue of contract or on well-known equitable principles to recover the moneys which the defendants had received. His Lordship then stated the facts of the case and read the clauses of the charterparty and York-Antwerp rules set out above, and, continuing, said that the relations of the parties to that charter were those that had been described in the case of "*Manchester Trust v. Furness*" ([1895] 2 Q.B., 539). The captain in signing bills of lading no doubt in a sense was acting for the charterers, but he remained the servant of the owners. The plaintiffs said that, although the defendants had paid for the wages and provisions during detention, as they were bound by the charterparty to do, still they were none the worse off, inasmuch as they had received hire for the whole of that period, that the plaintiffs and not the defendants were the losers by the stay in the ports of refuge, and that the wages and provisions during that period were in effect paid by the plaintiffs, because the hire was calculated at a rate sufficient to reimburse the defendants for the cost of wages and provisions. But the plaintiffs had to make out, not that the defendants ought not to have received contribution, but that they were entitled to get that contribution out of the defendants' hands. Mr. Scrutton contended that the charterers, having undertaken to indemnify the owners against the consequences of the captain signing bills of lading, were entitled to the benefits received under the bills of lading, which were contracts really made on their behalf. But had the plaintiffs made out any legal right to receive that contribution which was by the York-Antwerp rules made in respect of wages and provisions for which the plaintiffs had stipulated that the defendants should pay? If the plaintiffs had themselves claimed to recover general average contribution, the answer would at once have been made that it was not they who paid the wages. In substance the plaintiffs were seeking compensation for loss of time which by the terms of their contract they had undertaken to bear, having moreover agreed that compensation should be paid, not for loss of time, but for expenditure on wages and provisions. The defendants were, therefore, entitled to judgment.

Prob., Divorce, and Adm. Div. (The)
Right Hon. the President, Sir Francis } 1898.
Jeune) Jan. 20.

THE BOYNTON.*

Ship—Collision—Steamship and sailing ship—
Stopping and reversing rule discussed.

In this case the plaintiffs were the owners of the steamship Helena, and claimed damages for a collision between their vessel and the defendants' steamship Boynton. The defendants counter-claimed for the damages they had sustained. It appears that at about 1.30 a.m. on December 16, 1897, the Boynton was steering E. by S. $\frac{1}{2}$ S. up the Bristol Channel, when the masthead and red lights of the Helena were sighted about a point on the port bow. The Boynton continued on her course till the Helena, when about 2 to 2½ points

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

on the port bow and about two ships' lengths away, suddenly opened her green light. As the only means of avoiding collision the Boynton was kept on her course at full speed, but the Helena with her stem and port bow struck the Boynton a heavy blow about abreast of the engine-room on the port side, causing the damages complained of.

Mr. Aspinall, Q.C., and Mr. Dawson Miller appeared for the plaintiffs; Mr. Pyke, Q.C., and Mr. Butler Aspinall for the defendants.

The PRESIDENT, after finding the facts set out above and holding the Helena to blame, said,—The question now is when the Boynton saw the green light of the Helena open at some such distance and some such bearing, whether or no she is to be condemned because she undoubtedly did not stop and reverse. Now I think the law about this matter is not quite the same as it was, and perhaps the obligation to stop and reverse is now somewhat less stringent on vessels. The old rule 18 was:—"Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary." Now, as we all know, the rule received a stringent application in the case of the *Khedive* (5 App.Cas., 876)—where it was held that the rule must be obeyed strictly. The case of the *Benares* (9 P.D., 16) undoubtedly added that where the one course of seeking safety was not to obey the rule, but to keep one's speed, then the general principles of navigation allowed by the latter article enabled the speed to be kept, and the strict obligation of article 18 was not to be followed, but that article 23 of the old rules applied. The law as it now stands appears to me to have been framed in contemplation of those cases, and now one has to look, I think, at article 21, article 23, and also, of course, article 29. Article 21:—"Where by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed." It is suggested that this only applied where the vessels' courses were crossing and when they were some little distance from one another. I cannot accept this, partly because it is obvious that article 18 was intended, when modified, to apply to cases where the collision is imminent, when one looks at the note to article 21:—"When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." Article 23 reads:—"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed or stop and reverse"—that is to say, under the obligation which both vessels were under under article 18 of the old rules. The result is that when collision is imminent and one vessel is to keep her course and speed it must be read with this modification:—"If the collision cannot be avoided by the action of the giving-way vessel alone, then the other vessel is to take such action as will best aid to avert collision." That is the state of things which has arisen in the present case. Owing to the action of the Helena the Boynton found herself so close that a collision could not be avoided by the action of the Helena alone, and then came the obligation on the Boynton, not absolutely to stop and reverse, as it would have been under the old rules, article 18, but "to take such action as would best aid to avert collision." It might perhaps be put under article 29, but then it probably comes to the same thing. The way I prefer to put it is to consider whether the Boynton took such action as would best aid to avert the collision. Upon the point I have consulted the *Trinity Master* and considered the matter carefully, having regard to the facts as I have found them to be, and I am advised that there would have been a collision even if the Boynton

had stopped and reversed. The conclusion which I have come to is that the Boynton took such action as best aided to avert collision, and I hold the Helena alone to blame.

[Solicitors—Botterell and Roche, for Vaughan and Hornby; T. Cooper and Co.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.J.J.) } Jan. 21.

GRANT V. THE GREAT WESTERN RAILWAY COMPANY.*
Negligence—Railway company—Shunting operations—Personal injuries—Evidence of negligence.

This was an appeal by the plaintiff from a judgment of Lord Justice (then Mr. Justice) Henn Collins at the trial of the action with a special jury at Glamorgan. The case is reported in *The Times* of July 5 last. The action was brought by the widow of a railway shunter named Grant against the Great Western Railway Company for compensation for the death of her husband, which occurred from an accident whilst shunting. At the place where the accident happened there were several curved lines of railway connecting the Great Western Railway with the Taff Valley Railway. These several curves converged and met at each end before connecting the two main lines. They were used as sidings. According to the plan used at the trial the Taff Valley Railway was at the right-hand end of the curves and the Great Western Railway at the left-hand end. On January 19, 1897, the date of the accident, at about 9 o'clock in the evening, a Taff Valley train consisting of 38 wagons with a view to shunt into these sidings backed some way into curve No. 6 from the right-hand end. At this time there were 14 Great Western trucks standing in this curve and they were pushed further towards the left-hand end by impact with the tail of the Taff Valley train. There were also some Great Western trucks standing in curve No. 5. Each of these two sidings was long enough to accommodate 26 wagons. A shunter named James was sent from the Taff Valley train to see Stone, the Great Western foreman of the sidings, for instructions as to the best mode of shunting the train. Stone told him to back out of No. 6 and put all the wagons he could into No. 5 before putting any into No. 6, and at the same time he directed a Great Western engine-driver to clear No. 5 of the Great Western trucks and having done that to back into No. 6 from the left-hand end and hook on to the 14 trucks and remove the lot to another siding called the long siding. It appeared that while the Taff Valley train was standing in curve No. 6 awaiting instructions, Grant, without the knowledge of either Stone or James, had uncoupled the last 12 wagons, so that when the train moved out of curve No. 6 and shunted into curve No. 5, which had then been cleared, these 12 wagons were left behind in curve No. 6. In shunting into curve No. 5 the remaining 26 wagons completely filled the siding and the consequence was that the engine stood on the crossing at the right-hand junction of the two curves. In this state of things the Great Western engine, having cleared No. 5 of trucks, backed into No. 6 in order to hook on to the 14 Great Western trucks and remove them, but the engine-driver, not knowing that the position of these trucks had been shifted, or that the 12 trucks of the Taff Valley train were in this siding, went too fast and so drove the last of the 12 trucks on to the Taff Valley engine. The deceased was on the line between the 12 trucks and the Taff Valley engine and was crushed to death. The jury

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

gave a verdict in favour of the plaintiff, with damages £250. The learned Judge, however, held that there was no evidence of negligence and gave judgment for the defendants.

The plaintiff appealed.

Mr. Abel Thomas, Q.C., and Mr. T. F. Howell were for the appellant; Mr. Bowen Rowlands, Q.C., and Mr. Benson were for the respondents.

Their LORDSHIPS were of opinion that the learned Judge had taken a too narrow view of the duties of the defendants in these shunting operations and they were not prepared to hold that there was no evidence of negligence. The appeal should, therefore, be allowed.

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } Jan. 21.
IN THE MATTER OF AN APPLICATION FOR THE ISSUE
OF A BANKRUPTCY NOTICE.*

Bankruptcy—Bankruptcy notice—Scotch judgment registered in England.

The Court has no power to grant leave to issue a bankruptcy notice founded on a Scotch decret or judgment registered in England under sec. 3 of the Judgments Extension Act, 1868.

This was an application for an order to issue a bankruptcy notice, Mr. Registrar Giffard having refused to order it to issue. The application was made *ex parte* in December last, when the Court, upon the ground that the question was an important one, directed the applicant to serve notice of the application on the debtor (see *The Times* of December 18). This having been done, the application now came on for hearing. It appeared that the applicant had obtained a "decret" or judgment in Scotland against the debtor for the payment of a sum of over £1,000, and this judgment was registered in England under section 3 of the Judgments Extension Act, 1868 (31 and 32 Vict., c. 54). The applicant then applied under section 4 subsection 1 (g) of the Bankruptcy Act, 1883, for the issue of a bankruptcy notice founded upon the Scotch "decret" or judgment, which the Registrar, upon the authority of "*In re Watson—ex parte Johnston*" ([1893] 1 Q.B., 21), refused. Section 3 of the Judgments Extension Act, 1868, provides that a certificate of an extract of a decret of the Court of Session in Scotland for the payment of any debt, damages, or expenses may be registered in the Court of Common Pleas at Westminster, and "such certificate when so registered shall from the date of such registration be of the same force and effect as a judgment obtained or entered up in the Court in which it is so registered." By section 4 the Court of Common Pleas at Westminster shall have and exercise the same control and jurisdiction over any decret, and over any certificate of such decret, as it now has and exercises over any judgment or decret in its own Court, "but in so far only as relates to execution under this Act."

Mr. F. C. WILLIS, for the applicant, contended that the Scotch decret having been registered in England under the Judgments Extension Act, 1868, it had the same effect as a judgment in England upon which execution had not been stayed. He was therefore entitled to an order to issue a bankruptcy notice. The judgment of the Court of Appeal in "*In re Watson—ex parte Johnston*" ([1893] 1 Q.B., 21), which seemed to decide that the remedies under the Judgments Extension Act, 1868, were limited to execution, was not in accordance with a later decision of the same Court in "*In re Low—Bland v. Low*" ([1894] 1 Ch., 147).

Mr. CARRINGTON, for the debtor, contended that the decision in "*In re Watson—ex parte Johnston*," was conclusive, and that the Court in the later case of "*In re Low*" never intended to disturb that decision in any way.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the case was governed by the authority of "*In re Watson—ex parte Johnston*," and in his opinion that decision was right. The Bankruptcy Act, 1883, did not extend to Scotland, and the words "final judgment" in section 4, subsection 1 (g), obviously meant a final judgment obtained within the jurisdiction in which the Act applied, that is, a final judgment obtained in England. Therefore, if that section stood alone, the creditor would not have brought himself within it. It was said that section 3 of the Judgments Extension Act, 1868, gave power to issue a bankruptcy notice. It was true that section 3 of that Act was in large terms. But reading that section with section 4 a limitation was imposed upon that wide provision. The limitation was "in so far only as relates to execution under this Act." The application for a bankruptcy notice did not relate to execution. In his opinion that was the true construction of the Act. But, however that might be, the decision in "*In re Watson—ex parte Johnston*" was conclusive.

LORD JUSTICE CHITTY and LORD JUSTICE COLLINS concurred upon the ground that the case came within the decision in "*In re Watson—ex parte Johnston*," which was binding upon this Court, and that "*In re Low*" was not inconsistent with that case.

[Solicitors—G. M. Folkard, for the appellant; Hicks, Arnold, and Mozley, for the respondent.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } Jan. 21.

IN RE PALMER—EX PARTE BRIMS.*

Bankruptcy—Bankruptcy notice—Judgment creditor—Equitable assignment of judgment debt.

A judgment creditor who has made an equitable assignment of the judgment debt is still entitled to issue a bankruptcy notice in respect thereof.

This was an appeal against an order of Mr. Registrar Brougham setting aside a bankruptcy notice. In 1889 the debtor, Sir Charles M. Palmer, was in partnership with a Spanish gentleman named Martinez Rivas, under the style of Martinez Rivas Palmer, for the purpose of making docks in Spain. In that year the firm made a contract with a contractor named Brims, by which Brims undertook to construct docks for the firm in Spain. While the docks were being constructed the firm was converted into a Spanish company. Certain sums became due under the contract, and in 1892 an action was brought by Brims against Rivas and Sir C. M. Palmer to recover £16,273. Rivas allowed judgment to go against him by default, and on November 14, 1893, Sir C. M. Palmer consented to judgment being entered against him for the amount claimed. Sir C. M. Palmer subsequently paid part of this amount. Later on negotiations took place, in the course of which Sir C. M. Palmer requested Brims to go to Spain for the purpose of seeing what he could get from Rivas and the company, and it was agreed between Brims and Sir C. M. Palmer that any composition which the former could recover from Rivas or the company was

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

not to affect his claim for the balance against Palmer. Brims, thereupon, went out to Spain, and it was arranged that all the creditors, whether of Martinez Rivas Palmer or of the company, or of both, should take bills of the company as security for their debts. On March 30, 1896, Brims received from the company a bill for £10,866, dated October, 1894, and payable two years after date. In the summer of 1896, shortly before the bill was becoming due, further negotiations took place between Brims and Sir C. M. Palmer in reference to an offer by Rivas to pay Brims and the other creditors 7s. in the pound on the company's bills, and Sir C. M. Palmer through his solicitors consented to Brims accepting the composition of 7s. in the pound. Rivas then paid Brims 7s. in the pound, and Brims signed a receipt, which stated that Brims had received from Rivas a certain sum (representing the above-named composition) in full for the purchase of all his claims, ascertained or unascertained, against the company and (or) the firm of Martinez Rivas Palmer. The receipt ended as follows:—"In consideration of the payment now made I undertake, if and when called upon, to execute a due assignment of all my claims as above to Señor Martinez Rivas or his nominee." Sir C. M. Palmer did know of the form of the receipt. Brims having served a bankruptcy notice upon Sir C. M. Palmer in respect of the judgment debt, the Registrar set it aside upon the ground that by virtue of the above document the debt was assigned by Brims to Rivas. It was stated by Sir C. M. Palmer in affidavit that in case Rivas tried to enforce the claim against him he had a counterclaim against Rivas largely exceeding the amount of the judgment debt. Brims appealed, and contended, as in the Court below, that there had been no assignment of the judgment debt against Sir C. M. Palmer, but only of his claim against the company on the bill.

Mr. PICKFORD, Q.C., and Mr. AENEAS MACKINTOSH appeared for the appellant, and contended, in addition to the contentions in the Court below, that, assuming that there was an assignment of the judgment debt to Rivas, the assignment was only an equitable assignment, and that therefore Brims still had the right to sue at law, and was entitled to issue a bankruptcy notice. They referred to "*In re Hastings, ex parte Dearle*" (14 Q.B.D., 184).

Mr. MARSHALL HALL and Mr. R. E. MOORE, for the respondent, contended that, though this was only an equitable assignment, Brims was not a person who was entitled to enforce the judgment within the meaning of section 1 of the Bankruptcy Act, 1890, and did not therefore come within section 4 subsection 1 (g) of the Bankruptcy Act, 1883. He could not issue execution on the judgment. Further, the Court would set aside the bankruptcy notice upon the ground that it was inequitable to issue it, as the respondent had a large counterclaim against Rivas, who was the person beneficially entitled to anything recovered under the judgment.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said that many points had been argued, one being whether a certain document given by Brims to Rivas was an assignment of a judgment debt due from Sir Charles Palmer to Brims. His Lordship was not going to decide that question that day, but he might say that he felt this difficulty during the argument, that if the document assigned the judgment debt due from Rivas why was not the judgment debt due from Sir Charles Palmer also assigned? However, he could not decide that point. Brims was a judgment creditor of Sir Charles Palmer, and he was *prima facie* entitled to issue a bankruptcy notice on that judgment. In his opinion there was no legal assignment of the judgment debt, and Brims was entitled to issue the

bankruptcy notice. The judgments delivered by the members of this Court in "*In re Hastings—ex parte Dearle*" showed that this was so. It was then said that it was wholly inequitable to allow a bankruptcy notice to issue because Brims had no interest in the debt. In his opinion Brims was entitled to issue execution on this judgment debt. It was then said that Sir Charles Palmer had a counterclaim or set-off against Rivas. He was by no means satisfied upon the affidavits before the Court that there was such a counterclaim or set-off, and, speaking for himself, he thought that it must be a counterclaim or set-off against the judgment creditor who was seeking to issue the bankruptcy notice.

LORD JUSTICE CHITTY concurred. Sir Charles Palmer was unquestionably a debtor under a judgment. The judgment creditor was the person who had issued this bankruptcy notice, and he had the legal right to enforce the judgment. The alleged assignment of the judgment debt. Consequently, the legal right to issue execution remained vested in Brims. Assuming, therefore, that this was a good equitable assignment of the debt, which he did for the purposes of the argument only, Brims was trustee of this legal right for Rivas. His Lordship could not say that Brims did not come within section 4, subsection 1 (g) of the Bankruptcy Act, 1883. It would be a different matter when the petition came on to be heard, for then Brims would have to join Rivas, unless he then set up that there was no assignment at all of the judgment debt, which he would probably not do. He was content to rest his judgment upon the above ground. He would point out that section 1 of the Bankruptcy Act, 1890, had not cut down Brims's rights under section 4, subsection 1 (g) of the Bankruptcy Act, 1883. There was nothing in the words of section 1 of the Act of 1890 to show that the person who had obtained the judgment and was trustee of it for another had his rights under section 4, subsection 1 (g) of the Act of 1883 cut down.

LORD JUSTICE COLLINS concurred.

[Solicitors—J. E. and H. Scott, for the appellant.]

Chan. Div. }
(North, J.) }

1898.
Jan. 21.

THE SOUTH HETTON COAL COMPANY (LIMITED) v. HAWELL, SHOTTON, AND EASINGTON COAL COMPANY.*

Practice—Pleading—Statement of claim—No cause of action disclosed—Striking out—O. 25, r. 4.

These were two motions on the part of the several defendants to strike out (under Order XXV., rule 4, of the Rules of the Supreme Court, 1883) the statement of claim on the ground that it disclosed no reasonable cause of action. The action was for specific performance of an alleged contract by the defendant company in voluntary liquidation by the agency of their liquidator Mr. Holmes for the sale of certain coal measures known as the Easington and Undersea royalties which belonged to the defendant company, who also held a lease of coal measures known as the Pespool royalty. Besides the liquidating company, their liquidator and Mr. Barwick, a rival purchaser, were made defendants. The application was in the nature of the old demurrer, and was based entirely on the statements contained in the plaintiff's pleading. It appeared from the statement of claim that Mr. Holmes was negotiating with both the South Hetton Company, through their solicitors, Messrs. Dees and Thompson, and Mr. Barwick for the sale of the Easington and Undersea

*Reported by D. FICKLE, Esq., Barrister-at-Law.

royalties. He made a proposal in writing to each party that they should send in sealed tenders, which he undertook should be opened on October 7 in the presence of the chairman and directors of his company. His invitation closed with the following words:—"And the highest net money tender I receive (all other things being equal and satisfactory), that tender I will at once accept." Mr. Barwick sent in a tender in the following terms:—"I hereby offer you the sum of £81,000 for the company's interest in the Easington and Undersea royalties, and, in addition, I agree to indemnify you and the company against all claims and liabilities under the Pespool lease, taking an assignment of the same as from May, 1896, and repaying the £1,000 already paid by the Messrs. Lamb." Messrs. Dees and Thompson sent in a tender on behalf of their principals as follows:—"Referring to previous negotiations we on behalf of the South Hetton Company offer for these royalties such a sum as will exceed by £200 the amount to-day offered for them by the other proposing purchaser, coupled with a transfer of the Pespool lease, if the other offer be upon that footing." Mr. Holmes accepted the tender of Mr. Barwick as the one he ought to act upon, and the plaintiffs brought this action on the footing that they had made the highest net money tender which ought to be acted on. They claimed specific performance of their alleged contract and an injunction to restrain the carrying out a sale of the royalties to Mr. Barwick.

MR. VERNON SMITH, Q.C., and Mr. MICKLEM for Mr. Barwick moved to strike out the statement of claim and for the dismissal of the action against him.

MR. YOUNGER moved for a similar order on the part of the defendant company and their liquidators.

MR. SWINFEN EADY, Q.C., and Mr. O. LEIGH CLARE, for the plaintiffs, maintained that a good cause of action was shown on the pleading.

MR. JUSTICE NORTH, on the construction of the letters set out in the statement of claim, came to the conclusion that if the plaintiffs' tender could be considered the "highest net money tender" received, it did not fulfil the condition "all other things being equal and satisfactory." Messrs. Dees and Thompson's tender was, he said, an ingenious attempt to get behind the offer of their rival bidder; if they had known what the contents of Mr. Barwick's letters were perhaps they might have succeeded. Their tender included an offer to take an assignment of the Pespool lease, which would carry with it an indemnity for rent from the date of the assignment, but Mr. Barwick offered an indemnity against existing claims in respect of the lease and to take an assignment from a period carrying with it payment of a year and a half's back rent, besides the payment of £1,000 that had been paid by somebody else. In his Lordship's opinion the statement of claim showed no just cause of action. He had been asked that an amendment might be made; such amendment, it was clear to him, would not strengthen the plaintiffs' case, and he made the orders asked for with costs.

[Solicitors—Botterell and Roche, for Mr. Barwick; Flux and Leadbitter, for the defendant company; Crossman, Prichard, Prichard, and Block, for the plaintiff company.]

Chan. Div. } 1898.
(Stirling, J.) Jan. 21.

CHASE V. THE LONDON COUNTY COUNCIL AND LESLIE AND CO. (LIMITED).*

Nuisance—Collecting crowd—Injury to neighbour's property—Interlocutory injunction refused.

The plaintiffs in this case, who were the owners and the occupier of Court Farm, Epsom, asked for an injunction to restrain the defendants from collecting or causing to be collected together, in or about certain works which are being carried on by the defendants upon lands adjacent to the plaintiffs' farm, large numbers of disorderly persons without providing, by means of proper fences or walls, for the protection of the plaintiffs' land from injury or trespass.

It appeared that in August, 1896, the London County Council bought a large estate at Epsom known as Horton Manor, consisting of 1,058 acres, in order to provide further asylum accommodation for pauper lunatics. On April 29, 1897, they entered into a contract with the defendants, Leslie and Co., for the construction of the foundations of an asylum for 2,000 patients upon a portion of the estate which was adjacent to the plaintiffs' land. Under the contract the work was to be done within six months, but, although commenced on May 28 last, it was not yet completed. The carrying out of these works necessarily involved the employment of a large number of workmen, it being in evidence that from 800 to 1,000 men were from time to time engaged by the contractors. The plaintiffs' case was that in consequence of the defendants not providing proper accommodation for the men and not fencing off the road by which they went to and from the works various acts of trespass and nuisance had been committed upon the plaintiffs' property. They alleged that the workmen had, amongst other things, broken down their fences, taken and used the wood for fires, trodden down and destroyed the crops, caused the cattle to stray, slept in the barns, used the hay, and committed acts of nuisance and indecency upon their lands. Under these circumstances they now moved for an injunction, contending that the case came within the principle of the authorities which decided that to bring together upon land a large crowd or gathering which was certain, if it dispersed, to cause a nuisance or do damage was an actionable wrong. They further pointed out that, although the present contract was nearly completed, it was only for the foundations of the building, and, having regard to the proposed building operations of the County Council in the future, the nuisance complained of might last for many years, and an injunction ought to be granted. The defendants, on the other hand, contended that they were not liable. The County Council said that the men were not employed by them but by the contractors, who were not the agents or servants of the Council, nor were the Council under any duty by law to see that the contractors controlled their men. The contractors submitted that after the men had left the works they had no control over them. This case, they contended, was distinguishable from the authorities as to the collection of crowds, because the workmen were themselves responsible for their acts of trespass, while the contractors were not bound to presume that the workmen would commit trespass or do other unlawful acts. With regard to the present application no injunction ought to be granted against the contractors inasmuch as the contract was almost completed.

MR. MILLAR, Q.C., and Mr. Muir M'Kenzie appeared for the plaintiffs; Mr. Jenkins, Q.C., and Mr. Methold for the London County Council; and Mr. Butcher, Q.C., and Mr. A. B. Terrell for Leslie and Co. (Limited).

MR. JUSTICE STIRLING, in dealing with that portion of the plaintiffs' case which rested upon the alleged neglect of the defendants to provide sleeping accommodation, said that it had not been shown that there was an inadequate supply of lodgings in the neighbourhood, and even if it had been his Lordship thought that that was not a matter upon which relief could properly be given on an interlocutory application. As regards the

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

alleged indecent acts committed by the men, the police ought to intervene; and there was no evidence that the defendants had the police force at their disposal any more than the plaintiffs. With reference to the trespasses committed in going and coming to and from work, the case was thus put by the plaintiffs. A large number of men were brought by the defendants to a piece of land belonging to the Council which was not fenced off from the lands of their neighbours, the plaintiffs. There were two roads by which the men might leave, but still human nature being what it was it might reasonably be expected that unless precautions were taken to prevent it some of the men would make their way to and from their homes by short cuts over the plaintiffs' land. It was contended that the defendants ought to take precautions to prevent their men from entering on or leaving the lands of the Council otherwise than by the roads intended for the purpose. That was based on the law laid down in "*Rex v. Moore*" (3 B. and Ad., 184), where Lord Tenterden C.J., said, "If a person collects together a crowd of people to the annoyance of his neighbours that is a nuisance for which he is answerable; and this is an old principle"; and in the same case *Littledale, J.*, said, "It has been contended that to render the defendant liable it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position, because if it be the probable consequence of his act he is answerable as if it were his actual object." The claim of the plaintiffs in this case went considerably beyond any application hitherto made of the doctrine there expressed, but his Lordship was not prepared to say that it might not prove to be to some extent well founded. Looking at all the circumstances of the case his Lordship thought he ought not to interfere by way of interlocutory injunction. Although he had come to that conclusion, he thought the matter required serious consideration on the part of the County Council; even if the possibility of their being held legally liable for what had happened be left out of consideration still they might reasonably be expected as owners of this property, on which they were erecting extensive buildings, to take care to minimize the inconvenience caused to neighbouring owners and occupiers by the presence of so large a body of men under imperfect control. There was one step which his Lordship would point out that the County Council might possibly take. The proposed asylum must at some time necessarily be fenced off. It would be very reasonable if the fences were erected before the building was proceeded with, so that they might be used for the purpose of preventing these trespasses. On the whole, he thought there ought to be no order on the motion, except that the costs be costs in the action, but this would be without prejudice to any further application by the plaintiffs in the event of any fresh contract being entered into by the County Council for the erection of the proposed buildings.

[Solicitors—Budd, Brodie, and Hart; W. A. Blaxland; Madgates.]

Chan. Div. }
(Kekewich, J.) }

1898.
Jan. 21.

LANCHBURY V. BODE.*

Custom—Providing a common bull and a common boar for use of parishioners—Custom held good in law—Liability of owner of great tithes—

Lands allotted in lieu of tithes held not subject to the custom.

This was an action of a very singular nature raising the question of the existence of an ancient parish custom of providing a common bull and common boar for the use of the parishioners. The existence of such a custom is alluded to in Shakespeare's *Henry IV.*, Part II., Act II., Scene ii., and in the last chapter of Sterne's "*Tristram Shandy*." The action was brought by Mr. James Lanchbury, clerk to the Parish Council of Haddenham, Buckinghamshire, and Mr. Frederick Merrick, on their own behalf, and also on behalf of themselves and all other the parishioners of the parish, against Mrs. Jane Elizabeth Bode, widow, claiming a declaration "that it was an ancient custom of the parish of Haddenham that the parson, as the owner of the great tithes of the said parish, and as a charge thereon, should keep within the said parish a common bull and a common boar for the common use of the kine and sows of the parishioners at any time for the increase of calves and pigs within the said parish; and that the defendant, as the present owner of the lands allotted in lieu of the great tithes, is bound to perform the said custom; an injunction to restrain the defendant, her agent and servants, from omitting to provide and keep a bull and a boar in accordance with the said custom, or from otherwise infringing the same; and damages." The plaintiffs alleged in their statement of claim that "from time immemorial it has been a custom in the parish of Haddenham that the parson of the parish as the owner of the great tithes thereof, and as a charge thereon, should provide and keep in the said parish a common bull and a common boar for the common use of the kine and sows of the said parishioners at any time." In the year 1312 the parsonage or rectory of Haddenham was appropriated by the Priory of Rochester, which was dissolved in the year 1540; and subsequently, in 1542, the parsonage or rectory, with the parish church, glebe, tithes, and property belonging thereto, was granted by King Henry VIII. to the Dean and Chapter of Rochester and their successors. Under an enclosure Act of George IV., passed in 1830, certain lands were allotted to the Dean and Chapter in satisfaction and discharge of the great tithes; and in 1866, by an Order in Council, the parsonage and rectory, with the parish church, &c., and the allotted lands, were transferred to the Ecclesiastical Commissioners, who in 1881 sold the greater part of the allotted lands to Henry Bode, the defendant's late husband, subject to all charges and duties thereon. Henry Bode died in 1892, having devised the lands to his widow, the defendant. The plaintiffs then alleged that "the said bull and boar were always provided and kept by the said priory, the said Dean and Chapter, and the Ecclesiastical Commissioners respectively, or their respective tenants on their behalf, and afterwards by the said Henry Bode; but the defendant has, although requested by the plaintiffs so to do, refused to provide and keep the same, and the plaintiffs who, as two of the parishioners, are entitled to the use of the said bull and boar for their cows and sows, have thereby sustained damage." The plaintiffs then claimed relief in the form above mentioned. In her defence the defendant denied the existence of the custom, and asserted that since the appropriation by the Priory of Rochester no parson or rector had resided in the parish or kept a bull or a boar therein, and that the Dean and Chapter had never performed or been required to perform this duty with respect to the parish. She also maintained that there was and always had been a sufficient supply of bulls and boars in the parish and the adjoining parishes, and that neither the plaintiffs nor any other inhabitants of the

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

parish had suffered any damage for want of such animals. She suggested that the alleged custom arose from the fact that Mr. John Franklin, the "squire," and a large landowner in the neighbourhood, who died in 1862, had held the lands allotted in lieu of tithes on a renewable lease for 21 years, and, being interested in cattle-breeding, generally kept a bull on his estate, though not on the lands in question, and that this led to the erroneous impression that he was under a legal obligation to keep a bull and a boar; but that in 1865 the then vicar of the parish ascertained from the Dean and Chapter that neither the lease to Franklin nor any previous leases contained any reference to the alleged custom. She further contended that even if the alleged custom existed she was under no obligation to comply with it, not being the parson of the parish nor in receipt of the great tithes. The action now came on for trial. A number of aged parishioners were called on the part of the plaintiffs as witnesses with a view to proving the existence of the custom, and reliance was placed upon section 27 of the Inclosure Act of 1830, which provided that the commissioners under the Act should allot to the Dean and Chapter of Rochester and their lessee and successors, and to the vicars of the parish of Haddenham, "for and in lieu and satisfaction of and for the several and respective rectorial and vicarial tithes yearly arising, issuing, and renewing out of all and every" the common fields and waste grounds in the said parish, and out of the lands held in severalty within the same parish which were "subject to tithes," parcels of the said commonable lands, which parcels "shall be in full satisfaction and discharge of and for the said several rectorial and vicarial tithes arising, issuing, and renewing from and out of" the said commonable lands and the said lands held in severalty in the said parish. Then section 58 enacted that the lands and hereditaments allotted "for or in respect of any freehold lands, or for or in respect of any right of common or any right or interest appurtenant or appendant to such freehold lands, shall from and after the execution of the award be deemed to be freehold"; and that the lands allotted in respect of copyhold or leasehold lands, or for or in respect of any right of common or any right or interest appurtenant or appendant to any such copyhold and leasehold premises respectively, should from and after the execution of the award be deemed to be copyhold or leasehold respectively, "and shall be held as such by and under the same tenure, rents, payments, fines, heriots, customs, and services as the freehold, copyhold, and leasehold lands respectively for which such allotments shall be made are now or shall be held immediately before the execution of the said award." The evidence showed that a search through the records of the Dean and Chapter and of the Ecclesiastical Commissioners had failed to discover any reference to the alleged custom.

Mr. Bramwell Davis, Q.C., and Mr. Dunham appeared for the plaintiffs; and Mr. Warrington, Q.C., and Sir R. J. Cust for the defendant.

MR. JUSTICE KEKEWICH (without calling upon the defendant's counsel for argument) said that the custom alleged in the statement of claim was a good custom in law. Of course, the custom being properly alleged as a legal custom, the first question was whether it had been proved as a matter of fact. In the view that his Lordship took of the case it was unnecessary to answer that question either in the one way or in the other. He should assume that the evidence was sufficient to establish the custom as alleged. It was imposed on the parson of the parish as owner of the great tithes, and it followed that if the great tithes had been assigned to some other person or corporation the custom would go as an incident to the tithes. That he

assumed. That brought him down to the year 1830, up to which time the tithes had been in the ownership of the Dean and Chapter of Rochester. In 1830 an Act of Parliament was passed which might be conveniently described as an "Inclosure Act." The general purport of it was to settle all commonable rights and rights of all kinds by an inquiry followed by an award, the result of which would be to allot lands in satisfaction of all rights subsisting up to that time. It was unnecessary to go into the Act at length. All he had to do was to consider that part of it which dealt with the ownership of the tithes. That was section 37. His Lordship read it, and continued:—Now, what was the effect of that? The Dean and Chapter of Rochester were to be compensated for the tithes proposed to be taken from them. The compensation was to go to them and their lessees. They were, it appeared, in the habit of demising the tithes for terms of years. It would have been iniquitous to give compensation to the Dean and Chapter and not to their lessees; the omission to do so would certainly have led to litigation under the covenants in the leases. The mere fact that the lessees were provided for in that way did not appear to be otherwise of importance upon the question he had to consider. The case made by the plaintiffs was that, without more than what he had said, the burden of keeping these animals for the use of the parish was by the Act shifted from the tithes to the land substituted for them, and notwithstanding that the tithes were thereby satisfied and discharged. The first objection was this. This was an ancient custom, to be proved by such evidence as the Court was in the habit of receiving upon such a point; that is to say, the evidence of old people, of documents, and of user. When the question came to be one of a charge on land, there was quite a different question to be considered. A charge on land was proved by producing the original conveyance creating the charge, unless the case was one in which a lost grant could be presumed; but, when the alleged charge was one going back, as here, only to the year 1830, one expected to find something in the nature of an express charge; and it was almost incredible to suppose that the Legislature intended that, when the land was allotted, it should be taken subject to a charge that was not expressed. That appeared to his Lordship to be of itself a sufficient answer to the argument that the lands were to be taken subject to this charge. Now the tithes were one indivisible whole. His Lordship thought he was right in saying that they were to be considered as entire tithes. The right to collect and receive the tithes was one entire and indivisible right vested in the Dean and Chapter and must have been conveyed by them as a whole and not in part. As a matter of fact, the defendant was not the owner of all the lands allotted in substitution for the tithes. She was owner of only a part of those lands. It was said that as owner of part of the land she was liable to the custom. If so, the position must go to this—that the owner of each part of the lands, as, for instance, the owner of one acre, was subject to the custom. It could not be said that one part of the land was subject to the custom and that other parts were not. If so, it must follow that the owner of every piece of these lands must be subject, if at all, to the custom. If the plaintiffs were entitled to maintain the custom against the defendant she would, his Lordship supposed, be entitled to contribution from the owners of other parts of the lands; but this conclusion could not be arrived at without stronger reasons being given for it than had been urged before him; and he was not aware of any precedent that the owner of the land could have a right of contribution in the case of such a custom as this. He would take the analogy of a lay rector entitled to a pew in the parish

church. Supposing he had lands allotted to him in lieu of his rights as lay rector, could the right to the pew be parcelled out among the several owners of those lands? His Lordship believed that the question, though often mooted, had never been judicially decided, and, therefore, until it actually arose he should not express any decision upon it; but he thought, upon principle, that it fell within the same lines as a case of this kind. The person who wished to establish a right to the pew must do so by some rectorial right. If he could not do so, that was in substance an answer to the plaintiffs' case under section 37, and seemed conclusive. But then it was said there were two arguments, either of which was sufficient for the plaintiffs' case, even if section 37 were out of the way. The first argument was on section 58; but the words did not fit this case at all. (His Lordship read the section and continued.) The language did not apply to the case. The other argument was of a different character. The bull and the boar were kept and were available after the Inclosure Act as much as they were before. They were kept by those who would have kept them if the burden had been in fact shifted from the ownership of the tithes to the ownership of the substituted lands. But if his Lordship's view of section 37 was correct, they had now to deal with the setting up of a new custom, a custom quite different from a custom established by ancient user, a custom said to have been established in 1834. But what was attempted to be shown was that that was done in fulfilment of an obligation, and because there was a liability already existing. No doubt the liability was insisted on by some persons and was not contested by others; but there was nothing to show that when Mr. Bode did not contest his liability he admitted it. It would be monstrous to say that because a man would not contest a claim therefore he must be taken to have admitted it. Experience went to show that many people submitted to claims they believed to be unjust rather than go into litigation. His Lordship would not assume that because Mr. Bode did not dispute the liability therefore it was established against him. The fact was that the parishioners wished to keep up the alleged custom after the award, and they thought that the liability had been shifted from the tithes to the land, and they insisted on the obligation being performed as before. That, however, did not establish the liability, and his Lordship did not see that anything had been done by the Dean and Chapter or their successors, including Mr. Bode, showing that this liability existed. If it could be proved that Mr. Bode, being the owner in fee of these lands, had distinctly admitted this liability, it was possible that he and his successors might have been fixed with the liability, but it required a good deal of evidence to show that an owner in fee had burdened his estate in that way. Therefore his Lordship was of opinion that those other points did not disturb his view of section 37, and accordingly the plaintiffs' case failed, and the action must be dismissed with costs.

[Solicitors—Gedge, Kirby, and Millett, for Horwood and James, Aylesbury; Peake, Bird, Collins, and Peake.]

Q.B. Div. (Day and)
Lawrance, JJ.)

1898.
Jan. 21.

JONES V. DAVIS.*
Fishery—Nets—Illegal size—Salmon Fisheries Acts.

It is not an offence under the Salmon Fisheries Act, 1873, sec. 18 (3), to be in possession of a net with meshes of an illegal size.

*Reported by C. E. WILERHAM, Esq., Barrister-at-Law.

This was an appeal, by case stated, from a decision of justices of Merionethshire convicting the appellant of an offence under the Salmon Fisheries Act, 1861.

Mr. Honoratus Lloyd and Mr. E. Owen Roberts appeared for the appellant; and Mr. Montague Lush for the respondent.

The Salmon Fisheries Act, 1861, section 8, as amended by the Salmon Fisheries Act, 1873, section 18, provides that—"No person shall do the following things or any of them, that is to say:—(1) Use any light for the purpose of catching salmon, trout, or char; (2) use any otter lath, or jack, wire, snare, spear, gaff, strokeball, snatch, or other like instrument for catching or killing salmon, trout, or char; (3) have in his possession a light or any of the foregoing instruments under such circumstances as to satisfy the Court before whom he is tried that he intended at the time to catch or kill salmon, trout, or char by means thereof." An information was laid against the appellant under the third subsection. It was proved that in July last the appellant was seen near the river Wnion, a salmon river, having in his possession a net the mesh of which was smaller than that permitted by section 10 of the Act. The justices held that the net came within the description "other like instrument" and convicted the appellant.

Mr. LLOYD contended that a net was not one of the instruments prohibited by section 8 (3), because to catch salmon by means of a net was perfectly lawful, provided the net were of the proper size of mesh. It was clear that the use of a net was not intended to be prohibited, because the offence of using a gaff an exception was expressly made in section 8, when it was used by sportsmen for landing fish, while no such exception was reserved in the case of a net. If the ruling of the justices were correct it would be illegal for a sportsman to carry a net for the purpose of landing fish.

Mr. LUSH contended that a net was *ejusdem generis* with a snare. He cited "Allen v. Thompson" (L.R., 5 Q.B., 336). He contended, further, that the justices were, at any rate, right in holding the net carried by the appellant to be *ejusdem generis* with a snare, because that net was an illegal net.

MR. JUSTICE DAY allowed the appeal and quashed the conviction. He said that the net found on the appellant, though an illegal net, was still a net, and was quite different from a snare. The meshes of the net were firm. Neither was it *ejusdem generis* with a snare.

MR. JUSTICE LAWRENCE said that the object of the Act was to suppress illegal modes of fishing. The only legal modes of fishing were declared to be fishing by means of a rod and line and by means of nets. Section 10 enacted that it was illegal to use nets of less than a certain size of mesh, but it was nowhere enacted that it was illegal for a person to have such nets in his possession. If the Legislature had intended to make that an offence it would have said so. If the prosecutor desired to catch the appellant under section 10 he ought to have waited until he had found him attempting to catch fish with his net.

[Solicitors—Guthrie and Jones, for the appellant; W. R. Davis, for the respondent.]

Q.B. Div. }
(Channell, J.)

1898.
Jan. 21.

SYER V. ALDER.

Contract—Agreement—Construction—Sale of house.

This action was brought to recover damages for breach of an agreement that the defendant would

sell to the plaintiff Nos. 1 and 2, Milton-villas, Southend, for £1,500. The defendant pleaded that the contract was conditional.

Mr. Coek, Q.C., and Mr. P. T. Blackwell appeared for the plaintiff; and Mr. Chester Jones for the defence.

It appeared that the contract was as follows:—"I, Andrew Alder, agree to sell and I, John Syer, agree to buy Nos. 1 and 2, Milton-villas, Southend. Contract to be delivered within 14 days or deposit to be returned." The plaintiff paid to the defendant a deposit of £20, which was returned to him after a few days. He declined to accept it, and instituted the present action. He considered the property was worth about £3,000.

Counsel for the defence contended that the terms of the contract gave the defendant the option of declaring the bargain off within 14 days, and evidence was adduced to show that such was the defendant's intention when entering into the agreement.

His LORDSHIP held that the first part of the agreement acted as a contract and the remainder was not a condition of its being binding; he gave the plaintiff £100 damages with costs.

Stay of execution for 14 days was granted with a view to an appeal.

Q.B. Div. }
(Kennedy, J.) }

1898.
Jan. 22.

MARKS V. FROGLEY AND OTHERS.*

Army—Volunteer—False imprisonment—Liability—Military law

This was an action tried in November last before his Lordship and a special jury, being a claim by a Volunteer for damages for assault and false imprisonment. After the verdict of the jury his Lordship reserved judgment until the questions of law arising in the case had been argued.

Mr. A. J. Tassell and Mr. Theobald Mathew appeared for the plaintiff; Mr. Lawson Walton, Q.C., and Mr. R. D. Muir for the defendants.

MR. JUSTICE KENNEDY read the following judgment:—Henry Marks, the plaintiff in this action, who is a member of a Bedfordshire Volunteer corps, has obtained in an action for assault and false imprisonment which was tried before me, sitting with a special jury, a finding of the jury of £300 damages against three defendants—Arthur Cooper, who is a sergeant, and Thomas Lovelock and George Albert Short, who are privates in the same corps as that to which the plaintiff belongs. A further defendant in the action, Frederic Frogley, who is a superintendent of the Herts County Police, has had, upon the findings of the jury, a judgment in his favour, and no question arises in his case. The points affecting the three first-named defendants, which I reserved after argument for consideration, are of a somewhat peculiar nature. The facts relevant to the decision of the points are as follows:—The plaintiff and these defendants, with other members of the corps, were in August last in military training with a portion of the Regular forces at Shorncliffe. The camp was broken up on the morning of August 8. Early on that morning, and whilst the preparations for the return of the Volunteers to their respective homes were proceeding in the camp, a disturbance took place in and around the tent in which the plaintiff and others had been lodged in consequence of some of the plaintiff's comrades accusing him of having stolen and hidden in his kit bag a number of articles which belonged to them. The adjutant of the corps, Captain Foote,

having been informed as to the disturbance, came to the spot, and ultimately (to omit details on which there was some conflict in the evidence) ordered Sergeant Killin to form an escort and take the plaintiff to the guard tent, where he would find Lieutenant Roberts on the point of proceeding with the luggage and its escort to Shorncliffe Railway Station. Sergeant Killin was to direct Lieutenant Roberts to take the plaintiff with the baggage guard to the railway station and there keep him until the D (plaintiff's) Company arrived. By the further orders of Captain Foote, conveyed through Sergeant Killin, the plaintiff, after his arrival at the railway station, was to be taken in military custody in the special military train which was then about to start for the conveyance of Volunteers to Watford, Boxmoor, and other stations to which the plaintiff and other members of his Volunteer corps belonged; and on his arrival at Boxmoor (the railway station, about two miles distant), for Hemel Hempstead, where the plaintiff lived, the plaintiff was to be taken by his escort to the police-station at Hemel Hempstead, and then handed over to the civil authority. Captain Foote at the same time directed that information as to what had happened should be given at Hemel Hempstead to Captain Smeaton, the officer in command of the plaintiff's company. These orders were carried out. After the plaintiff had reached Shorncliffe Station with the baggage guard, under Lieutenant Roberts, and the train was ready to receive her passengers, the defendant Cooper selected, in the usual way, from the ranks of the Volunteers who were drawn up in the railway station, his two co-defendants Lovelock and Short to form the prisoner's escort on the journey to Boxmoor and Hemel Hempstead. The plaintiff was then placed in a compartment with these defendants, and the four so travelled together in the train to Boxmoor (a journey of about 3½ hours). On the arrival of the train at Boxmoor the prisoner, under the charge of his escort, was directed by the defendant Cooper to remain in a waiting-room, while the rest of the Volunteers, other than certain persons who would be required as witnesses in the plaintiff's case, were formally dismissed. The defendant Cooper directed Corporal Young to keep these witnesses together, and, with them to follow prisoner's escort to the police-station at Hemel Hempstead. The defendants then marched with the plaintiff, who was placed between the two privates, to the police-station, and there charged by the defendant Frogley with the offence of larceny. After inquiry, and after hearing the evidence of some witnesses, the defendant Frogley took the plaintiff into custody. As there is now no question affecting this defendant it is unnecessary further to pursue the history of the case, except to say, in justice to the plaintiff, that when put on his trial, as he afterwards was, at the quarter sessions at Canterbury, he was honourably acquitted on the charges made against him. Upon these facts the plaintiff's case against these three defendants Cooper, Lovelock, and Short is a case of assault and false imprisonment based upon the treatment to which they subjected him by keeping him in detention as their prisoner from the time when they took him in charge at Shorncliffe Station to the time when they gave him in charge at Hemel Hempstead. It was not pleaded or contended on behalf of the defendants in answer to the plaintiff's claim that a felony had been committed. Therefore, if the matter had been one touching ordinary civilians the action was, except as to damages, an undefended action. The defendants, however, contended that this was not a case touching ordinary civilians, but a case in which they, and the plaintiff also, ought to be treated as persons under military law; that the order of Captain Foote was, under the law, justifiable; that even if it was in any respect illegal, it was not obviously illegal,

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

and that as they simply obeyed an order which they were bound to obey, they were in no case responsible. These being, as regards these defendants, the only defences of law, and the facts upon which they were based not being in dispute, the only question I had to ask the jury in regard to the claim against these defendants was as to the amount of damages to be awarded to the plaintiff in the event of the defences in point of law being held to be bad. The jury assessed these damages at £300. I have now to decide whether the defendants are entitled to succeed upon any of the points of law which they have put forward. I have come to the conclusion that they are not. In the first place, at the time of the acts of which the plaintiff complains—i.e., during the conveyance of the plaintiff in custody from Shorncliffe to Boxmoor Railway Station and then to Hemel Hempstead police-station—I do not think that either the plaintiff or the defendants were subject to military law. The matter depends upon the provisions of the Army Act, 1881. The most important of these is section 176. That section commences by enacting:—"The persons mentioned are persons subject to military law as soldiers, and this Act shall apply accordingly to all the persons so specified." The statute then enumerates in several subsections, which have no bearing upon the present case, various classes of persons; and in subsection 8 it proceeds to include all non-commissioned officers and men belonging to the Volunteer forces of the United Kingdom, (a) when they are being trained or exercised with any portion of the Regular forces or with any portion of the Militia when subject to military law. Now there is no question that whilst in the camp at Shorncliffe, and, in my view, until the despatch of the prisoner, in fact (although he stated that he was unaware of it), from Shorncliffe Railway Station, both plaintiff and defendants were Volunteers who were being trained and exercised with a portion of the Regular forces, and were therefore, according to this enactment, persons subject to military law. Captain Foote in his evidence deposed to his opinion—and this is the contention of the defendants' counsel—that the "training" or "exercise" mentioned in the section ought to be held to continue in regard to each Volunteer after the camp was broken up by the departure of the Volunteers, and until the moment of his formal dismissal at his home destination, which in the case of the Hemel Hempstead party would be such a point either at Boxmoor Station or after leaving Boxmoor Station as the officer in command of the party might desire for the dismissal of the men. Indeed, I understand Captain Foote to go so far as to say that, in his opinion, if one of these Volunteers had stolen a sheep on his way home between Boxmoor and Hemel Hempstead he could have been tried by court-martial for the offence. I cannot so construe the statute. The words in question appear to me to have a plain and sensible meaning, and to confine the subjection of the Volunteer to military law within the period of his being trained and exercised with any portion of the Regular forces or of the Militia when subject to military law. The interpretation of Captain Foote and the defendants' counsel would add to the subsection the words, "and when they are proceeding to or from such training or exercise." I hold that upon the departure of the plaintiff and defendants from the camp they ceased to be subject to military law; their status ceased to be that of soldiers, and became that of civilians subject only as to discipline to the provisions of the Volunteer Act, 1863, and subsequent statutes relating to Volunteers, under none of which could the defendants justify their treatment of the plaintiff. It is, however, contended for the defendants that even if this be the true view, and they and the plaintiff ceased

to be subject to military law after leaving the camp at Shorncliffe, they are entitled to immunity by the combined effect of sections 41, 45, and 158 of the Army Act. I think this defence fails also. There is no doubt that the charge of larceny committed during his training with the Regulars in the camp was an offence for which he might have been tried by Court-martial under section 41; there is no doubt that his arrest by order of Captain Foote when that charge was preferred against him was perfectly proper and legal under section 45; and I am inclined to think that, if after his arrest it had been judged better that instead of being tried by Court-martial the plaintiff should be handed over to the local police with the view of his being tried by the civil Court, the arrest might properly have been continued, provided due diligence was used, until he was so handed over. I understood the plaintiff's counsel to be willing to concede so much. But Captain Foote did not adopt this course. He adopted the course he did with, no doubt, the best intentions, believing it to be both lawful and also expedient, and in order to prevent the inconvenience which would arise from delaying (as the holding of a Court-martial or the sending of the parties concerned to Hythe police-station would delay) the breaking up of the camp and the departure of the plaintiff and the witnesses for their homes by the special train which had been ordered for their conveyance from Shorncliffe. But the course which he preferred was one for which I can find no justification in any section of the Army Act. The provision of section 158 (1) upon which reliance was placed for the defendants appears to me not to afford any, for more than one reason. In the first place, its sanction for taking into and keeping in military custody, and for trying and punishing a person who has been but has ceased to be subject to military law, is by the opening words of the subsection confined to cases in which "an offence under this Act has been committed" by that person. Here, *ex concessio*, Marks had not committed an offence. One might, perhaps, I agree, have expected that the sanction would have been extended to the case of an offence under the Act being alleged to have been committed; but the words as they stand seem plain enough. Even, however, if the words could be interpreted as they must be interpreted in order to avail the defendants, I could find in this section no justification for that which the defendants did under Captain Foote's orders when, after they had ceased to be subject to military law, they kept the plaintiff as a prisoner during a long railway journey and a two-mile march, not in order that he might be tried by Court-martial, but in order that he might be handed over to the police authority, not at the place of the alleged offence, but in a different county. I doubt whether, even if the plaintiff and the defendants continued, as Captain Foote thought they did, to be subject to military law, a detention of this kind and for this purpose could be treated as a proper exercise of the powers of military custody given by section 45 of the Army Act. The last point taken for the defendants was that, even if the order which they obeyed were unjustifiable or illegal, still it was not obviously unjustifiable or illegal, and the defendants, who were at the time when it was given by Captain Foote subject to military law and bound to obey his orders and simply did what he ordered, ought not to be held liable for what they did. The principles of law applicable to a case such as the present I take as they are stated by Mr. Justice Willes in his judgments in "*Keighley v. Bell*" (4 F. and F., at pp. 790 and 805) and in "*Dawkins v. Lord Rokeby*" (*ib.*, p. 831). In accordance with those principles, as I understand them, I should hold this to be a good plea for the defendants if I were of opinion that they and the plaintiff continued subject to military

law during the time of the doing of the acts by the defendants of which the plaintiff complains. Even if the order were in excess of the powers as to military custody given by section 45, it would be an excess which, in my view, would not be obvious to persons in the position of the defendants. I am, however, for the reasons which I have already stated, of opinion that at the time of the acts complained of neither the plaintiff nor the defendants were subject to military law, and therefore—also, I think, in accordance with the law as laid down by Mr. Justice Willes in the cases to which I have referred—I must decide that this defence also fails. I give judgment for the plaintiff for the amount of the damages fixed by the jury.

Mr. MUN applied for a stay of execution pending an appeal.

His LORDSHIP granted a stay upon the terms that within a month the damages be paid into Court or security given, and the taxed costs paid to the plaintiff's solicitors upon the usual undertaking by them.

[Solicitors—H. W. Lathom, for the plaintiff; Mason and Co., for Swarder and Longmore, for the defendants.]

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.JJ.) }

1898.
Jan. 24.

COUNTY COUNCIL OF DORSET (APPELLANTS) V. PETHICK BROTHERS (RESPONDENTS).*

Practice—Appeal—Leave to appeal.

Applications to the Court of Appeal for leave to appeal from the Divisional Court should be made *ex parte*.

MR. JOSEPH WALTON, Q.C. (Mr. Clavell Salter with him), applied on behalf of the appellants, the Dorset County Council, for leave to appeal from the decision of the Divisional Court consisting of Mr. Justice Day and Mr. Justice Lawrence. The Divisional Court had refused leave to appeal. The Dorset County Council claimed £250 for the expenses incurred in repairing the damage to certain roads caused by extraordinary traffic. The respondents, Messrs. Pethick Brothers, were the builders of an asylum and they contracted with a third person that he should cart their materials from the railway station to the place where the building was being erected. This carting occasioned the damage to the roads. The Divisional Court held that the respondents were not liable upon the authority of the decision in "Kent County Council v. Lord Gerard" ([1897] A. C., 633). The learned counsel contended that that case did not apply as there the materials which were carted over the roads did not belong to Lord Gerard, whereas in the present case the materials belonged to the respondents, and whether they carted them or employed a contractor to cart them could make no difference.

MR. C. A. RUSSELL, Q.C. (Mr. H. E. Duke and Mr. Charles S. Preston with him), for the respondents, said that notice of this application had been served upon them, whereas the application ought to have been made *ex parte*.

MR. JOSEPH WALTON, Q.C., said that there was some doubt as to whether the application should be made *ex parte* or upon notice.

LORD JUSTICE A. L. SMITH said that these applications should always be made *ex parte*, and if the Court desired the other side to be heard they would direct notice to be served upon them. The Court would give leave to appeal, and the costs of this application would be reserved.

Q.B. Div. }
(Kennedy, J.) }

1898.
Jan. 24.

ROWLAND AND MARWOODS STEAMSHIP COMPANY (LIMITED) V. WILLS AND CO. (LIMITED).*

Ship—Charterparty—Construction—"Freight to be in full of all port charges"—Tonnage dues—Liability for.

This was an action by the owners of the steamship Roma against the charterers for £57 16s. 5d., balance of freight due under the charterparty. The Roma, a steamship of 1,722 tons register, was chartered by the defendants for the carriage of a cargo of coal from Cardiff to Colombo. The charterparty contained the following clause:—"The freight is in full of trimming, and of all port charges, pilotages, and consular dues on the vessel. All wharfage dues on the cargo to be paid by the charterers." The Roma in due course went to Ceylon, and discharged her cargo. In the freight account the defendants debited the plaintiffs with 891.25 rupees, described as "tonnage dues," which had been paid by the defendants to the Government. The question in this case was whether the plaintiffs were bound to give credit to the defendants for this sum. If they were so bound, it was agreed that the defendants were entitled to set it off against the amount due for freight, and that nothing further was due in this action. By No. 6 of the legislative enactments of Ceylon, 1875, the Colombo Harbour ordinance, the Government was empowered to borrow money for the improvement of the harbour of Colombo, and to levy, in lieu of the port dues then levied at Colombo, such increased dues as might from time to time be sanctioned by her Majesty's Government. By a proclamation of May 6, 1885, certain dues were sanctioned—viz., dues payable by ships entering the port, these dues to clear a vessel inwards and outwards; dues payable by ships discharging or loading cargo; cargo brought to the port for transshipment to be free of dues under this heading if not landed, or if landed and not entered for duty; coal to pay 25 cents a ton inwards only. The sum which the defendants claimed to set off against the plaintiffs' claim was paid by the ship on the discharge of the cargo of coal.

MR. BOYD, Q.C., and MR. ROCHE appeared for the plaintiffs, and contended that the payment was a wharfage charge on the cargo, which, under the charterparty, must be borne by the charterers. The payment was not for services to the ship, but was in the nature of an import duty on coal, leviable on the ship in the first instance, for greater facility in collection. If the cargo were transhipped then the dues were not payable, and that was a matter solely within the control of the charterers.

MR. CARVER, Q.C., for the defendants, argued that the payment was in respect of a port charge for which the owners under the charterparty were liable. The dues were port dues within the definition given by Mr. Justice Mathew in "Newman and Dale v. Lamport and Holt" (1 Com. Cas., 161). Moreover, the dues were for the benefit of the ship, for their object was to improve the harbour. It was never intended or contemplated that this cargo would be transhipped, and no argument could be based on that proviso in the proclamation.

MR. JUSTICE KENNEDY was of opinion that the defendants must succeed in this action. The question was whether these dues which had been paid by the defendants came within the language of the charterparty, which provided that freight should be in full of all port charges. Those words were intended by the parties to

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

be used in their fair literal sense—that was, port dues chargeable on the vessel. It was indisputable that this was a charge on the vessel, for unless the vessel paid the charge she could not clear out of the port. It was true that in one sense the question whether the ship would have to pay these dues would depend on the charterers' action at the port of arrival. If the cargo was merely transhipped, the dues were not payable, but it was always in the contemplation of the parties that this cargo would be imported into Ceylon in the ordinary course. Therefore, if the cargo had been transhipped, it would have been to the benefit of the owners. There would be judgment for the defendants with costs.

[Solicitors—Botterell and Roche, for the plaintiffs; Rowcliffes, Rawle, and Co., for Hill, Dickinson, Dickin-son, and Hill, Liverpool, for the defendants.]

Prob., Divorce, and Adm. Div. (The)
Right Hon. the President, Sir Francis } 1898.
Jeune) Jan. 24.

THE RUBY.*

Ship—Mortgage—Sale by High Bailiff in an action *in rem*.

The High Bailiff in selling a ship by order of the County Court in an action *in rem* can give a good title to the purchaser notwithstanding the fact that there is a mortgage on the ship.

This was a motion brought by the High Bailiff of the County Court of Bew for directions as to the completion of the sale of the steamship Ruby. It appears that on September 3, 1897, the learned Judge of the City of London Court in a collision action found the steamship Ruby to blame, and gave judgment for the plaintiffs in that action. On September 11, in default of payment by the owners of the Ruby, a warrant of execution was issued. In accordance with the terms of the warrant the High Bailiff appraised the ship and eventually sold her. At the time of the action the ship was mortgaged and the mortgagees had since sold the ship. The Registrar of Shipping refused to register the sale of the ship by the High Bailiff, on the ground that there was a mortgage on the register and the present motion was brought to ask the Court to declare that the High Bailiff could execute a bill of sale of the ship to the purchaser from him.

Mr. BUTLER ASPINALL, on behalf of the High Bailiff, contended that as the judgment was *in rem* in favour of a maritime lien, the County Court had power to order its officers to sell the property in respect of which the lien had existed to satisfy the judgment, and that the High Bailiff could give a good title to a purchaser from him.

Mr. F. LAING, on behalf of the mortgagees, contended that the County Court could not order a sale of the ship when there was a mortgage upon her, as the Court had no power to deal with mortgages of a ship. The defendants in the collision action only had an equity of redemption, and the High Bailiff could only sell that equity.

Mr. Lauriston Batten appeared for the plaintiff in the collision action; Mr. Muir Mackenzie appeared for the trustee in bankruptcy of the owner of the ship.

The PRESIDENT said that the County Court had jurisdiction to order a sale of a ship in an action *in rem*, and when it empowered the High Bailiff to sell it empowered him to give a good title to the purchaser, and the Registrar of Shipping must make the necessary alterations in the register to give effect to orders of the Court.

Prob., Divorce, and Adm. Div. (The)
Right Hon. the President, Sir Francis } 1898.
Jeune) Jan. 24.

THE RUBY (NO. 2).*

Ship—Seaman—Definition of—Ship's husband—Merchant Shipping Act, 1894, sec. 742—Admiralty Court Act, 1861, sec. 10.

This was a motion to prohibit the learned Judge of the City of London Court from determining a case as to a ship's husband's right to wages. It appears that an action was brought by the plaintiff to recover a sum of £42 for wages as ship's husband to the steamship Ruby. The plaintiff acted as ship's husband and also found charterparties for her and engaged and paid her crew, and on three occasions he went in her to Ostend to transact the ship's business.

Mr. F. LAING, on behalf of the mortgagees of the ship, contended that the claim of a ship's husband was not a claim by a seaman for wages earned by him on board a ship, and did not come within section 10 of the Admiralty Court Act, 1861, and therefore did not give the plaintiff a lien upon the ship or entitle him to sue the ship in an action *in rem*.

Mr. LAURISTON BATTEN, on behalf of the plaintiff, contended that the word seaman had been defined by the Merchant Shipping Act to include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship, and that therefore the plaintiff came within the term seaman, as some of his work had to be done on board the ship, and he was, consequently, entitled to a lien for his wages. In support of his contention he quoted "The Queen v. the Judge of the City of London Court and the Owners of the ss. Michigan" (25 Q.B.D., 339).

The PRESIDENT held that a person employed as a ship's husband was not a person who came within section 10 of the Admiralty Court Act, 1861, and that the City of London Court could not entertain the action.

Prob., Divorce, and Adm. Div. } 1898.
(Gorell Barnes, J.) } Jan. 24.

GRIFFITHS V. GRIFFITHS—THE QUEEN'S PROCTOR
SHOWING CAUSE.†

Practice—Trial—Special jury—Certificate.

Applications for a certificate for a special jury should be made to the Judge immediately after trial.

In this case, which was tried on Friday last, and was reported in *The Times* on January 22,

Mr. RAWLINSON, Q.C., applied for a certificate for a special jury.

Mr. JUSTICE BARNES.—Have I the power, now, to grant your application?

Mr. RAWLINSON, Q.C.—The Annual Practice, 1898, at p. 689, sub. tit., Ord. 35, Rule 7, says:—"The application for a certificate must be made while the matter is fresh in the mind of the Judge who tried it, 'Webster v. Appleton' (62 L.T., 704)." Lord Ellenborough, however, in "Waggett v. Shaw" (3 Camp., 316), laid down that by the statute 24 Geo. 2, c. 18, "the Judge before whom a cause had been tried shall, immediately after trial, certify in open Court," and said that he knew of no authority for granting a certificate on the day following.

Mr. JUSTICE BARNES.—I must say I entirely agree. I think these applications should be made at the time.

Application refused.

[Solicitor—The Queen's Proctor.]

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

†Reported by J. H. MURPHY, Esq., Barrister-at-Law.

Q.B. Div. (Day and }
Lawrance, JJ.) }

1898.
Jan. 25.

REG. V. TAYLOR AND OTHERS, JUSTICES, AND LAIDLER—
EX PARTE VOGWILL.*

Justices—Disqualification—Alleged bias—Magistrate held not disqualified.

This was the argument on a rule nisi for a *certiorari* to quash a licence granted by two licensing justices for the Rastington Ward of the county of Durham. The rule was obtained by Mr. S. G. Lushington on November 9 on the ground of the alleged bias of Mr. C. Hunting, one of the justices who granted the licence. Mr. Danckwerts appeared to show cause against the rule. The facts on which the rule was granted were these. Mr. Charles Hunting, a justice of the peace for the county of Durham, signed a petition in favour of the granting a grocer's licence to Mrs. Laidler, of South Hatton, Durham, where he also resided. He attended at the licensing sessions sitting at Castle Eden on September 25, 1897, and with another justice formed the Court and took an active part in the proceedings. When the application for the licence was made a petition in support of the application was put in, verified, and received by the Bench. It was the petition which had been signed by Mr. Charles Hunting. The Court refused to read a petition against the licence. The affidavit of Mr. Hunting was to the effect that he attended on the bench at the day in question because he was applied to by the clerk of the justices to do so to make up the number required for the bench. He had no notion when he signed the petition that he should sit on the bench at the hearing of the application. He had no manner of interest in granting or refusing the licence, but he knew the applicant to be a most respectable woman, and he stated special reasons why such a licence was desirable for the benefit of the neighbourhood. The other justice made an affidavit, adding that he was not aware that Mr. Hunting had signed the petition. The clerk of the justices swore that he had written to ask Mr. Hunting to attend because without him there would not have been a quorum. There was a good deal of other work. It was by his advice that the petition against granting the licence was not looked at. He so advised on the ground that there was no evidence verifying the signatures.

MR. DANCKWERTS, for Mr. Hunting, submitted that the affidavits showed that the signature of the petition by Mr. Hunting made no difference in his conduct. He had considered the application on its merits. Lastly, this petty sessions sitting to grant licences was not a Court at all. "*Boulter v. Kent, Justice*" (66 L.J., Q.B., 787). Mr. Hunting was entitled to use his personal knowledge of the district.

MR. LUSHINGTON submitted that though justices might not be sitting in licensing sessions as a Court, yet that they ought to exercise their discretion judicially. He cited "*Allinson v. General Medical Council*" ([1894] 1 Q.B., 750). There should be no ground for even suspicion of bias in the administration of justice.

The COURT discharged the rule.

MR. JUSTICE DAY said he had no doubt in this case. He did not see how any reasonable person, knowing the facts of the case, could suspect that Mr. Hunting was influenced by bias. It was true that persons entirely ignorant of all the facts were always prone to suspicion. It was, of course, much to be regretted that any one should do anything at any time which could make fools suspect. Apart from that, there was no reasonable ground for suspicion. Mr. Hunting lived in a district

where justices were scarce, and he was on this, as on many other occasions, invited to come to the bench to form a quorum. He had no knowledge that this case was coming on, as it did, after some other business had been disposed of. He explained in his affidavit that he thought the applicant was a fit woman to have a licence. He had been informed by a medical man and other persons knowing the locality that such a licence was wanted in the interests of the public. It could not be said that any one with a neutral mind could reasonably form a suspicion as to the behaviour of the justice on a case such as this. The rule must be discharged.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—J. E. and H. Scott, for William Bell, Sunderland, in support of rule; Mr. Hyman Isaacs, for Isidore Isaacs.]

Q.B. Div. }
(Hawkins, J.) }

1898.
Jan. 25.

SHARPE V. FEENEY AND CO., AND OTHERS.*

Conspiracy—Newspaper—Reports of law cases—
Alleged conspiracy to keep solicitor's name out
of newspaper—Non-suit.

In this case Mr. J. Sutton Sharpe, a solicitor, practising at West Bromwich and Birmingham, sought to recover damages for an alleged libel, and for conspiracy, from the defendants Messrs. Feeney and Co., who were the proprietors of the *Birmingham Daily Post* and the *Birmingham Daily Mail*, and Mr. Bunce, the editor of the *Birmingham Daily Post*, and Mr. Herbert, a newspaper reporter. The defendants denied that they had published any libel, or that there had been any conspiracy on their part.

Mr. Jelf, Q.C., Mr. Tindal Atkinson, Q.C., and Mr. Ernest Jelf appeared for the plaintiff; and Sir Robert Reid, Q.C., Mr. Blake Odgers, Q.C., and Mr. H. E. Richards were counsel for the defendants.

MR. JELF, in opening the case, said that the plaintiff, Mr. Sharpe, was a solicitor, who had practised for the last 18 years at West Bromwich and Birmingham, and the defendants were the proprietors of the *Birmingham Daily Post* and *Birmingham Daily Mail*, papers of great influence in that district. There were also two other defendants on the record, Mr. Bunce, editor of the *Birmingham Daily Post*, and Mr. Herbert, a newspaper reporter. The plaintiff complained in the first place that the defendants had conspired to keep his name out of cases in which he was engaged as advocate, a course of conduct which was calculated to do him great injury in his profession. In the second place he complained of a serious libel which had been published in the report of a case tried at the Birmingham Assizes in March, 1897. The defendants said there was a mistake on the reporter's part in the report of that case, but whether there was a mistake or not he should ask the jury to say that the defendants were guilty of a very serious libel, especially having regard to the course of the conduct that had been previously pursued towards the plaintiff by the defendants. Mr. Sharpe was a gentleman who had a large practice in the County Courts and Police-courts of the neighbourhood where he lived, and it was a matter of importance to him, and due to him in common fairness, that his name should appear in the reports of cases in which he was engaged. There was a time when it was a keen disappointment to a learned counsel if his name was omitted in a report in which it should have appeared,

and he had no doubt his friend, Sir Robert Reid, had felt the same. (Laughter.)

STR R. REID.—Oh, no. I was never reported. (Laughter.)

MR. JELF (continuing).—Of course there was no legal right that a name should appear, but it was hardly fair that it should be kept out of the papers through pique or motives of that nature. In 1894 and 1895 Mr. Sharpe's name appeared in these Birmingham papers 80 or 90 times, but in 1896 he was engaged in a case in which his client, Mr. Ezra Horton, made a claim against the *Birmingham Daily Mail*, one of the papers in question, for libel. This action was settled on very reasonable terms, but in the course of the negotiations Mr. Herbert, who had been mentioned as a reporter, warned Mr. Sharpe that he had better be careful of putting himself in antagonism to a great newspaper. Mr. Sharpe was very indignant at the suggestion that he should allow any considerations of that kind to interfere with his duty to his client. Mr. Herbert's threat was subsequently repeated at one of the Police courts, and Mr. Sharpe again expressed his indignation. After this began a system of persecution, and Mr. Sharpe's name was persistently left out in the reports of cases in which he was engaged. The plaintiff then communicated with Mr. Herbert and complained of the omission of his name from reports, where his remarks were actually reported. No answer was sent by Mr. Herbert, and in a subsequent interview Mr. Herbert said he had direct instructions from headquarters to leave out the plaintiff's name from reports of proceedings in which he was engaged. In consequence of this course of "boycotting" Mr. Sharpe wrote to the editors of the *Birmingham Daily Mail* and *Daily Post* making a similar complaint, and neither of them vouchsafed an answer. Was that the kind of tone the jury would allow influential papers of the kind counsel had mentioned to adopt? There was, as he had already said, no legal right for any person to have his name reported. Mr. Sharpe at the time, in consequence of the legal difficulties which appeared to beset his position, thought it best to "grin and bear it." Mr. Feeney and the other gentlemen responsible for these newspapers had, however, gone a little too near the edge of a precipice, and had prepared for themselves a fall. There were a large number of cases in 1896 from which the plaintiff's name was kept out, but at the end of the year his name began to appear again in the *Mail*. At the Assizes at Birmingham, in March, 1897, before Mr. Justice Wright, there were three actions brought by a Mr. Silvester against Messrs. Withington, Ellis, and Jackson. The last gentleman was a solicitor, against whom Silvester had brought an action for negligence, and Mr. Sharpe was solicitor for him (Jackson), but he did not appear in the case beyond sitting beside Mr. Jackson, who conducted his own case, and advising him. A verdict was given for the defendant Mr. Jackson, after he had given his evidence, and on March 16, 1897, there appeared the following passages in a report in the *Birmingham Daily Post*, which constituted the libel complained of. It was headed, "Curious actions for slander," and the paragraphs complained of were:—

"On the 9th of April, 1890, plaintiff instructed Mr. Sharpe, solicitor, to bring an action against the defendants, but he did not do so, and plaintiff was now bringing an action against Mr. Sharpe for negligence. . . ."

"The action against Mr. J. Sutton Sharpe, solicitor, West Bromwich, to recover damages for negligence was then proceeded with. Plaintiff said he several times instructed him to bring actions against the last defendants, but he neglected to do so. Mr. Sharpe defended himself, and said he never undertook to bring actions against the defendants Withington and Ellis. Plaintiff

once spoke to him about Withington, but he was convinced plaintiff had no cause of action. Had he consented to bring the actions he should have required a large sum of money first from the plaintiff to cover costs. The jury returned a verdict for the defendant, and judgment was given with costs."

This paragraph made it appear that it was not Jackson against whom the action for negligence was brought, but Sharpe. There was the serious imputation, too, that a large sum would have been asked as security for costs by Sharpe. The defendants said this error in the report had occurred merely through a slip of the pen, and they would put it right, but they never did so beyond putting the following paragraphs in their paper:—

"The Curious Actions for Slander.—In our report yesterday of the two actions for slander and one for negligence brought by Alfred Silvester, of West Bromwich, it was stated by a slip of the pen that the action for negligence was against Mr. J. Sutton Sharpe, solicitor, West Bromwich. Mr. Sharpe was Mr. Jackson's solicitor at the trial. It was Mr. Jackson whom the plaintiff said he instructed to bring actions for slander against the defendants Withington and Ellis. Mr. Jackson defended himself, and said he never undertook to bring the actions, and the jury gave a verdict in his favour."

The plaintiff declined to accept this paragraph as an adequate apology for what had been done, and some further correspondence ensued, and the defendants expressed their regret and said they would insert a retraction, a copy of which they forwarded to his solicitors, and in the last paragraph expressed the hope that Mr. Sharpe would suffer no professional loss in consequence of the mistake that had been made, especially as the defendant had won the case handsomely. Instead of inserting the whole of the paragraph they had promised, there appeared in the *Birmingham Daily Post* of March 19, 1897, only a part of it, which ran as follows:—

"In a paragraph in our issue of the 16th inst. reporting these two actions for slander and the action by the same plaintiff for negligence we regret to say that the name of Mr. J. Sutton Sharpe, solicitor, of West Bromwich, was given as the defendant in the latter action. In point of fact this gentleman was not the defendant, but the defendant's solicitor. The error in the report was corrected in our next issue, and we have pleasure in repeating the correction and in expressing our sincere regret that our reporter should have confused the two names and thereby given Mr. Sharpe ground for annoyance."

They carefully omitted part of what they had promised to put in with reference to the hope that no professional loss would be sustained by the plaintiff, and in consequence he proceeded to take action. In answer to interrogatories Mr. Feeney admitted that he had given instructions that the plaintiff's name was not to be advertised in his papers. That was on account of the proceedings in the Horton matter. Counsel asked the jury to look at the whole course of conduct of the defendants, and to say that a very grave wrong had been done to Mr. Sharpe, and by their verdict to make the defendants in future follow the good example which was generally set by the Press of this country.

Mr. John Sutton Sharpe, the plaintiff, was then called. He said he had practised as advocate in the County Courts, Police courts, and at licensing sessions, &c., at Birmingham, West Bromwich, and in that neighbourhood for 18 years. Up to September, 1896, his name had been fairly reported in the *Birmingham Daily Post* and *Birmingham Daily Mail*. In that month he was engaged in settling a claim by a Mr. Ezra Horton for libel against the *Birmingham Daily Mail*.

In the course of the negotiations with Mr. Sullivan, the editor of that paper, Mr. Herbert, a reporter for the *Birmingham Daily Post* and *Daily Mail* in the local courts, came to see him, and said he had come from the *Birmingham Daily Mail* with a view of discussing the claim witness had made respecting Horton. In the course of the discussion Herbert said, "It will be a very imprudent course on your part if you get on two sides with powerful papers like the *Mail* and the *Post*." Witness was angry and replied, "You go back to the people that have sent you and tell them that I shall not allow a consideration of that kind to influence me." Three or four days afterwards he saw Herbert again at the Smethwick Police-court, and he then said, "If this claim is persisted in it may be a bad job for you to come into collision with the *Mail* and the *Post*." On September 24 witness was engaged in a case at the West Bromwich Police-court of considerable public interest. Mr. Herbert or his son was present in court as reporter, and both the *Post* and the *Mail* contained reports of the case, but the witness's name was omitted as solicitor for the prosecution.

Mr. JELF.—From that time onwards was your name in cases where you appeared systematically omitted from reports in the *Post*?

Witness.—Systematically down to the commencement of this action. The same thing went on in the case of the *Mail* till Christmas, 1896.

Examination continued.—Witness communicated with Mr. Herbert and Mr. Sullivan, but received no replies. He saw Mr. Herbert, who told him he had received instructions from headquarters to suppress his name in reports of his cases. Witness was at the Birmingham Assizes in March, 1897, and he was solicitor for Mr. Withington, the defendant in the first *Silvester* action, and for Mr. Jackson, the defendant in the third action. The only part he took in court was sitting beside Mr. Jackson, who conducted his case in person, and advising him. Mr. Jackson was frequently mentioned as the defendant, and he gave evidence on his own behalf. Witness's name was not mentioned by anybody from first to last during the action. Jackson never said that he should have required a large sum of money before bringing the actions to cover costs. Witness then saw the report in the *Birmingham Daily Post* of March 16, and his solicitors communicated with the defendants, who eventually proposed to insert an apology and retraction, a form of which was sent to witness's solicitors. The paragraph, however, was only partly inserted in the paper. Proceedings were then taken against the defendants.

Cross-examined by SIR ROBERT REID.—Witness's action was for conspiracy to keep his name out of the newspapers. Mr. Ezra Horton, about whom the matter arose, was a West Bromwich football hero. (Laughter.) He disappeared from his home, and a paragraph appeared in the newspapers that his goods had been sold by County Court bailiffs, which was untrue. His property was seized and advertised for sale, but was not sold, as the money required, witness heard, was found. Instructions to take proceedings for libel were first given by Mr. Ezra Horton's brother on September 9 to witness's clerk. The claim was originally for ten guineas from the three papers which had published the offending paragraph, and the witness obtained seven guineas from each paper. It was not the fact that witness had asked Horton to leave the matter in his hands and he would get as much as he could out of the newspapers and would not charge him anything for costs. He said his charge would be two guineas, but it did not appear in his books because the matter was settled. In writing to the defendants claiming reparation his clerk wrote that there was not the slightest foundation in fact for the statement that

Horton's goods had been sold, although there had been a seizure and they had been advertised for sale. Witness endorsed his clerk's letter, but at the time did not know of the seizure. He now agreed that the statement made in the clerk's letter was an exaggerated one, but he still adhered to it. He did not agree that the newspaper proprietors had any reason of complaint against witness for his conduct in the matter. It was not his practice to bring claims against newspapers for libel on the terms of getting his costs out of the defendants. Witness had known Mr. Herbert in a friendly way for some time. His case was that he had conspired with Mr. Feeney to keep witness's name out of the papers. In the "*Silvester v. Jackson*" action witness was of opinion Jackson had acted properly in refusing to bring the libel actions, in consequence of which the action for negligence had been brought against him, and witness's complaint was that he had been put in the place of Jackson. He could not imagine that it had been done by mistake. The two subsequent paragraphs inserted in the papers were not sufficient. If the second paragraph had been put in in the form in which it was originally sent to witness's solicitors this action would not have been brought. The omission of the last part of the paragraph in his opinion showed malice.

Re-examined.—Witness did not discover the real facts about Ezra Horton till some time after the settlement.

By MR. JUSTICE HAWKINS.—Witness did ascertain that there was a judgment and execution against Horton, but he knew that his goods had not been sold. It might have been a little careless on his part not to have made further inquiries.

Charles Darby, the plaintiff's managing clerk, said that he wrote the letter claiming reparation for Ezra Horton on the instruction of his brother, John Horton, and in the absence of the plaintiff on a holiday. His instructions were that the statement that the goods had been sold was quite untrue. He was told that there was a judgment and execution out against Horton, but that the execution had been paid out.

Cross-examined.—About three days after receiving these instructions he heard that the goods had been advertised for sale.

This closed the plaintiff's case.

SIR ROBERT REID submitted there was no case to go to the jury. There were here two causes of action. An alleged conspiracy between two persons to keep a man's name out of the newspapers was absolutely rotten, and there was no special damage alleged at all.

MR. JUSTICE HAWKINS said he was of opinion that there was no case on this head of conspiracy.

SIR ROBERT REID.—This desire to have one's name advertised was absurd. He had never heard before of a solicitor making complaint that his name had not been reported. This was the only means newspapers had of dealing with solicitors who acted in the way the plaintiff had. The defendants had done what was a lawful thing, and they declined to advertise the plaintiff. As to the libel it was most trumpery. The reason of the mistake by which Mr. Sharpe's name appeared as defendant in the "*Silvester v. Jackson*" case in the newspaper report was this. The reporter asked what was the name of the defendant solicitor—i.e., Jackson. He was informed, it being thought he had asked for the name of the defendant's solicitor, that it was Mr. J. Sutton Sharpe. There was not a suggestion that he had suffered any damage whatever.

It being 4 o'clock, his LORDSHIP said he should adjourn till to-morrow.

SIR ROBERT REID said he had only one witness to call.

The jury, however, intimated at this point that they were unanimously in favour of the defendants.

MR. TINDAL ATKINSON said he should like to address a few words to the jury first before they actually gave their verdict. He commented on the action of the newspapers in publishing the libel on Ezra Horton and the spiteful action they took in keeping the plaintiff's name out of the papers in consequence of his conduct of that matter. They did report him when they could put him in as appearing in an unpleasant situation as defendant in an action of negligence, and it was calculated to do an immense amount of harm to a solicitor in appearing in the papers as a defendant in such a case. He submitted that the newspapers had conducted themselves in a most oppressive manner.

MR. JUSTICE HAWKINS said that if Mr. Sharpe thought that his character had been damaged he ought to have vindicated it in Birmingham where he was well known. Having commented on the plaintiff's action to the newspapers with reference to the Ezra Horton matter, he said no action would lie for keeping the plaintiff's name out of the newspapers, and there was no case on that point. His Lordship, dealing with the libel, pointed out that there was no proof that Sharpe's name had been wilfully substituted for Jackson's. Supposing the action had been against Sharpe, there was nothing which could possibly reflect on the character and conduct of Mr. Sharpe in the report in question.

The jury said they were of opinion that there was no libel, and judgment was given for the defendants, with costs.

HIS LORDSHIP, addressing the jury, expressed a strong opinion that this case ought to have been tried at Birmingham. He disapproved extremely of bringing actions of this character at great expense up to London for trial.

Prob., Divorce, and Adm. Div. }
(Gorell Barnes, J.) }

1898.
Jan. 25.

THE SERVIA AND THE CARINTHIA.*

Ship—Pilot—Remuneration—Compulsory pilotage rates in the Mersey—Services outside those covered by the compulsory rates—Mersey Docks Acts (Consolidation Act), 1858—"Vessels proceeding to sea," meaning of.

This was an action brought by the Mersey Docks and Harbour Board and the Mersey pilots to recover a sum of £3 from the owners of the steamships *Servia* and *Carinthia* for pilotage of those vessels in the river Mersey. This case, which is of considerable importance to shipowners using the river Mersey, was concluded yesterday. The facts sufficiently appear from the judgment.

Mr. Joseph Walton, Q.C., and Mr. Carver, Q.C., appeared for the plaintiffs; Mr. Boyd, Q.C., and Mr. Maurice Hill for the defendants.

MR. JUSTICE BARNES said.—This is a test action brought to try the right of the Liverpool pilots to certain extra remuneration for piloting outward-bound steamers to the Prince's landing-stage for the purpose of embarking passengers and for piloting inward-bound cattle steamers to the Wallasey and Woodside stages before taking them into dock. Pilotage is compulsory in the port of Liverpool for the vessels in question, and the point in the case is whether the said services are covered by the compulsory pilotage rates or are to be paid for in addition to such rates. The pilotage of the said port is regulated by the Mersey Dock Acts Consolidation Act, 1858, under which the Mersey Docks and Harbour Board is constituted the pilotage authority, with power to license pilots. The board is merely a

formal party to these proceedings. The other plaintiffs are pilots licensed by the board. One of them, Mr. Gore, was in charge of the defendants' steamship *Servia* on her outward voyage in August last, and the other, Mr. Durrant, was in charge of the defendants' steamship *Carinthia* on her inward voyage in the same month. The defendants load their steamers in the Canada Dock, some distance below the Prince's landing-stage, and after a steamer's loading is completed she is generally taken out of dock on the high water preceding the afternoon of the day fixed for her departure, and, according to the state of the tide, then proceeds to an anchor, and thence to the Prince's landing-stage, or direct to the stage. Sometimes, on account of neap tides, it is necessary for the vessel to leave the dock earlier and moor at the defendants' buoy in the Sloyne, further up river than the stage, before proceeding to the stage. The defendants are the only company possessing a mooring buoy in the Sloyne. The vessel reaches the stage shortly before the hour fixed for her departure, usually about 4 p.m. She is assisted alongside by a tug or tugs, and after making fast to the stage she embarks her saloon passengers and their baggage and the mails, and sometimes receives on board some fine goods. From the stage she proceeds to sea. The time occupied at the stage is sometimes as long as four hours, sometimes not more than half an hour to an hour, and on the average about two hours. The steerage passengers generally embark by tender while the vessel is in the river at anchor or at the buoy, but sometimes in dock, if the vessel goes direct to the stage. The case does not directly raise any question as to the pilot's remuneration for bringing inward-bound vessels to this stage, though I understand that this question is practically involved in that before the Court as to outward-bound steamers. It is always a difficult operation to bring these large steamers alongside the stage, owing to vessels going in and out of dock and the other traffic in the river, and especially on strong flood or ebb tides. The steamers must always leave dock at high water, but they come alongside the stage at all times of the tide. In the particular case of the *Servia* she left the Canada Dock on August 10 last, on the morning tide, in charge of the plaintiff Gore, and anchored about abreast of the Prince's stage. Shortly before 4 30 p.m. her anchor was weighed, and she was brought alongside the stage under Mr. Gore's charge. There she embarked her saloon passengers, their baggage, and the mails, and thence she proceeded to sea on the same evening through the Queen's Channel, bound for New York. Mr. Gore piloted the vessel to the outward compulsory pilotage limit at the north-west buoy. The defendants have paid the outward compulsory pilotage rate for Mr. Gore's services, and contend that such payment covers his service for taking the *Servia* to the stage. On the other hand, he claims £1 for extra remuneration for the last-mentioned service. This sum has been fixed by the Pilotage Board as a regular charge to be made by pilots for bringing vessels to the stage for the purpose of embarking and disembarking passengers on the footing that their services in so doing are not covered by the compulsory pilotage rate. The charge has been paid in respect of all steamers using the stage in manner aforesaid. It is now disputed. Secondly, with regard to the case of the *Carinthia*, she was inward bound with cattle, sheep, and other cargo from America, and about 8 30 p.m. on August 21 last Mr. Durrant boarded her off Point Lynas, took charge, and brought her into the river about 2 a.m. on the 22nd. She then proceeded in the usual way, first to the Wallasey stage, where she discharged her sheep, and then to the Woodside stage, where the cattle were landed. At 5 a.m. she was taken to Canada Dock entrance, but owing to her draught

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

was not permitted to enter, and was, therefore, anchored and lightened. She did not get into dock till the evening tide of the 23rd. Mr. Durrant was in charge throughout. The defendants have paid the inward compulsory pilotage rate for Mr. Durrant's services and 10s. for two days' detention while at anchor at 15s. per day. They contend that such payments cover all his services, but he claims £2 for extra remuneration for taking the vessel to and from the two stages; £1 for each stage is the regular charge fixed by the board in a similar way to that in the outward cases. This charge, which is now disputed, has been paid in respect of all cattle steamers using the stages since the user began 15 years ago. The questions raised turn upon the construction to be placed upon certain sections of the said Mersey Docks Acts (Consolidation Act) of 1858, which render pilotage compulsory for outward and inward bound vessels, except coasting vessels in ballast or under the burden of 100 tons. Section 121 gives power to the board to license persons to act as pilots "for the port of Liverpool." The 123rd section imposes a penalty upon any person who shall pilot any vessel "into or out of the port of Liverpool" without a licence. The 124th section imposes penalties upon any pilot "who shall refuse to take charge of any inward-bound vessel upon a proper signal being made for a pilot, or of any outward-bound vessel upon the request of the master thereof." The sections dealing more particularly with outward-bound vessels are the 127th, 133rd, and 139th. The 127th section, which is under a title as to the duties of pilots, specifies the distances to which outward-bound vessels are to be piloted, but makes no mention of the point at which the pilot is to take charge. This point would ordinarily be the dock in which a vessel loaded, because, except in those cases of embarking passengers, a vessel would usually proceed from the dock to sea as fast as tide and weather would permit. The 133rd section gives power to the board to fix rates of pilotage to be paid to pilots for piloting vessels within certain limits. The rate "for piloting a vessel out of the port of Liverpool" is to be "not less than 3s. and not more than 4s. per foot" draught of water. The 139th section provides that "in case the master of any vessel, being outward bound," except the said coasters, "shall proceed to sea, and shall refuse to take on board or to employ a pilot," he shall still pay the full pilotage rate. The material sections which relate to inward-bound vessels, in addition to the 124th, are the 125th, 128th, the 130th, and the 133rd. The 125th section imposes a penalty on any pilot refusing to conduct an inward-bound vessel. The 128th section defines the duties of the pilot in charge of an inward-bound vessel. It provides that:—"The pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the river Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the river Mersey and before going into dock, in which case he shall be entitled to receive 5s. per day for such attendance." There is nothing in any other section expressly extending these limited duties or preventing a pilot from making a charge for services performed beyond the limit, nor, on the other hand, imposing on the owners or masters of vessels any obligation to employ pilots to perform services other than the limited services specified in this section. The 130th section provides that in case the master "of any inward-bound vessel (except the said coasters) shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose," he shall

pay full pilotage rates as if the vessel had been piloted "into the port of Liverpool." Under the 133rd section the rate for piloting a vessel from the distance of Great Ormes Head "to the port of Liverpool" is fixed at not less than 5s. nor more than 8s. per foot draught of water, and from any greater distance "to the port of Liverpool" not less than 6s. nor more than 9s. per like foot. There appears to be nothing in the Act rendering it obligatory to employ a pilot when a vessel is changing docks or coming from the docks on one side of the river to those on the other, or is navigated in the port when not outward or inward bound, and the word "stage," according to the interpretation clause in the Act (section 3), is included in the term "dock," though not in the term "wet docks" (see also section 596, subsection, Merchant Shipping Act, 1894). The sections above mentioned have been held to render pilotage compulsory for outward and inward bound vessels except the said coasters, and, although the question in the case is in strictness not whether pilotage is compulsory while the services in dispute are being rendered, but whether these services are covered by the pilotage rates fixed in pursuance of section 133, yet, on the argument before me, counsel felt great difficulty in severing the two questions, because the sections are correlative and the rates aforesaid are fixed for the compulsory services, so that if it is compulsory to employ the pilots for the services in question the services would seem to be covered by the compulsory rates, but if the services are voluntary the rates fixed do not cover them. The material cases which have been decided with regard to outward-bound vessels are "*Rodrigues v. Melbush*" (10 Ex., 110); "*The City of Cambridge*" (L.R., 5 P.C., 451); and "*The Cachapool*" (7 P.D., 217). There are the following cases relating to inward-bound vessels—the "*Annapolis*" (Lush., 295, 30 L.J., Ad., 205), the "*Woburn Abbey*" (3 Asp. M.C., 240), and the "*Princeton*" (3 P.D., 90). It was held in the case of the City of Cambridge that section 138 does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged. The section provides for the remuneration of pilots voluntarily engaged to attend on vessels in the cases mentioned in the section, and for extra remuneration to pilots compulsorily employed, where delay in the navigation takes place compelling a vessel to remain in the river. It was contended before me that it provided for remuneration for such services as those in dispute at 5s. per day, and extended the compulsory services so as to include those in question, because of the words "attendance on board any vessel during her riding at anchor, or being at Hoylake, or in the river Mersey." In my opinion, however, this section does not relate to services rendered while a vessel is being actively navigated to the stage or stages for such purposes as those in question, but only to attendance on a vessel lying in the river or at Hoylake, as mentioned in the section. The Act of 1858, so far as the sections relating to pilotage are concerned, is loosely drawn, and these sections are somewhat confused. They appear to have been framed in relation to the known course of business at the port of Liverpool, which is for vessels to load and discharge their cargoes in the wet docks of the port. My review of the aforesaid sections and cases has led me to the conclusion that the principle which underlies the decisions is that if an outward-bound vessel is loaded, equipped, and prepared ready for sea, and in that condition makes such progress to sea as tide and weather permit, from her point of starting on her voyage she is proceeding to sea within the meaning of the Act; but that a vessel is not so proceeding to sea if after leaving her dock she remains waiting in the port for the purpose of performing operations which are necessary in order

to complete her loading, or other preparations required in order to render her ready for sea; and similarly that an inward-bound vessel, if she cannot go direct into dock on her arrival in the river, is in course of progress to her dock while she remains at anchor with the intention of docking as soon as tide and weather will permit. The rates of pilotage referred to in the 133rd section were, in my opinion, to be fixed to cover the duties which were to be performed by the pilots in the one case for piloting outward-bound vessels from the time of their start ready to proceed to sea, and in the other case for piloting inward-bound vessels from sea to dock, and if need be for anchoring them in the river till they can be docked. The 5s. a day extra is also to be paid for inward and outward bound ships in case of necessary delay in the navigation on the inward and outward progress. It follows that for services which are not covered by the compulsory rates and the extra 5s. a day, the pilots ought to receive an extra reasonable remuneration. In the present case the outward-bound vessel, the *Servia*, although her equipment was complete, was not ready for sea until she had taken on board her mails and passengers and their baggage, and, in my opinion, the compulsory rate paid by the defendants for Mr. Gore's services did not cover the service rendered by him in taking the vessel to the Prince's Stage. So also the compulsory rate paid by the defendants in respect of the *Carinthia* did not, in my opinion, cover Mr. Durrant's services in taking the vessel to and from the Wallasey and Woodside Stages. It was admitted that if reasonable extra charges could be made the pilots were respectively employed on the terms that they should be paid such charges. The charges were fixed by the Board in pursuance of the 18th bye-law made under the 221st section of the Act of 1858, and there was no contest as to their reasonableness if they could be legally made. It was said that the importance of the case to the shipowners is that, if the plaintiffs are right in their contention, vessels proceeding to the stages are not under compulsory pilotage. My decision is only asked upon the question whether or not the pilots are to be paid extra if they are required to take vessels to the stages; but I do not shrink from saying that it may follow from my determination of this question in favour of the plaintiffs that vessels proceeding to the stages are not under compulsory pilotage while so doing. It was suggested in argument that this did not logically follow, and it is not necessary for me to decide that it does, though the reasoning of my judgment probably leads to this conclusion. The suggestion aforesaid was founded on the cases of "*The General Steam Navigation Company v. the British and Colonial Steam Navigation Company (Limited)*" (L.R., 4 Ex., 238) and "*The Charlton*" (8 M.L.C., 20). These cases decided that where a pilot has been compulsorily taken on board and placed in charge of a ship, and then an accident happens while he is in charge in the district for which he is licensed, though outside the limits of the port in which he is a compulsory pilot, the shipowner is exempt from responsibility for the act of the pilot, on the ground that the relationship of master and servant does not exist, and that the exemption contained in section 388 of the Merchant Shipping Act, 1854 (now section 633 of the Merchant Shipping Act of 1894), does not require that the pilot should be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens, and that the shipowners are within its protection. In each of these cases, however, the pilot was engaged to take the ship to a point beyond that at which the accident happened, and the shipowner had to pay a rate which covered his services to this further point. There are,

however, obvious distinctions between these cases and the present, and I am unable to see how the principle upon which they were decided can apply to extra services not paid for by the compulsory rates. It was further said that if this case were to determine that vessels are not under compulsory pilotage while the pilots are rendering services for which they are to receive extra pay great difficulty will arise in the master of a vessel determining whether he or the pilot is in charge. From what I have said, however, the difficulty will not arise with regard to outward-bound vessels if the compulsory duties are treated as commencing at the time when the steamer proceeds from the stage to sea; and with regard to inward-bound vessels, if it follows from this judgment that it is not compulsory to employ a pilot to take a vessel to the stages the service for which extra charge is made would begin and the compulsion cease, or it may be suddenly suspended, as soon as the vessel deviates to the stage from the route which she would follow in docking without going to the stage. It was also urged that as an inward-bound cattle steamer is compelled to go to the cattle stages—or one of them—to land her cattle and sheep before going into dock, unless she lands them in the Alfred Dock, the pilot cannot take her into a wet dock direct, and must therefore take her to the stage or stages in order to earn his compulsory fee, except when she goes to the Alfred Dock. But the answer to this is that the compulsory rate is paid for bringing the vessel in and anchoring her, if necessary, and then docking her, and that he is not responsible for the vessel having cattle or sheep on board, and that if he has to perform duties in consequence which are not provided for in the compulsory rate, and beyond those defined by the 128th section (the only section expressly defining the duties of the pilot of an inward-bound vessel), he must be paid extra for his extra services. As this case only requires a decision upon the question of payment, and not a final determination of the question of compulsory employment of a pilot to take a vessel to the stages, I am not at present called upon to decide a further question which was discussed—viz., whether the interposition of services for which extra remuneration is to be paid puts an end to or suspends the services to an inward-bound cattle ship which are covered by the compulsory rate. It is sufficient for me on this claim to decide that if an inward-bound ship is taken to one or more stages her owners will have to pay the extra charge for each stage. I have not felt disposed to arrive at my conclusions by any narrow construction of the Act. Although it is desirable that no difficulties should be placed by the Court in the way of trade developments and the navigation of vessels in the port, yet it is clear to me that the Act of 1858 did not contemplate pilots performing the duties they are now asked to perform, and receiving nothing more than the compulsory pilotage rates for them. These duties impose upon the pilots requested to perform them great additional responsibility, and require the exercise of great care and skill; and it is only reasonable that they should be properly rewarded for performing them. The case has been contested, as I understand, by the Liverpool Steamship Owners' Association in the name of the defendants, and it was stated that the matter of the payments to the pilots was not of so much moment as the question of compulsory pilotage during the services in question. I have dealt fully with all the points taken, but may state that the broad view presented by the defendants' case is that the services in question of the pilots are requisite in order to enable shipowners to carry on what has become a regular course of practice with most passenger steamers, and as regards the cattle ships to comply with the provisions of the Diseases of Animals Act, 1894, and that their

services should be treated as a necessary part of those which they are compelled to pay for under the Act of 1858, and that this Act should be so construed that the compulsory payments should cover all the services. According, however, to the opinion which I have expressed, this construction is wider than the terms of the sections of the Act bearing on the subject will permit. The questions in the case depend upon the construction of these sections, and not upon general considerations; and if I am right in my opinion an amendment of the Act will be necessary in order to carry out the object of the shipowners. My judgment is for the plaintiffs for the sum of £3, with costs, and I certify that this was a proper case to be tried in the High Court.

[Solicitors—A. T. Squarey; Hill, Dickinson, Dickinson, and Hill.]

Prob., Divorce, and Adm. Div. } 1898.
(Gorell Barnes, J.) } Jan. 25.

THE KNIGHT OF ST. MICHAEL.*

Insurance—Marine—Policy on freight—Loss by perils insured against.

Loss of freight consequent on discharge of cargo to prevent probable damage by fire held to be a loss by perils insured against, although the fire had not actually occurred.

This case was tried last term on an agreed statement of facts. It was also agreed that the decision of Mr. Justice Gorell Barnes should be final. The facts appear in the judgment delivered yesterday.

Mr. Carver, Q.C., and Mr. A. D. Bateson appeared for the plaintiffs; and Mr. Joseph Walton, Q.C., and Mr. Scrutton for the defendants.

The COURT found for the plaintiffs.

MR. JUSTICE BARNES said,—"This case raises certain novel and interesting questions of marine insurance law. A special case has been stated by the parties, which sets out the general facts, refers to the policies, ship's practice, and certain reports of surveyors, and gives the Court power to draw inferences of fact. It is necessary that I should first state the facts which I find and upon which I base my judgment. The plaintiffs are the owners of the sailing ship *Knight of St. Michael*, and on November 1, 1895, she was chartered to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso at a freight of 15s. per ton. The plaintiffs insured the freight with the defendants for £2,500 and the perils insured against included perils "of the seas, fire, jettisons, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the" said subject matter of insurance or any part thereof. The vessel sailed with a cargo of 3,206 tons of coal on February 1, 1896. On February 2 part of the cargo was found to be getting hot, and the vessel was accordingly taken into Sydney on February 4. Several surveys were then held upon the cargo, with the result that 1,716 tons were discharged and sold. The vessel sailed with the rest of the cargo on March 31 for Valparaiso. No freight was paid or payable in respect of the coal sold at Sydney, and the plaintiff and his co-owners have lost that portion of the freight amounting to £1,338 2s. 4d. which otherwise they would have earned under the said charterparty. In the special case it is stated that the defendants do not rely on unseaworthiness of ship or on improper condition of cargo as a defence to any claim there may be. If the action had been by the cargo owners against their underwriters for the loss on the coal, I presume

that their claim would have been defended on the ground that the loss was due to the inherent vice of the coal, but the practice of the shipowners with regard to the freight is different. I find that it was necessary for the safety of the whole adventure for the vessel to put into Sydney and discharge the coal landed there, and that the coal landed at Sydney could not have been reloaded and carried with safety to Valparaiso and was necessarily and properly sold at Sydney. The owners of the vessel being the persons interested in the freight which has been lost now contend that this freight has been lost by perils insured against by the policies, and claim the right to recover directly from the defendants for the loss. The defendants, on the other hand, contend that there has been no loss of freight by perils insured against by the policies, and, although willing to concede that the freight lost was sacrificed to avert a probable loss by fire and therefore should be made good in general average, they maintain that they are only liable for the share to be contributed in general averages by the shipowners in respect of their interest in the freight. These contentions raise the question whether, although no fire actually broke out on board the vessel, the defendants may be made directly liable for the loss, on the ground that it was in the circumstances due to the operation of perils insured against, and not merely for the share of the loss which would be borne by those interested in the freight if the loss should be adjusted as a general average loss. It was formerly considered, in case of a sacrifice of property for the preservation of ship, freight, and cargo from losses for which underwriters would be liable, that the only liability falling upon the underwriters of the property sacrificed was to contribute their respective proportions to the amount required to make good the loss in general average; but it was decided in the well-known case of "*Dickenson v. Jardine*" (L.R., 3 C.P., 639) that underwriters are directly liable for a partial loss of the subject insured, occasioned by a general average sacrifice, and that having paid the assured they are entitled to stand in his place with respect to the general average contribution, and it was further held in "*Price v. A 1 Ships Small Damage Insurance Association*" (22 Q.B.D., 530) that such partial loss as aforesaid is not a particular average loss. The distinction drawn by the defendants between these cases and the present is that in the former the losses were proximately caused by perils enumerated in the policies, the goods in the first case having been jettisoned, in order to avert an existing peril of the sea, and in the second the ship's materials having been cut away and cast overboard in order to avert a similar existing peril, whereas in the present case they contend that the loss was not caused proximately by an existing fire, but by the steps taken in consequence merely of fear of a fire breaking out. Cases were cited to show that a loss caused by steps taken in consequence of fear of peril and not to avert an existing peril is not covered by an ordinary marine policy. It was not disputed that if fire had in any degree actually broken out and the loss in question had happened to avert its consequences the plaintiffs could recover directly from the defendants. Now, I find that fire did not actually break out, but it is reasonably certain it would have broken out, and the condition of things was such that there was an actual existing state of peril of fire and not merely a fear of fire. The case is peculiar and not exactly analogous to that of any other peril. The danger was present, and if nothing were done spontaneous combustion and fire would follow in natural course. In effect the concession of the defendants admits this, because they do not dispute their liability for the shares of the loss in general

average. But, in order to give rise to a general average act there must have been imminent danger to ship and cargo—that is to say, real substantial danger. I have found that such danger existed in this case. Then does it make any difference that the fire had not actually broken out? I think not in the circumstances. There was imminent danger of fire and an existing condition of things producing this danger, and if this cannot, strictly speaking, be termed a loss by fire it is, in my opinion, a loss *ejusdem generis*, and covered by the general words "all other losses or misfortunes," &c. This view is supported by the case of "*Butler v. Wildman*" (3 B. and Ald., 398), where a master of a Spanish vessel, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, threw the same into the sea and was immediately afterwards captured. It was held that it was a loss by jettison or by enemies, and if not strictly a loss by either peril it was a loss within the general words. In further support of this view I may refer to the judgment of Kelly, C.B., in "*Stanley v. Western Insurance Company*" (L.R., 3, Ex. p. 74), (Porter's Laws of Insurance, p. 123), the Canadian cases of "*M'Gibbon v. the Queen Insurance Company*" (10 Lr. Can. Jur., 227), and "*Harris v. the London and Lancashire Insurance Company*" (ib. p. 268), and the case of "*Nobel's Explosives Company (Limited) v. Jenkins and Co.*" (Commercial Cases, p. 436). I am therefore of opinion that the defendants are liable directly to make good to the plaintiffs the loss of freight as a partial loss under the policies. I am not asked to determine any question as to the right of the defendants to deduct in settling the loss the amount which the plaintiffs, as owners of the ship, are liable to contribute in general average towards the loss of freight.

[Solicitors—Batesons, Warr, and Wimshurst; Hill, Dickinson, Dickinson, and Hill.]

Court of Appeal (Lord Halsbury, L.C., } 1898.
A. L. Smith and Collins, L.J.J.) } Jan. 26.

WOOD V. MAYOR, &c., OF WIDNES.*

Local Government—Power of local authority as to privy accommodation—Duty to exercise discretion in each particular case—Public Health Act, 1875, sec. 36.

Decision of Divisional Court (13 *The Times* L.R., 537) affirmed.

This was an appeal from the judgment of a Divisional Court (Mr. Justice Lawrance and Mr. Justice Ridley), on a case stated by two justices of the county of Lancaster (reported in 13 *The Times* Law Reports, 537). Mr. Edwin Wood was the owner of certain houses, 52 to 68, Terrace-road, Widnes. At a petty sessions holden at Widnes a complaint was preferred against him by the corporation of Widnes, acting as urban sanitary authority, under section 36 of the Public Health Act, 1875, claiming payment of certain private improvement expenses in respect of slop water-closets fixed at his houses. The justices adjudged that the corporation should recover the sum claimed. The facts were as follows:—On February 12, 1895, the urban sanitary authority confirmed the following resolution of the Health Committee:—"Waste water-closet system.—Resolved,—That in all future cases of nuisances requiring the reconstruction of privies and ashpits the local authority of this borough do, as

far as practicable, order that such privies and ashpits be converted into the waste water-closet system, or into such other water-closet system as the local authority may from time to time approve, and that the Highway Committee be requested to take such steps for the adoption of the first-named system generally throughout the borough." On March 22, 1895, the corporation's inspector of nuisances served upon Wood a notice requiring him to abate a nuisance at his premises, 52 to 68, Terrace-road, by converting the privies into water-closets. On April 3 the inspector reported that certain houses in the borough, including Wood's, were without a sufficient water-closet, earth-closet, or privy, and on April 9 the local authority confirmed a resolution of the Health Committee that notice be served upon Wood and the other owners of the houses requiring them to provide a sufficient privy and ashpit upon the waste water-closet system approved by the corporation. On April 23 notice was served upon Wood in accordance with the terms of this resolution, and, the notice not having been complied with, the local authority did the necessary work, and then took these proceedings to recover the amount. It was contended for Wood that the resolution of February 12 and the subsequent proceedings thereunder were invalid. The question of law for the opinion of the Court was whether the resolution of February 12 was valid, and, if not, whether it invalidated the subsequent proceedings. The Divisional Court allowed the appeal raised on the case stated, holding that the local authority were not entitled to lay down a general rule to be applied in all cases without regard to the particular requirements of individual houses, and had no power to order that only one particular kind of water-closet should be used. The corporation appealed.

Mr. McCall, Q.C., Mr. Macmorran, Q.C., and Mr. Bonsey appeared for the corporation; Mr. C. A. Russell, Q.C., and Mr. F. W. R. Rycroft for Wood.

The COURT dismissed the appeal.

The LORD CHANCELLOR said it was admitted on the part of the corporation that a local authority, when proceeding under section 36 of the Public Health Act, was bound to exercise a discretion in each particular case, and had no right to impose a new scheme of sanitation on a district generally. The only question to be decided now was whether upon the facts of the case the local authority had complied with the statute so interpreted. He came to the conclusion that there was here an effort, without having regard to each particular case, to enforce on the district a uniform scheme. On that ground the judgment ought, in his opinion, to be affirmed. Further, he thought that the notice which had been given to the respondent in this case was not a good notice under the statute. It said in terms that, if he did not do a particular thing, he would not be complying with the notice. If there had been a note at the bottom suggesting that a particular kind of work would satisfy the corporation, that, perhaps, would not have been improper. But if there had been the addition that nothing else would satisfy them, that would have been bad. In the present case it was worse still, for the particular requirement was made part of the notice itself. On both grounds—viz., that there had been no exercise of discretion, and no proper notice—he thought the appeal should be dismissed.

LORD JUSTICE A. L. SMITH delivered judgment to the like effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Alfred Grundy, Son, and Co., for Wood; Sharpe, Parker, Pritchards, and Barham, agents for Oppenheim, Widnes, for the Corporation.]

Chan. Div. }
(Stirling, J.) }

1898.
Jan. 26.

THE DEUTSCHE NATIONAL BANK V. PAUL.*

Practice—Writ—Service out of the jurisdiction—
O. 11, r. 1 (g).

Order for service out of the jurisdiction under O. 11, r. 1 (g), set aside on the ground that the action was not "properly brought" against the person served within the jurisdiction.

This case raised an interesting point of practice relating to the liability of persons residing out of the jurisdiction of the Courts of this country to be served with notice of proceedings in such Courts. Shortly stated the facts of the case were these. In May, 1890, Messrs. Jellings, Blow, and Co., who carried on business in London, applied to the plaintiffs, a German bank, for a credit, and offered by way of security to give the bank a charge upon certain policies of assurance issued by an English office upon the life of the senior member of the firm. This was accepted by the bank, and the policies were duly deposited with the plaintiffs to secure advances made by them to the firm. In November, 1894, the firm further mortgaged the policies to the defendant Ebbecke, who carried on business at Bremen, in Germany, to secure the repayment of an advance made by him to them, and the firm themselves gave notice of this charge to the plaintiffs. In December, 1894, the firm assigned all their property to a Mr. Jackson as trustee for their creditors. In January, 1897, the plaintiffs commenced an action for foreclosure in this country against Mr. Jackson and the defendant Ebbecke. The writ in that action was not served upon the defendant Ebbecke. Subsequently Mr. Jackson sold the equity of redemption in the policies for the sum of £50 to the plaintiffs, and thereupon by a deed to which the plaintiffs were parties the equity of redemption was transferred by Jackson to two gentlemen named Paul and Farish, both of whom were resident in this country. A fresh action claiming the same relief as the former one, which had been abandoned, was then commenced against Messrs. Paul and Farish and the defendant Ebbecke, and upon the application of the plaintiffs an order was made for the service upon the defendant Ebbecke, out of the jurisdiction, of notice of the writ in this action. The defendant Ebbecke now applied by way of motion to have that order discharged, and the service which had been effected thereunder and all proceedings in the action as against him set aside on the ground that Messrs. Paul and Farish being merely trustees or nominees of the plaintiffs the action was not properly brought against them. It was suggested that the bringing of the action against them was a mere device for the purpose of bringing in the defendant Ebbecke, and thus founding a jurisdiction against him which would not otherwise have existed. The question turned upon the effect of order XI., rule 1, of the Rules of the Supreme Court, which provides as follows:—“Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever . . . (e) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction . . . or (g) whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.”

Mr. Grosvenor Woods, Q.C., and Mr. G. Lawrence appeared for the defendant Ebbecke in support of the

motion; and Mr. Butcher, Q.C., and Mr. Kirby for the plaintiffs.

MR. JUSTICE STIRLING, after stating the facts, said that he would assume that under section 25, subsection 6 of the Judicature Act, 1873, the legal right to sue on the policies was now vested in the defendants Paul and Farish. It was admitted that they were simply trustees for the plaintiffs, and were bound to act with reference to the subject-matter of the trust as the plaintiffs directed, and that they had not refused to do so, and did not object to become co-plaintiffs in the action. To justify service out of the jurisdiction it was clear that the case must be brought within the provisions of order XI., rule 1 (See "*Re Eager*," L.R., 22 Ch.D., 86; and "*Re Cliff*," L.R. [1895], 2 Ch., 21). Clause G of that rule was mainly relied on, but at a later stage in the argument a suggestion was made that Clause E might apply, and his Lordship would deal with that first. The writ claimed a declaration that the plaintiffs were entitled to a charge for the sum of £6,022 6s. 2d. and interest on six policies of assurance, and that the charge might be enforced by foreclosure, and all accounts and inquiries necessary for that purpose, and for further or other relief. The object of the action, therefore, so far as specific relief was thereby sought, was to compel the defendant Ebbecke to redeem the plaintiffs by paying off what was due to them, and in default to become the absolute owners of the property on which the charge existed. Under the claim for general relief the plaintiffs would be entitled to ask that, in the event of the Court refusing to give relief by way of foreclosure, the policies might be sold and the proceeds applied in payment of the plaintiffs' debt. In his Lordship's judgment an action so framed was not founded on a breach of contract within the meaning of order XI., rule 1 E. The plaintiffs' title to a charge might have arisen by reason of a breach on the part of Jennings, Blow, and Co. in not paying what they owed to the plaintiffs. The action, however, was not founded on that breach, nor, indeed, on any other breach of contract; for the defendants had not committed any breach of any contract with the plaintiffs; it was founded on the existence of a charge constituting a security for the debt due to the plaintiffs. Coming then to Clause G the question was whether the present action was properly brought against Paul and Farish. The practice of the Court required that to an action for foreclosure all persons who had or claimed an interest in the equity of redemption should be parties, and his Lordship thought that to such an action as the present the defendants Paul and Farish were certainly proper if not necessary parties. The rule would have been satisfied, however, if those gentlemen had been made co-plaintiffs instead of defendants; and his Lordship thought that they ought more properly to have been made plaintiffs, in the sense that any extra costs occasioned by making them defendants might upon a proper application for that purpose be ordered to be borne by the plaintiffs. Messrs. Paul and Farish were made parties simply to comply with that rule of practice. Against them no relief was sought and no right was claimed to be enforced. No substantial reason was given why they should have been made defendants rather than plaintiffs. If the plaintiffs had taken an assignment to themselves instead of the defendants, the action would not have fallen within order XI., rule 1. It was not necessary to come to the conclusion that the assignment to trustees was a mere device to enable this action to be brought, but in his Lordship's judgment the action was not properly brought against them within the meaning of the rule. The order for service out of the jurisdiction must therefore be discharged.

[Solicitors—Druses and Attlee; Norton, Rose, and Co.]

*Reported by W. W. Knox, Esq., Barrister-at-Law.

Chan. Div. }
(Romer, J.) }

1898.
Jan. 26.

IN RE CASTELL AND BROWN (LIMITED)—EX PARTE UNION
BANK OF LONDON.*

Mortgage—Priority—Equitable encumbrancers—
Title deeds of company deposited with bank as
security—Question of priority between bank
and the company's debenture-holders.

The question in this case was whether the bankers of a company who had advanced money to the company on the security of its title deeds were entitled to priority over the company's debenture-holders notwithstanding that the property comprised in the title deeds was comprised in the debenture security and by the terms of the debenture itself the company was expressly forbidden to charge such property in priority to the debenture charge. It appeared that the above company was formed in December, 1884, and in May, 1885, issued in pursuance of its borrowing powers debentures to the amount of £28,000. Each debenture purported to charge all the property of the company whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, and was endorsed with conditions. These were, amongst others, that the debenture was one of a series for securing principal moneys not exceeding in the whole at any time two-thirds of the amount of the company's paid-up capital for the time being, and that the debentures were to rank *pari passu*, and that the charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge upon its freehold or leasehold hereditaments in priority to the debentures. No legal mortgage of the freehold or leasehold hereditaments was ever made to the debenture-holders, and the title deeds remained in the possession and under the control of the company. In April, 1892, the directors of the company opened an account with the Union Bank of London, and were allowed by the bank to overdraw on depositing the title deeds of the company's leasehold property. The overdraft was paid, but the deeds remained in the custody of the bank, and in August, 1895, the bank allowed a second overdraft on the company giving a memorandum of equitable charge on the deeds and an undertaking that the company and all other necessary parties would on demand make and execute valid legal mortgages in favour of the bank. The interest on the debentures being in default the above action was instituted by the debenture-holders, and in July, 1896, the usual judgment was made for the appointment of a receiver and directing inquiries as to the charges and their priorities. In April, 1896, the company had passed resolutions for voluntary liquidation, and in June, 1897, an order was made for the continuation of the liquidation under the supervision of the Court. In February, 1897, the bank was served with notice of judgment in the action. At that date the overdraft at the bank amounted to some £220. The bank stated that until served with notice of judgment they had not had any notice of the company having issued any debentures, or that it had created any charge upon the property comprised in the deeds deposited with the bank. The company being stated to be insolvent the bank claimed to have a prior charge for £220 and interest, and to retain the deeds until their debt was paid.

Mr. Farwell, Q.C., and Mr. E. Ford appeared for the debenture-holders; and Mr. Neville, Q.C., and Mr. Gere-Browne for the bank.

*Reported by E. B. SCOMMERFORD, Esq., Barrister-at-Law.

MR. JUSTICE ROMER said.—This is a question of priority between two equitable encumbrancers. The debentures are prior in date. But the Union Bank at the date of its charges had no notice, express or implied, of the prior encumbrance, and obtained possession of the title deeds, and, under the circumstances of the case, claims priority. If the equities of the two encumbrancers are in other respects equal then, of course, priority depends upon the dates of the charges. But the question is whether, under the circumstances of this case, the bank has not the better equity so as to entitle it to priority. Now, as between equitable encumbrancers in determining priority, the possession of the deeds has always been treated as a circumstance of great importance. And, indeed, in some of the numerous cases which show this there are observations of the Judges who decided them which go very far. For instance, in "Rice v. Rice" (2 Drew, at p. 81), Vice-Chancellor Hinderley said:—"We have here, then, ample authority for the proposition or rule of equity that, as between two persons whose equitable interests are of precisely the same nature and quality and in that respect precisely equal, the possession of the deeds gives the better equity." And in "Lloyd's Banking Company v. Jones" (L.R., 29 C.D., at p. 229), Mr. Justice Pearson observed:—"I think upon the authorities which have been cited, and which are so well known, that it would be pedantry for me to go over these again. The doctrine of the Court has always been that, where there are equities which are otherwise equal, the possession of the deeds gives priority to the person who has got them." But, in my opinion, these observations, if taken without any limit or restriction, go too far, for I do not think a prior equitable encumbrancer would lose his priority where he did not obtain the deeds, and the deeds came to the hands of the subsequent encumbrancer through no default of any sort on his part. I therefore proceed to inquire into the circumstances under which, in the present case, the deeds came into the hands of the bank. In the first place, I cannot hold that there was any negligence on the part of the bank. When making its advances to Castell and Brown (Limited) (which I will hereafter call the company) it found the company in possession of the deeds in question, and, apparently, able as unencumbered owner to charge the property. The company purported as such unencumbered owner to give a charge to the bank, and I think the bank was, under the circumstances, entitled to rely upon obtaining a charge free from encumbrance. It is suggested on behalf of the debenture-holders that the bank ought to have made some special inquiries of the company. But it is not suggested that the bank wilfully abstained from making inquiries, and as the bank had no reason to suppose that the company were not fully able to give a valid first charge, and found the company in possession of the deeds which showed no encumbrance, I think the bank was not bound to make any special inquiry. It is said on behalf of the debenture-holders that it is so common for companies to issue debentures that the bank ought to have assumed there were some in this case, or, at any rate, to have specially inquired about debentures. But every company does not issue debentures, and, moreover, every debenture does not charge property of the company, and certainly not property the title deeds of which were left with the company. It might just as well be said, because it is common for private individuals to mortgage their properties, that a person asked to make advances to a borrower who appears to be unencumbered owner, and has the deeds showing him to be such owner, is bound to assume that the borrower has previously mortgaged, or to make special inquiries of him on the footing that he has previously mortgaged. Such a contention appears to me

unreasonable. I therefore hold that there was no negligence on the part of the bank; and I now look to see how it was that the company retained possession of the deeds, notwithstanding the issue of the debentures. The reason appears to me to be obvious. The debentures were only intended to give what is called a floating charge, that is to say, it was intended, notwithstanding the debentures, that the company should have power, so long as it was a going concern, to deal with its property as absolute owner. And I infer it was on this account that the company was allowed to, and did, retain possession of the deeds. In other words, the debenture-holders, notwithstanding their charge—and, indeed, by its very terms—authorized their mortgagor, the company, to deal with its property as if it had not been encumbered, and left with their mortgagor the deeds in order to enable the company to act as owner. It is true that, having given this general authority to the company, the debentures purported to put a certain special restriction on its exercise. By the first condition it was provided that, though the charge was to be a floating security, the company was not to be at liberty to create any mortgage or charge upon its freehold and leasehold hereditaments in priority to the debentures. This restriction was, no doubt, quite valid as a private arrangement between the company and the debenture-holders. But can the debenture-holders, under the circumstances, set it up as against the bank taking its securities without notice? I think not. I take it to be established that if a first mortgagee, even though he has the legal estate, authorizes the mortgagor to retain the deeds in order that the mortgagor may thereby as ostensible owner of the property be able to deal with it, though only to a limited extent, yet if the mortgagor takes advantage of the deeds so left with him to deal with the property to an extent beyond what was authorized, then the mortgagee cannot set up his charge as against a purchaser for value without notice who claims under the unauthorized dealing and relied on the deeds and the apparent ability of the owner to deal with the property free from encumbrances. In *"Perry Herrick v. Atwood"* (2 D. and J., at p. 39) Lord Cranworth, L.C., says with reference to a case of this kind that if a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or fraud, but with the intention of enabling him to raise a sum of £15,000 which is to take precedence of the legal mortgage, the mortgagee cannot as against subsequent mortgagees complain, if instead of £15,000 the mortgagor raises £50,000, because he had himself put it into the mortgagor's power to raise any sum of money he pleased; and the principle has been acted on in numerous later cases, amongst which I may mention *"Briggs v. Jones"* (L.R., 10 Eq. 92). This being the case as between a prior legal mortgagee and a subsequent equitable encumbrance, it is an *a fortiori* case where the first mortgage is only equitable. In my opinion, therefore, the bank has a stronger equity than the debenture-holders and is entitled to priority. I may add that if I am not mistaken in my inference that the deeds were allowed to remain with the company because the debentures created a floating charge only, and it was intended that the company should be authorized to act as owner (subject to the special conditions imposed by the debentures), then I cannot see why the debenture-holders should not have obtained possession of or control over the deeds in some shape or form, and they would come within the series of cases which have decided that a first mortgagee, even a legal one, who negligently leaves the deeds in the hands of the mortgagor, is postponed to a subsequent mortgagee who obtains the deeds without notice; see *inter alia* *"Clarke v. Palmer"* (L.R., 21 C.D. 125), and *"Northern Counties of England Fire Insurance Com-*

panies v. Whipp" (L.R., 26 C.D. 482). I therefore declare that the bank's charge has priority and their costs will be added to their security.

[Solicitors—Fritchard and Sons; Campbell, Reeves, and Hooper.]

Q.B. Div. }
(Mathew, J.) }

1898.
Jan. 26.

BENNETT V. SLATER.*

Friendly Society—Policy of insurance—Nomination of person to receive the moneys at death under sec. 15 (3) of the Friendly Societies Act, 1875—Will—Revocation of nomination.

This was an issue directed to be tried in interpleader proceedings, by which the Royal Liver Friendly Society interpleaded upon a claim made by the defendants, the executors of the will of William May, deceased, under a policy granted by the society to William May.

Mr. H. Burrows appeared for the plaintiff; and Mr. Bonsey for the defendants.

In 1864 a policy for £100 was granted to William May by the Royal Liver Friendly Society—a society deemed to be registered under the Friendly Societies Acts. In 1889 William May made a nomination for the full amount in favour of his daughter, Patience Bennett, the plaintiff in these proceedings. The nomination was made and delivered to the society in accordance with section 15 (3) of the Friendly Societies Act, 1875, which provides:—"A member of a society (other than a benevolent society or working men's club), not being under the age of 16 years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person not being an officer or servant of the society, to whom any money payable by the society on the death of such member, not exceeding £100, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." William May died on October 29, 1896, leaving the will, dated September 7, 1895, of which defendants were the executors. By the will he left all his property to his executors in trust to pay his funeral expenses and debts and upon other trusts. Neither the will nor a copy thereof was delivered or sent to the society during the lifetime of William May, but after his decease probate of the will was delivered. The amount due from the society on the death of William May was £104. On behalf of the plaintiff it was contended that the nomination was not equivalent to a will or subject to the law of wills, and was, therefore, not revoked by the will made subsequently; and that, even if it were, the terms of the Act with regard to revocations had not been complied with. For the defendants it was contended that the nomination was a gift revocable by will, and that it was in fact revoked by the will. It was also contended that as the Act only applied to sums less than £100 it could not govern the present case where the sum payable was £104.

His LORDSHIP gave judgment for the defendants. He said that the nomination was not a will nor anything in the nature of a will, nor was it a gift. The object the Legislature had in view when they enacted section 15 (3) was to enable members of friendly societies to make a disposition without trouble and to enable the nominee to obtain the money without taking out letters of administration. In the present case a nomination was made. Subsequently to the nomination a will was

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

made by which the executors became entitled to all the property of the testator subject to the payment of debts. It appeared that without recourse to the money payable by the friendly society the debts could not be paid. Mr. Burrows contended that the nomination was irrevocable. That that was not the case was clear, because the Act provided for revocation. But it was said further that if the will revoked the nomination the proper steps had not been taken to bring the revocation to the notice of the society. It was said that the proper mode was to produce the original will during the lifetime of the member. But, in truth, the proper mode was to produce the probate of the will, as had been done in the present case.

[Solicitors—Hyde, Tandy, and Co., for the plaintiff; Letts Brothers, for the defendant.]

Chan. Div. }
(Wright, J.) }

1898.
Jan. 27.

IN RE NEW BRITISH IRON COMPANY (LIMITED).*

Company—Winding up—Proof—Directors' fees. Directors held entitled to rank as ordinary creditors in respect of unpaid fees.

"*Ex parte Cannon*" (30 Ch.D., 629) distinguished.

This case resulted in a very useful decision as to directors' fees. The directors were required by the articles of association to possess a share-qualification, and article 62 provided that "the remuneration of the board shall be an annual sum of £1,000 to be paid out of the funds of the company, which sum shall be divided in such manner as the board from time to time determine." The company having gone into liquidation the directors claimed to rank as ordinary creditors in respect of their fees due at the commencement of the liquidation. Section 38, subsection 7, of the Companies Act, 1862, provides that "no sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such debt may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves." It has been somewhat hastily assumed that in all cases where directors are obliged to be members of the company their unpaid fees are debts due to them in their character of members, and are postponed to the debts of outside creditors, the decision of Mr. Justice Pearson in "*Ex parte Cannon*" (L.R., 30 Ch. D., 629) being often regarded as an authority for this proposition. In that case, however, the articles only provided that "the remuneration of the directors for their services shall be such sum as the company in general meeting may from time to time determine," and Mr. Justice Pearson held that no remuneration being fixed, it depended entirely on the good will of the meeting whether any remuneration was to be given.

Mr. DIGTON POLLOCK, for the directors, contended that "*Ex parte Cannon*" was distinguishable, but that if it was in point it ought not to be followed, having regard to Mr. Justice Kay's decision in "*In re Dale and Plant*" (L.R., 43 Ch. D., 255).

Mr. HOWARD WRIGHT, for the liquidator, said his client did not wish to oppose the claim if the Court thought the directors were legally entitled to the remuneration.

*Reported by F. EVANS, Esq., Barrister-at-Law.

MR. JUSTICE WRIGHT, in delivering judgment, said the case depended on an article (62) which was different from that in "*Ex parte Cannon*." That article was not in itself a contract between the company and the directors—it was only part of the contract amongst the members of the company *inter se*. But when, on the footing of that article, the directors were employed and accepted office the terms of the article were embodied in the contract. Under the article as thus embodied the directors obtained a contractual right to an annual sum of £1,000 as remuneration. His Lordship did not intend by this decision to fritter away any obligation of being bound by any previous decision. If the facts in "*Ex parte Cannon*" and in this case had been the same his Lordship would have followed "*Ex parte Cannon*," but the ground of Mr. Justice Pearson's decision was that the directors in that case were not in a distinct contractual position, as regarded the company. The present case was within the principle of "*In re Dale and Plant*." It was not within section 38 of the Act of 1862, because the remuneration was not due to the directors in their character of members. It was not due to them by their being members, but under a distinct contract. The claim must, therefore, be allowed.

[Solicitors—J. Beckwith; Freshfields and Williams.]

Q.B. Div. (Day and }
Lawrance, JJ.) }

1898.
Jan. 27.

ROGERS V. MANCHESTER PACKING COMPANY.*

Factory Acts—"Factory," what is—Bleaching and dyeing works—Factory and Workshop Act, 1878, sec. 93.

This was a case stated by the stipendiary magistrate for Manchester on the hearing of an information by an inspector for factories for that the respondents, being the occupiers of a "factory," did employ a young person after 8 p.m. The Justices dismissed the information on the ground that the premises of the respondents were not a factory within the meaning of the definition in the 93rd section of the Factory and Workshop Act, 1878 (41 and 42 Vict., c. 16). The definition provides that "factory" includes a "non-textile factory," which includes "bleaching and dyeing works"—i.e., "premises in which bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making-up and packing any yarn or cloth or any material, or the dressing or finishing of lace, or any one or more of such processes or any process incidental thereto are or is carried on." The respondents carried on the business of makers-up and packers in their premises. This business is exclusively the hooking, lapping, making-up and packing of cloth for exportation. The respondents receive the cloth from the shipping merchants in the finished condition in which it is received from the manufacturers. The respondents then cut it into lengths according to instruction, and these lengths are then folded in different ways. After binding or stitching the ends of the folds together in order to keep them straight, this cloth is made up into neat parcels and labels are affixed thereon. A number of these parcels are then placed together and hydraulic pressure is applied to reduce the bulk. The respondents despatch the goods direct from their warehouse to the shipowners. The processes just described are essential to the business of the respondents, and are properly called hooking, lapping, making-up and packing. By the operation of "hooking and lapping"

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

the cloth is measured and folded. It was admitted that hooking, lapping, making-up and packing could be carried on as a separate trade, though it was often the case that bleaching, beetling, dyeing, calendering, finishing, hooking, lapping and making-up and packing of cloth were carried on together in premises known as bleaching and dyeing works. It was part of the bargain between the merchant and his customers that the cloth should be made up in a particular way. The sole question was whether the premises were a factory. The respondents contended that they were not, on the ground that the hooking, lapping, making-up and packing were not carried on incidentally to bleaching and dyeing. The appellant contended that any premises where hooking, lapping, making-up and packing were carried on were a bleaching and dyeing works within the Act.

The Attorney-General and Mr. H. Sutton appeared for the appellant; Mr. A. M. Langdon for the respondents.

The ATTORNEY-GENERAL said these premises were premises in which four of the processes named were carried on, therefore these premises were a "factory." He referred to the history of the legislation on the subject. First came the Bleaching and Dyeing Act (1860) (23 and 24 Vict., c. 78), on which he cited the case of "Howarth v. Coles" (12 C. B., N.S., 140); then followed the Statutes 26 and 27 Vict., c. 38 (1863), 27 and 28 Vict., c. 98 (1864), which showed that if hooking and lapping, making-up and packing were carried on on premises they were a factory. By 33 and 34 Vict., c. 62 (1870), all these bleaching and dyeing Acts were repealed, and such classes of premises were brought within the Factories Act.

Mr. LANGDON said the premises in question were not bleaching or dye works, and therefore not a factory. The respondents received the goods when completed. The work carried on by them was a separate business. The words "any one or more of such processes" meant any of them incidental to bleaching and dyeing. The premises referred to in the section were bleaching and dyeing works in the ordinary sense of the words, where one or other of the processes named was carried on.

Mr. JUSTICE DAY said it was clear that the contention for the Crown was right. The Legislature had power to regulate factories, and they had done so. His Lordship then referred to the words of the section, and said that though not bleaching and dyeing works in the natural sense of the words, yet the premises in question were clearly within the definition of bleaching and dyeing works given in the section. The matter must go back to be dealt with by the magistrates.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Pritchard, Englefield, and Co., for Hill and Doughty, for the respondents; The Solicitor to the Treasury, for the appellant.]

Court of Appeal (Lord Halsbury, L.C., } 1898.
A. L. Smith and Collins, L.J.J.) } Jan. 23.

THE MERSEY STEAMSHIP COMPANY (LIMITED) V.
MAYOR, & C., OF LONDON.*

Thames—Navigation—Corporation of London (Tower Bridge) Act, 1885 (48 and 49 Vict., c. cxv.), sec. 54—Duty of Corporation to provide a steamtug—Liability.

This was an appeal by the defendants, the Corporation of London, from the judgment of Mr. Justice Mathew at the trial of the action with a special jury.

The case is reported in *The Times* of July 10. The action was brought by the plaintiffs to recover damages for injury to their steamship *Oratava*. The question arose under section 54 of the Corporation of London (Tower Bridge) Act, 1885 (48 and 49 Vict., c. cxv.), which imposes a duty upon the Corporation of providing and maintaining a steamtug for the purpose of assisting vessels and barges navigating the centre channel of the Upper Pool. That section provides that "if and so long as the Conservators (of the Thames) shall require them so to do, the Corporation shall, from and after the commencement of any temporary works in connexion with the construction of the piers of the Tower-bridge, at all times thereafter during the construction of the Tower-bridge, and after the completion thereof, provide and maintain a steamtug upon the River Thames between the Shadwell entrance to the London Docks and London-bridge for the purpose of assisting vessels and barges navigating the centre channel of the Upper Pool. The captain or other person in charge of the said steamtug shall in all things observe the bye-laws for the regulation of the navigation of the River Thames for the time being in force, and also the directions of the harbour-master and other officers of the Conservators." It appeared that the *Oratava* was coming out of the London and St. Katharine's Docks, which were just below the Tower-bridge on the north side of the Thames, stern first, shortly before high tide, when she was caught by the tide, and in consequence of the number of barges in the river she was placed in a position of danger with regard to one of the piers of the Tower-bridge. Her engines were accordingly put full speed ahead in order to bring her down the river and thus get her out of danger, when the propeller fouled a buoy and was damaged. It was admitted that the defendants had, at the request of the Conservators, provided and maintained a steamtug for the purpose of assisting vessels navigating the centre channel, that this steamtug was close at hand when the accident happened, and that the master of the tug saw the *Oratava*, but did not go to her assistance, as he did not think that she was in danger. It was also admitted or proved that if the tug had gone to her assistance it could have brought her head down channel and prevented the injury to her. The jury found that before and at the time of the accident the *Oratava* was navigating the centre channel of the Upper Pool. By consent all other questions were left to the Judge. The defendants contended that their sole duty under section 54 was to provide and maintain a steamtug and to place it at the disposal of the Conservators of the Thames, who had control of the navigation of the river, and that the master of the tug was the servant of the Conservators, he being bound to obey the orders of the harbour-master, who was in the employment of the Conservators and who alone could give him any orders, and that, therefore, they were not liable. The learned Judge held that the defendants' duty was to provide and maintain a tug and to assist vessels navigating the centre channel, that the master of the tug was the servant of the defendants, who were responsible for his acts, and that the master was negligent. He accordingly gave judgment for the plaintiffs.

Mr. Bucknill, Q.C., and Mr. Danckwerts (Sir Edward Clarke, Q.C., with them) appeared for the defendants.

Sir R. T. Reid, Q.C., and Mr. T. E. Scrutton, for the plaintiffs, were not called upon.

The COURT dismissed the appeal.

The LORD CHANCELLOR said that in his opinion the judgment of the learned Judge was right. The question turned upon the true construction of section 54 of the Corporation of London (Tower Bridge) Act, 1885.

By that section, when properly interpreted, the obligation of the defendants was to provide and maintain a steam tug when required to do so and to assist vessels navigating the centre channel when circumstances arose which rendered assistance necessary. If that were so the inevitable result followed that the defendants were guilty of a breach of duty by their servant, who was bound to assist and did not assist the *Oratava*. That really disposed of the whole case. No doubt the steam tug, in navigating the river, was bound, like any other vessel, to obey the orders of the harbour-master in the region of his administration. What that was the Thames Conservancy Act, 1894, showed. It was clear that there were two different sets of Acts, and there was no difficulty in assigning each to its proper jurisdiction. There was, first, the navigation of each vessel on the Thames, and there was also the general navigation of the river, the general dominion over the traffic on the river. To say that the navigation of each particular ship in the Thames was under the control of the harbour-master, who was the officer of the Thames Conservancy, was to reduce the whole thing to an absurdity, because that would make the Thames Conservancy responsible for every act of every vessel navigating the Thames. In his opinion the master of the tug was the defendants' servant, and the true construction of section 54 of the Act of 1885 was that the words "for the purpose of assisting" meant "and shall assist."

The LORDS JUSTICES concurred.

[Solicitors—R. Cattarns, for the plaintiff; H. H. Crawford, for the defendants.]

Chan. Div. }
(Stirling, J.) }

1898.
Jan. 28.

JENNINGS V. JENNINGS.*

Goodwill—Sale of business—Settlement of action between partners amounting to sale—Canvassing customers—Injunction.

The question in this case was one which often arises upon the termination of a partnership—namely, whether where one partner retains the business the others are entitled to canvass the customers of the old firm. It was decided by the House of Lords in 1896, in the case of *"Trego v. Hunt"* (L.R. [1896], A.C., 7), that upon the sale of the goodwill of a business the vendor was not entitled to canvass the old customers of the firm, and the substantial question was whether the present case was covered by that decision. The case came on upon a motion to restrain the defendant from canvassing customers of a business formerly carried on by the plaintiff and defendant in partnership. The partnership was entered into under articles dated January 25, 1896. In February, 1897, the present defendant commenced an action against the present plaintiff in the Queen's Bench Division, claiming a rescission of the partnership and damages on the ground of misrepresentation made by the present plaintiff to the present defendant. That action came on to be tried on November 22, 1897, but was at once compromised upon the terms stated in the following certificate:—"By consent the Judge directed that judgment should be entered for the plaintiff for £1,200, to include costs, on the following terms. All charges of fraud withdrawn. The plaintiff to be indemnified as to all debts of partnership, and the partnership to be dissolved, the defendant retaining the assets and allowing the plaintiff 14 days to remove from the premises. The

other action to be dropped. This in full settlement of all disputes." Subsequently, the defendant issued a circular to the old customers stating that he intended to commence business and asking for orders. Thereupon the present action was brought.

Mr. Rashleigh appeared for the plaintiff; Mr. Butcher, Q.C., and Mr. Daniel Jones for the defendant.

MR. JUSTICE STIRLING said that the injunction was claimed upon the authority of *"Trego v. Hunt"* (L.R. [1896], A.C., 7), in which it was established that when the goodwill of a business was sold the vendor, although he might set up a rival business, was not entitled to canvass the customers of the old business, and might be restrained from soliciting any person who was such customer to continue to deal with the vendor or not to deal with the purchaser. The obligation to refrain from canvassing the customers arose out of the relation of vendor and purchaser. His Lordship then referred to the observations of Lords Macnaghten, Herschell, and Davey in *"Trego v. Hunt,"* and, continuing, said that the source of the obligation was well shown by the decision in *"Walker v. Mottram"* (L.R., 19 Ch. D., 355), where it was held that a bankrupt, the goodwill of whose business had been sold by the trustee in his bankruptcy, could not be restrained from canvassing the customers, not because the goodwill sold by a trustee in bankruptcy differed from that sold by a solvent man, but simply because the bankrupt was not the vendor, and consequently under no liability towards the purchaser. "There is all the difference in the world" said Lord Macnaghten, referring to *"Walker v. Mottram,"* "between the case of a man who sells what belongs to himself, and receives the consideration, and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee." The first inquiry therefore must be whether the relationship of vendor and purchaser existed between the plaintiff and defendant, and in his Lordship's judgment that question must be answered in the affirmative. The judgment was one by consent upon terms agreed and stated by the certificate. The case was not one of a dissolution and sale by the Court, but of a dissolution by mutual consent, one of the terms being in substance a sale by the plaintiff of all his interest in the assets of the partnership for £1,200, and indeed this was not disputed by the defendant. Next, was the defendant the vendor of the goodwill? He sold all his interest in the "assets" of the partnership. Goodwill was not expressly mentioned. It was not disputed that the word "assets" included goodwill so far as it constituted property, but it was contended that the defendant was not such a vendor as to give rise to the obligation on which the plaintiff's title to an injunction rested. The word "assets" was a compendious expression for the aggregate of the several items of property belonging to the partnership. An agreement for the sale of such assets would in most cases bear the same construction and have the same effect as if the several items of property were specifically enumerated either in the body of the agreement or in a schedule annexed to it. There were however two cases, binding on his Lordship, which were said to establish that this was not always so. His Lordship then referred to the cases of *"Gray v. Smith"* (L.R., 43 Ch. D., 208) and *"Pearson v. Pearson"* (L.R., 27 Ch. D., 145), and said that in point of decision neither of those cases governed that now before the Court. *"Gray v. Smith"* did not, for it related to the use of the trade name and not to the canvassing of customers. It was, however, an authority in favour of the defendant to this extent, that it decided that a contract for the sale of "assets" generally did not always confer on a

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

purchaser the same rights as one in which goodwill was specifically mentioned. Neither again did "Pearson v. Pearson," for all the learned Judges relied on the terms of a clause, no equivalent to which was found in the agreement with which his Lordship had here to deal. It appeared, however, to be an authority in favour of the plaintiff so far as it contained expression of opinion by the majority of the Court of Appeal that, under a clause not substantially differing from the agreement now before the Court, the defendant was not entitled to canvass customers; while the third member of the Court (Lord Justice Cotton) apparently was not of that opinion. It appearing therefore that in some cases a contract for sale of assets did not confer on a purchaser the same rights as if the items of which the assets consisted, and in particular the goodwill, were specifically enumerated, it became necessary to inquire in what cases this happened. On a sale of property the parties did not in general contemplate the possibility of personal liabilities on the part of either contracting party arising otherwise than out of the contract itself. If, then, the purchaser tried to use some part of the purchased property (such as the trade name) in such a way as to throw on the vendor a liability not directly arising from the relation of vendor and purchaser, it might well be that he should not be allowed to do so unless he could point to something in the contract which justified his act over and above the mere description of the subject matter of the sale in general terms, such as "assets," "interest," "property," and the like. On the other hand, if a vendor sought to exonerate himself from a liability which would be the ordinary consequence of a sale of property comprised in the contract, his Lordship thought that he ought not to be allowed to do so unless he could point to some express stipulation in the contract for sale enabling him in that behalf. This view appeared to be consistent with both "Gray v. Smith" and "Pearson v. Pearson." It was to be observed that the obligation enforced in "Trego v. Hunt" was not confined to goodwill, but extended to other kinds of property. If, for example, the assets sold by the defendant to the plaintiff had included a house which adjoined land belonging to the defendant, he could not, after the sale, build on his own land so as to obstruct the access of light to the house which he had sold. It was true that if the house commanded a sea view the defendant could not be restrained from building so as to shut out from the house the view of the sea; but the reason was that the law did not recognize any property in such a view, although it did recognize a right to the access of light to a window. As the law recognized a property in goodwill, his Lordship thought that the defendant by selling it came under an obligation not to do any act which would injure it, and amongst such acts was included canvassing of the old customers. His Lordship then dealt with a further contention on behalf of the defendant—viz., that the word "assets" ought not to be held to include more than would be ordered to be sold if the Court were directing a sale for the purpose of winding up the partnership—but expressed no opinion upon the points to which it gave rise, and said that his present decision rested upon the following findings, viz.:—that the sale with which he had to deal was not a compulsory one made by the Court, but was the subject of a voluntary agreement containing no express stipulation reserving to the defendant any right to carry on business. His Lordship thought, therefore, that the defendant was subject to the ordinary obligations of a vendor, and that an injunction ought to be granted.

[Solicitors—Rashleigh, Son, and Hall; Boyce and Son.]

Q.B. Div. (Lord Russell of Killowen, C.J., and Mathew, J.) } 1898.
Jan. 29.

REG. V. TEMPEST AND ANOTHER (JUSTICES) AND CUTTS
—EX PARTE TOWNEND.*

Poor Rate—Distress warrant—Agreement with owner to pay rates—Poor Rate Assessment and Collection Act, 1869, secs. 3 and 16.

In this case Mr. Roskill appeared for the justices of the West Riding of Yorkshire to show cause against an order for a *mandamus* directing them to state a special case; Mr. Alexander Glen appeared in support of the rule.

The facts were these:—On June 19, 1897, a poor-rate for the parish of Hemsworth, in the county of York, was made and allowed. The rate on the face of it was expressed to be estimated to meet all expenses which should be incurred before September 29, 1897. In this parish the vestry, under section 4 of the Poor-rate Assessment and Collection Act, 1869 (32 and 33 Vict., c. 41), ordered the owners of all rateable hereditaments not exceeding £8 per annum to be rated instead of the occupiers. A Mrs. Cutts was entered as the owner of 12 dwelling-houses under the rateable value of £8 each. The houses were newly built, being completed and occupied just before the date of the rate on June 19. Mrs. Cutts on June 18 agreed with the overseers to pay the rates for the 12 houses whether occupied or not, and thereby obtained a reduction of 25 per cent. A demand for a rate of £5 8s. was made on her. She, however, refused to pay. The overseers took out a summons to enforce the rate. The justices ordered the issue of a distress warrant for the sum of £4 1s. 0½d., giving as their reason for not issuing a warrant for the full amount that the rate made on June 19 was current for the period from March 25, 1897, to September 29, 1897, while the houses were only occupied on June 12, and that, therefore, the rate ought not to be paid in full. An application was thereon made to them to state a case, but the justices refused to do so. Mr. Glen obtained a rule *nisi* to compel them to state a case; he had also asked for a rule for a *mandamus* to direct the justices to issue a distress warrant. The Court, however, had made him select between the two. On the present motion cause was shown against the rule for a special case on the ground that, on the authority of the case of "Boulter v. Justices of Kent," ([1897] App. Ca., 556), the justices enforcing a distress warrant, not being a Court of summary jurisdiction, could not state a special case.

Mr. ROSKILL cited "*Ex parte May*" ([1862] 31 L.J., M.C., 161); "*R. v. Price*" ([1880] 5 Q.B.D., 300), and urged that both these cases were still good law. He commented on "*R. v. Lord Mayor of London*" ([1887] 57 L.T., 491), and said that this was overruled by "*Boulter v. Justices of Kent*" ([1897] App. Ca., 556). He also cited "*Fourth City Building Society v. Churchwardens of East Ham*" ([1892] 1 Q.B., 661). The statute 52 and 53 Vict., c. 63, s. 13 (11), defined "Court of summary jurisdiction" to mean any "justice or justices . . . to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law." The words in the definition could not embrace all acts of magistrates, but only when they were exercising summary jurisdiction. The original jurisdiction to enforce a rate was under the statute of 43 Elizabeth c. 2, s. 2 (1601). Assuming that, under that statute, they exercised both

*Reported by H. RUSSELL Esq., Barrister-at-Law.

judicial and ministerial functions, they were still not exercising summary jurisdiction. Section 10 of the Summary Jurisdiction Act, 1884, provided that "nothing in this Act shall alter the procedure for the non-payment of any poor-rate." The case of "R. v. Lord Mayor of London" must be taken as being overruled by the case of "Boulter v. Justices of Kent." Therefore, the case of "R. v. Lord Mayor of London" was not an authority against his contention. At this point the COURT intimated that, as the whole of the difficulty could be avoided if the rule were moulded into one for a *mandamus* to the justices to issue a warrant, the merits of the case should be gone into.

Mr. ROSKILL said he would deal with them, though it was the other point that he had come prepared to argue. He then contended that the course followed by the justices was right and equitable and in accordance with the analogy afforded by section 16 of the Act of 1869, in the case of an occupier ceasing to occupy before the rate was discharged. Here the houses were non-existent for a great part of the time in respect of the expenses for which the rate was made.

The COURT, without calling on Mr. Glen, came to the conclusion that the best course would be for the matter to go back to the justices with the expression of opinion from the Court that a warrant of distress for the whole sum should issue, Mr. Glen to have liberty to apply again if necessary. It was probable that the lady would pay the rate after that. There would be no order for costs. The rate in this case operated from June 19, and the tenants who then occupied the houses would have been chargeable had not the landlady made a contract with the overseers by which she undertook to pay the rates for these houses herself. The 16th section of the Act (32 and 33 Vic., c. 41) did not apply to the circumstances of this case. Passing by the point that that section only applied to occupiers and not owners, as not being a broad enough point in this case there was no ceasing to occupy before the rate had been wholly discharged, nor was the hereditament unoccupied at the time of the making of the rate. Therefore the justices had no jurisdiction to say that only a proportionate part of the rate should be levied.

[Solicitors—Badham and Williams, for Trevor Edwards, to show cause; Speechly, Mumford, and Rodgers, for Joshua Scholesfield, for the rule.]

Q.B. Div. }
(Channell, J.) }

1898.
Jan. 29.

SEAWARD V. DREW AND FARMER (THIRD PARTY).
Landlord and Tenant—Lease—Determination—
Notice—Validity—Notice by mortgagee of
assignee of lease.

This was an action to recover rent under a lease dated February 1, 1883, and the question was whether that lease had been determined by notice at the end of the 14th year. The plaintiff was assignee of the original lessor. The defendant Drew was the original lessee. The third party, Farmer, took an assignment from Drew, and covenanted to indemnify him. Farmer by deed assigned to one Yarnold, who covenanted to indemnify him. Yarnold gave a charge on the lease to Messrs. Hays and Co. to secure £50, and deposited the lease with them. Yarnold disappeared, and left the premises unoccupied. Drew was called upon to pay the rent, and in turn called upon Farmer to indemnify him, and Farmer paid the rent. Farmer then took an assignment from Hays and Co. of his rights, whatever they were, and they accepted from Farmer £10 as purchase money of their debt of £50 due to them from

Yarnold. Farmer proceeded to take possession of the premises and let them, and applied the rents in discharge of the rents due to the plaintiff. The plaintiff was aware of what was being done, and applied to Farmer from time to time for rent due under the lease, giving him receipts for rents as being due from Drew. Notices of repair were given, which were done by Farmer. On September 24, 1896, notices were given by Drew and Farmer to the plaintiff's solicitors to determine the lease, and the question was whether the lease was thereby determined. The proviso in the lease under which the notices were given was as follows:—"In case the said Richard Drew, his executors, administrators, or assigns shall be desirous of determining this present lease or demise at the end or expiration of the first seven or 14 years of the said term hereby granted, and of such his or their desire or intention, shall give notice in writing to the said Frederick Hose, his heirs, or assigns, or shall leave the same at his or their usual or last-known place of abode in England, six calendar months before the expiration of the said seven or 14 years of the said term hereby granted . . . then and in such case forward and immediately after the expiration of such seven or 14 years of the said term this indenture and every covenant clause, matter, or thing herein contained shall cease and determine." It was contended that Yarnold having abandoned possession of the premises, thereby authorized Farmer to deal with them as he pleased, and Yarnold, if he appeared, would be estopped from denying Farmer's authority to give the notice.

Mr. JUSTICE CHANNELL, in giving judgment, said the plaintiff was not estopped by anything that had passed between him and Farmer from denying that Farmer was assignee, and unless there was such an estoppel, the dealings between them appeared immaterial. He did not think that Yarnold would be estopped from denying Farmer's authority to give the notice. Farmer's possession was only as mortgagee. No proceedings to foreclose had been taken, and no power of sale had been exercised. There was no authority to give the notice arising out of what Yarnold had done. He gave no authority to Hays and Co. by going away to do anything but protect their security, and possibly for that purpose he must be taken to have authorized them to take possession of the abandoned property. Farmer, as purchaser of Hays and Co.'s rights, got no authority except what they had. The fact that Yarnold failed to indemnify Drew and Farmer did not entitle them to touch or deal with his property in the term, any more than it entitled them to recoup themselves out of any other property that he might have left behind him. Neither Drew nor Farmer had any kind of lien or interest in the term after the assignment of it by Farmer to Yarnold. If Yarnold was insolvent and so unable to perform his covenants, Farmer, with good reason, might have called upon him to exercise his option, and determine the lease; but if Yarnold had unreasonably and vexatiously refused to do so, he could not be compelled by any process that he knew of to give the notice, or to give the use of his name that notice might be given for him. He could not be treated as a mere trustee of the option, and bound to exercise it as directed by Farmer. The notice did not purport to be given on behalf of Yarnold, and could not, therefore, be ratified by him. Under those circumstances, he must hold that the lease was still subsisting.

Judgment for the plaintiff for £30 against the defendant with costs. Judgment for the defendant against Farmer on the indemnity directing him to indemnify the defendant. Costs on the High Court scale.

Mr. Kerly (Mr. Duke with him) appeared for the plaintiff; Mr. Lailey for the defendant; Mr. English Harrison, Q.C., and Mr. P. T. Blackwell for the third party.

Court of Appeal (Lindley, M.R.,) 1898.
 Rigby and Vaughan Williams, L.J.J.) Feb. 1.

HOCKEY V. WESTERN.*

Mortgage—Rights of mortgagee—Mortgage of trust fund—Receipt by mortgagee—Conveyancing Act, 1881, sec. 22, subs. 1—Trustees—“*Re Bell*” ([1895] 1 Ch., 1).

This was an appeal by the plaintiff, Mr. Oliver Hockey, from a decision of Mr. Justice Kekewich's, dated November 12 last. The plaintiff and Mr. H. C. Hay (since deceased) were both members of an association called the Southwark Freehold Land and House Property Association. It was established on March 1, 1882, under an indenture of that date, its object being to purchase land in England for the purpose of dealing with the same as the association should direct. The defendants, Mr. John Western and Mr. William Butcher, were the present trustees of the association. On September 24, 1889, Mr. Hay assigned to the plaintiff, by way of mortgage to secure the sum of £600 and interest, all the money paid in and then standing to the account of Mr. Hay in the association and the value of his share and all other (if any), his right, title, and interest in the association and the benefit, advantages, and emoluments arising from the same, together with certain other property. On December 20, 1896, Mr. Hay died intestate. There was no legal personal representative in existence. On January 14, 1897, the defendants furnished the plaintiff with a cash statement of the association showing that there was due to him and to Mr. Hay and the other members of the association, on account of their respective shares therein, the sum of £300. Subsequently further sums of £50 were shown to be due to the members respectively. The defendants were authorized by a resolution of the members to pay these sums subject to each member signing a receipt for the same in an approved form. The plaintiff claimed as mortgagee to be paid the sums of £300 and £50 due to Mr. Hay, and he alleged that the defendants had refused and neglected to pay the same to him. He accordingly brought this action against the defendants to enforce his claim. By their defence the defendants stated that in January, 1897, they had had notice that the son of Mr. Hay was winding up the estate of his father. They alleged that the plaintiff, though often so requested, had wholly refused to produce to them for their perusal the mortgage deeds and to furnish them with any account of the moneys owing in respect of the mortgages; that they were willing and had offered the plaintiff to pay him so much of the sums of £300 and £50 as, upon taking the accounts between mortgagor and mortgagee, might be found to be due to the plaintiff and upon receiving from him a proper covenant of indemnity against any claims which might arise or be made upon them in respect of the said sums or in respect of the association. The plaintiff contended that—inasmuch as under section 22, subsection 1, of the Conveyancing Act, 1881, the receipt in writing of a mortgagee was a sufficient discharge for any money comprised in his mortgage, and that a person paying the same was not to be concerned to inquire whether any money remained due under the mortgage—it was the duty of the defendants to pay the money to the plaintiff, he being a person empowered to give a receipt. It was decided by Mr. Justice Kekewich on the authority of “*Re Bell*, *Jeffery v. Sayles*” ([1896] 1 Ch. 1), that the defendants were entitled to refuse to hand over the money to the plaintiff until

an account had been taken; and that upon their undertaking to pay the money into Court the action would be dismissed. From that decision the plaintiff now appealed.

Mr. WARRINGTON, Q.C., and Mr. A. BEDDALL for the appellant argued that the authority of “*Re Bell*” (*ubi supra*) was distinguishable—first, because in that case there was only part of a fund due, while in the present case *prima facie* the whole fund was due; and, secondly, because in that case there were known to be adverse claimants, and therefore persons with whom the trustees could settle, while in the present case there were no adverse claimants and, therefore, no persons to settle it.

Mr. Renshaw, Q.C., and Mr. R. H. Spearman for the respondents were not called upon to argue.

Their LORDSHIPS affirmed the decision of Mr. Justice Kekewich and dismissed the appeal.

The MASTER of the ROLLS, in giving judgment, said that the case was one of considerable importance to trustees and mortgagees of equitable interests. He took the law to be as it was laid down in “*Re Bell*” (*ubi supra*). The only question was what was the effect of section 22, subsection 1, of the Conveyancing Act, 1881. Speaking generally, that was a statutory substitution for the power to give receipts commonly inserted in mortgage deeds, and it must not be cut down. Under it it was perfectly safe to pay money to mortgagees; and a person paying was not concerned to inquire whether any money remained due under the mortgage. If, therefore, there was no notice of anything wrong, persons need not hesitate to pay on having the receipt. But was it misconduct to say that if there were something suspicious a person would be justified in refusing to pay? Was it any answer to trustees to say that they must not seek the protection of the Court? That would be a revolution in the law relating to trustees. The case was gone the moment it was decided that the trustees should pay the money into Court. If there were any circumstances which made it reasonable for trustees to decline to be satisfied that the money ought to be paid over to the person claiming, it was competent for them to pay it into Court. It was not necessary to go closely into the facts of the present case. Here there was a mortgagor who was dead. The trustees knew that there was a controversy as regarded the mortgage debt, and they required to have the protection of the Court. The position taken up by the mortgagee was that the trustees had nothing to do with that and must pay the money on his giving a receipt. That was going a great deal too far. The appeal must therefore be dismissed.

LORD JUSTICE RIGBY delivered judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—R. Chapman; A. H. Procter.]

Court of Appeal (A. L. Smith,) 1898.
 Chitty, and Collins, L.J.J.) Feb. 1.

MONTGOMERY, JONES, AND CO. V. LIEBENTHAL AND CO.*

Practice—Writ—Service—O. 11, r. 1. (e).

There is nothing in the rules to negative the right of a person to enter into an agreement as to the mode in which service of a writ may be made upon him.

This was an appeal from an order by Mr. Justice Phillimore. The plaintiffs were corn merchants carrying on business at Liverpool. The defendant resided at Leith, in Scotland, and carried on business

there as a corn merchant under a firm name. The action was brought for breach of a contract whereby the defendant agreed to sell to the plaintiffs a cargo of Northern spring wheat. The contract was in the form used by the London Corn Trade Association and was made at Leith. By the terms of the contract buyer and seller agreed that for the purpose of proceedings, either legal or by arbitration, the contract should be deemed to have been made in England and to be performed there, and that the service of proceedings upon a party residing or carrying on business in a foreign country by leaving the same at such Consulate, and upon a party residing or carrying on business either in Scotland or Ireland by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address abroad or in Scotland or Ireland of such party, should be deemed good service, any rule of law or equity to the contrary notwithstanding. The writ of summons, by which the action was commenced, was served by the delivery of a true copy thereof to the secretary of the London Corn Trade Association at the office of the association in the City of London. The defendant took out a summons at Chambers to have the service set aside, on the ground that under the rules of Court there was no power to effect such service. Mr. Justice Phillimore refused to set the service aside. The defendant appealed. It was contended on his behalf that according to the rules a writ could only be served upon him either by personal service or by substituted service in pursuance of a Judge's order, and that it was not open to the parties by any agreement to alter the rules as to the service of proceedings.

Mr. McCall, Q.C., and Mr. Tindal Atkinson appeared for the defendant; Mr. Joseph Walton, Q.C., and Mr. L. Sanderson for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion the order of Mr. Justice Phillimore was right. The defendant applied to have service of the writ set aside. The answer was that the writ had been served in the way in which he had agreed that it should be served. The defendant was a domiciled Scotchman, and he entered into a contract to sell corn to the plaintiffs. The contract provided that any party to the contract residing or carrying on business in Scotland or Ireland should be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, and that service of proceedings upon such party by leaving the same at the office of the London Corn Trade Association should be deemed good service, any rule of law or equity to the contrary notwithstanding. Why could not the parties enter into such an agreement? Except for Order 11, rule 1 (e), he could see no pretence for suggesting that a person in the position of the defendant could not agree that he would accept service of a writ in this manner as good personal service. The case of "Tharsis Sulphur and Copper Company v. Société des Métaux" (60 L.T., N.S.; 924) was in favour of the plaintiffs, and showed that parties might make such a contract, if it did not involve their asking the Court to do something which by the rules the Court was prohibited from doing. In the case of "British Wagon Company v. Gray" ([1896] 1 Q.B., 35) the Court was asked to do that which was expressly prohibited by Order 11, r. 1. (e), and it was on that ground that they declined to grant the application.

LORD JUSTICE CHITTY said that the real question was whether the parties could rightly enter into such a contract as was made here. It was argued that it was void by reason of the rules, and "British Wagon Company v. Gray" was relied on. But in that case

the rules contained an express prohibition. Here there was no such prohibition; in his opinion there was no rule which negated the right of a person to enter into an agreement as to the mode in which service of a writ might be made upon him.

LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Tyrer, Kenion, Tyrer, and Simpson, for the plaintiffs; Murray, Hutchins, and Stirling, for the defendants.]

Prob., Divorce, and Adm. Div. (The)
Right Hon. the President, Sir Francis
Jeune, and Gorell Barnes, J.)

1898.
Feb. 1.

THE MELROSE ABBEY.*

Ship—Charterparty—Construction—"Two voyages per month, fortnightly"—Meaning of.

This was an appeal from the decision of the Judge of the County Court of Glamorgan holden at Swansea. It appears that the respondents entered into a charterparty with the appellants to charter the steamship Melrose Abbey from the end of June, 1886, to the end of April, 1897, for two voyages per month fortnightly. The appellants placed the Melrose Abbey at the respondents' disposal on July 15 and 28, August 5, 19, and 31, September 16, and October 8 and 29. The respondents claimed to have been entitled to the ship on October 23, and not being able to obtain the vessel on that date they chartered another vessel and brought an action in the County Court to recover the extra freight they had had to pay for the vessel they had chartered in the place of the Melrose Abbey. Judgment having been given in favour of the respondents, the appellants appealed.

Mr. MONTAGUE LUSH, for the appellants, contended that the words in the charterparty, "two voyages per month, fortnightly," meant that the appellants were to supply a steamer at intervals of about a fortnight, and not more than two per month. This they had done. The steamer of October 8 was supplied before she was properly due under the charterparty, and the appellants were not bound to supply another till about the 28th.

Mr. PYKE, Q.C., and Mr. IVOR BOWEN, for the respondents, contended that one steamer was to be supplied at the beginning of the month and another at a fortnight from that date. So that if one vessel was supplied on the 8th of the month, another was to be supplied a fortnight afterwards, and the next steamer was to be supplied at the beginning of the next month. The fortnight was to be reckoned from the time the steamer at the beginning of the month was supplied, even though she was supplied at a date earlier than that stipulated in the charterparty.

The Court allowed the appeal with costs.

The PRESIDENT said that if the contention of the respondents was right it would lead to a curious result, and one that the parties could not have contemplated when they entered into the charterparty. On the respondents' contention the appellants would be entitled to supply a vessel at the commencement of the month, again on the 15th of the month, and not another till nearly a month later—or they might supply a steamer about the 14th of the month, another on the 28th, and again at the beginning of the next month. If, however, they read "fortnightly" approximately, all trouble in construing the charterparty was avoided. This the appellants had done, and, in his opinion, they had fulfilled all their obligations under their contract and were entitled to succeed in their appeal.

MR. JUSTICE GORELL BARNES, after concurring with

the judgment of the President, said that there was a clause in the charterparty which, in his opinion, emphasized the view taken by Mr. Lush. It was that "owners to have liberty of substituting their Tintern Abbey or other approved steamer." Reading that clause with the clause as to the sailing of the Melrose Abbey fortnightly, it was evident that the parties to the contract intended the Melrose Abbey to sail at regular intervals, and not in accordance with the way suggested by Mr. Pyke. The appeal must, therefore, be allowed.

[Solicitors—Vanderpump and Eve, for Ingledew, Sons, and Vanderpump, Swansea, for the respondent; Botterell and Roche, for Vaughan and Hornby, Cardiff, for the appellants.]

Chan. Div. } 1898.
(Wright, J.) } Feb. 2.

IN RE LAND MORTGAGE BANK OF FLORIDA (LIMITED).*

Company—Winding up—Voluntary liquidation—Surplus from calls in hands of liquidators—"Undistributed assets," what are—Scheme under Joint Stock Companies Arrangement Act, 1870—Companies (Winding-up) Act, 1890, sec. 15.

This case raised a very important question as to the powers of the board with reference to liquidators of companies. The company went into voluntary liquidation in December, 1895, and then appointed voluntary liquidators. This was done because the company had got into difficulties (caused by the destruction of the orange groves in Florida), and was unable to pay the interest on its terminable debentures. On April 15, 1896, a scheme was sanctioned by the Court under the Joint Stock Companies Arrangement Act, 1870. Under this scheme the uncalled capital was to be called up and thereout a dividend of 12s. 6d. in the pound was to be paid to the debenture-holders in September, 1897, the balance being payable in 1902, and the interest being kept down in the meantime. Any surplus from calls, after paying the first dividend, was to be applied according to the liquidators' discretion for management and other expenses. The scheme also gave the liquidators power to borrow for protecting and developing the assets. By a trust deed executed in pursuance of the scheme the liquidators covenanted to apply the proceeds of the calls in accordance with the scheme. The liquidators in May and September, 1897, delivered to the Registrar of Joint Stock Companies the statements of account required by section 15 of the Companies (Winding-up) Act, 1890, and the Board of Trade subsequently directed them to pay into the Companies Liquidation Account the surplus of calls which their accounts showed that they had still in their hands. The liquidators refused to comply with this direction on the ground that the money was net "undistributed assets" within the meaning of section 15 (3) of the Act of 1890. In consequence of such refusal the Board of Trade now moved for an order on the liquidators to pay the money into the Companies Liquidation Account.

Mr. INGLE JOYCE, in support of the application, said that the case was clearly within section 15 of the Act of 1890, and Rule 127D of the Winding-up Rules. The proceeds of calls were clearly assets, and they had not been distributed, although they had been in hand for more than six months. It was not proposed to interfere with the scheme, but only to see that the assets were in proper custody. This was the very object of section 15, and there could be no objection to complying with it except that it was supposed to be incon-

venient, and that the Act was absurd. The Act was plain in its terms, and must be obeyed.

Mr. TINDAL ATKINSON, Q.C., and Mr. THEOBALD, for the liquidators, said the case was not within section 15 at all. The winding up was a liquidation, for the present at any rate, for the debenture-holders' benefit only, and when the scheme was worked out the winding up would be stayed and the company would go on as before. The assets were not undistributed, for they were appropriated to the purposes of a scheme and a trust deed approved by the Court. Under the scheme so approved the liquidators had a discretion as to payments and otherwise, which the Board of Trade wished to take away from them. If the order was made the liquidators would have to ask the Board for every cheque they had to pay under the scheme. The money was safe in a bank, and ought not to be diminished by the payment of the fees which would be payable if it was paid into the Companies Liquidation Account.

MR. JUSTICE WRIGHT, in delivering judgment, said that the application failed. Under the Joint Stock Companies Arrangement Act, 1870, section 2, a scheme, on being sanctioned by the Court, became binding on the creditors or class of creditors concerned, and also on the liquidator. The material provisions of the scheme in the present case were embodied in paragraph 9 of the scheme, under which, if there was a surplus after paying a dividend on the debentures, it might be applied, before paying any further dividend, in the payment of wages, &c., or in "any expenditure which the company may think necessary or expedient for protecting and keeping up the company's property and assets, or of developing the same with a view to the realization thereof." The scheme further provided, by clause 20, that a proper trust deed, giving effect to the provisions of the scheme, should be prepared and executed, and under clause 23 this deed was to be settled by counsel approved by the Judge. This scheme had been sanctioned by the Court, and the trust deed contemplated by it had been executed, with provisions in it relating to the application of the moneys in the hands of the liquidator. Section 15 (3) of the Act of 1890 was as follows:—"If it appears from any such statement or otherwise that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies Liquidation Account at the Bank of England. Every such liquidator shall be entitled to the prescribed certificate of receipt for the moneys so paid, and that certificate shall be an effectual discharge to him in respect thereof." It was not suggested that the sums in respect of which the present application was made were unclaimed assets, but it was said that they were undistributed assets. The answer to that was that, having regard to the scheme, they were not undistributed, but that some legal event had happened which had made them distributable in another way. In his Lordship's judgment the matter was governed by the provisions of the scheme. The special legislation provided by the scheme was not to be overruled by the general legislation of the Act with reference to the liquidator's duties. If the application were well-founded, it would be competent to the Board of Trade, and might perhaps even be their duty, to get in all the moneys in the hands of the liquidator, and to take the whole matter out of his hands and substitute the discretion of the Board for that given to the liquidator by the scheme. That was not the conclusion at which his Lordship ought to arrive. The question had been very properly raised, but in his judgment the Board of Trade were not entitled to displace the discretion given

*Reported by F. EVANS, Esq., Barrister-at-Law.

to the liquidator by the scheme. The motion must therefore be dismissed with costs.

[Solicitors—The Solicitor to the Board of Trade ; Johnson, Weatherall, and Sturt, for Wade, Bilbrough, Booth, and Co., Bradford.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } Feb. 3.
IN RE THE M'DONALD GOLD MINES (LIMITED)—EX
PARTE DUNCAN.*

Company—Winding up—Petition to wind up, on the ground that the whole substratum of the company had gone, dismissed—"In re Coolgardie Consolidated Gold Mines (Limited)" (13 *The Times* L.R., 301) distinguished.

This was an appeal by the petitioner, Mr. James Duncan, from a decision of Mr. Justice Wright, sitting as an additional Judge of the Chancery Division, dated November 24 last. The above-named company was incorporated in December, 1896, with a nominal capital of £80,000, divided into 240,000 ordinary shares of 5s. each. By its memorandum of association the company's object was stated to be, among other things, to take over the business property, undertaking, and assets of a company then in liquidation called the Bathurst Gold Mines (Limited), and its incorporation was part of a scheme of reconstruction of the Bathurst Company. The petitioner was the holder of 200 shares in the Bathurst Company, and he applied under the scheme of reconstruction for and was allotted 200 shares in the M'Donald Company, on which the sum of 4s. had been considered to have been paid, and he had paid two calls of 3d. each, making the shares 4s. 6d. paid. The Bathurst Company had agreed with the M'Donald Company for the acquisition by the latter of the mines and mining property of the Bathurst Company in New South Wales. The petitioner alleged that the Bathurst Company had not the mines and mining property in New South Wales which the M'Donald Company was formed to acquire, nor any mines and mining property at all which the Bathurst Company could transfer to the M'Donald Company, and that the M'Donald Company was negotiating for the acquisition of some other mining property. Under these circumstances the petitioner submitted that the whole substratum of the M'Donald Company had gone, and that it was not possible to carry out the essential purpose for which it was formed, and that it was just and equitable that it should be wound up. He accordingly presented his petition in August, 1897. The petitioner was supported by only one creditor and contributory, but persons holding shares to the value of £41,308 out of a total number of 164 shareholders whose shares amounted to £53,618 opposed the petition. Mr. Justice Wright was of opinion that, if the directors found that it was desirable to abandon the Bathurst Company's mine for another mine, so long as they had money to acquire that mine, it was impossible to say that the substratum had gone. His Lordship accordingly dismissed the petition with costs. The petitioner now appealed.

Mr. EUSTACE SMITH and Mr. W. HIGGINS, in support of the appeal, relied upon "*In re Coolgardie Consolidated Gold Mines (Limited)*" (13 *The Times* L.R., 301, and 76 *Law Times Reports*, p. 269), among other authorities.

Mr. Butcher, Q.C., and Mr. Curtis Price were for the respondents.

The MASTER of the ROLLS, in giving judgment, said that the case was a curious one, and brought much dis-

credit on the Companies Act, 1862, showing how by great ingenuity the Limited Liability Act could be used for purposes that were never originally contemplated. [His Lordship stated the facts and continued.] The scheme of reconstruction was to transfer all the assets of the Bathurst Company as a going concern to the M'Donald Company. That scheme might be regarded as being the means of calling into existence the M'Donald Company. The petition was presented by the holder of a very few shares in the M'Donald Company in August, 1897, a little more than six months after the formation of that company. He might be said to stand alone. His interest was exceedingly small, his unpaid liability as a contributory being only £5. His case was that the primary object of the M'Donald Company was for working the Bathurst Company's mine, and that therefore the M'Donald Company had failed in attaining its object. His Lordship thought that it did appear that there was nothing worth having from the Bathurst Company's mine. Such as it had was apparently hardly worth working or taking over, although its plant and machinery might possibly be worth something. His Lordship, however, considered that there was great difficulty in bringing the present case up to the principle upon which the Court of Appeal acted in "*In re the Coolgardie Consolidated Gold Mines (Limited)*"—*ubi supra*. That was a sound principle, but he had great difficulty in applying that case to the present in consequence of the difficulty there was in construing the memorandum of association in the present case. A reconstruction scheme was contemplated which it was difficult to work out. His Lordship, therefore, was not satisfied that the present case was clearly brought within the wholesome principle of the "*Coolgardie*" case. It appeared that the only person who wanted the M'Donald Company wound up was this petitioner with a very small interest. If there was a winding up the petitioner would not get anything out of it. The other shareholders were against it altogether, and his Lordship did not see that the Court was bound in the face of that opposition to make a winding-up order. He did not think that the petitioner was entitled to a winding-up order *ex debito justitiæ*. He thought that the appeal failed, but he regarded the affidavits filed on the other side as fishy and tricky, and he considered that if his learned brothers agreed he ought to say—Dismiss this appeal, but without costs.

LORD JUSTICE RIGBY, in the course of his judgment, said that he was satisfied that the "*Coolgardie*" case was well decided, but he thought that this appeal should be dismissed on the grounds stated by the Master of the Rolls. He was not satisfied that the petition was really presented in good faith and not for a collateral purpose. He agreed that the appeal must be dismissed without costs.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Burgoyne, Watts, and Co.; William Sparks.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.JJ.) } Feb. 3.
LLEWELLYN V. VALE OF GLAMORGAN RAILWAY
COMPANY.*

Railways—Construction—Interference with roads—Right to sue for penalties—Owner of half of road.

Section 54 of the Railways Clauses Act, 1845, is

*Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.

*Reported by F. G. EUCKER, Esq., Barrister-at-Law.

applicable to a case where part of the width of the road interfered with is owned by one person and part by another, and the first of such owners who sues and brings his action to trial can recover the penalty.

Decision of Wright, J. (13 *The Times* L.R., 491, and [1897] 2 Q.B., 239), affirmed.

This was an appeal from the judgment of Mr. Justice Wright; reported in 13 *The Times* Law Reports, 491; [1897] 2 Q.B., 239. The action was brought under section 54 of the Railways Clauses Act, 1845, to recover £1,700 as penalties for 85 days for default on the part of the defendants in providing a road in substitution for another road which they temporarily obstructed. The plaintiff was the owner of land situated near Bridgend, in the county of Glamorgan, and bounded on one side by a road which was not a public highway, but was an occupation road used by the owners of the lands adjoining it. The plaintiff, therefore, was the owner of one-half of the road—*usque ad medium flum.* The defendants were, by a special Act incorporating the Railways Clauses Act, 1845, authorized to construct a railway crossing the road at a point adjoining the plaintiff's land, and in constructing their railway they temporarily interfered with the road, and rendered it impassable, without providing a substituted way as required by section 53 of the Railways Clauses Act, 1845. The plaintiff contended that the defendants were liable to penalties under section 54 of that Act. By section 53, if it be found necessary to cross, cut through, raise, sink, or use any part of any road, either public or private, so as to render it impassable for or dangerous or extraordinarily inconvenient to persons entitled to the use thereof, the company shall, before commencing such operations, cause a sufficient road to be made instead of the road to be interfered with. By section 54, "If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit £20 for every day during which such substituted road shall not be made after the existing road shall have been interrupted, and such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or, in case of a private road, the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior Courts." The defendants contended that the plaintiff, being the owner of one-half of the road, was not the "owner" of the road within the meaning of section 54, and could not sue for the penalties. By a compromise it was agreed that, if the plaintiff was entitled to recover, £150 should be the amount recoverable. Mr. Justice Wright held that the plaintiff could recover, and gave judgment for him. The defendants appealed.

Mr. Cripps, Q.C., and Mr. Kenyon Parker appeared for the defendants; Mr. C. A. Russell, Q.C., and Mr. E. F. Buckley appeared for the plaintiff.

The Court, having taken time to consider, delivered judgment, dismissing the appeal.

LORD JUSTICE CHITTY read the judgment of the Court as follows:—This is an action to recover penalties from the defendants; a railway company, who in contravention of section 53 of the Railways Clauses Act, 1845, cut through and otherwise interfered with a private road without first causing a sufficient road to be made in substitution as required by that section. The plaintiffs are the owners of the soil of half the road up to the middle

line in that part of the road which was wrongfully cut through and interfered with. Mr. Justice Wright gave judgment for the plaintiffs for the amount at which the parties agreed the penalties in the event of the plaintiffs being entitled to succeed. The only point raised by the defendants on the appeal was that the plaintiffs were not "the owner" of the private road within the meaning of section 54 of the Act. The contention was pushed to the extreme length of saying that "the owner" meant all the owners for the entire length and breadth of the road, and apparently without any defined limit in the direction of the road, and it was argued that no action could be sustained for the penalties unless all such owners joined in the action. This contention is extravagant; if accepted it would operate to defeat the obvious intentions of the Legislature in many, if not in most cases. If any one of a dozen or a hundred of such owners declined to join in suing, the railway company would escape the penalty. It was further contended for the appellants that if this argument failed, as we think it does, the owner of the soil in the other half of the road ought to have joined in this action, and that the plaintiffs, suing alone, cannot recover. At the outset it is plain that the owner of one half had not in 1845, nor has he now, any power to compel the owner of the other half to join in suing. The question turns on sections 53, 54, and 55 of the Act. It is not necessary to state in full the terms of section 53. There is nothing in that section or in the other parts of the Act to oust the jurisdiction of the Court to grant an injunction. Section 54 divides itself into two parts. The first imposes the penalty and runs thus:—"If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit twenty pounds for every day during which such substituted road shall not be made after the existing road shall have been interrupted." This is plainly a penalty; it is not intended to be a sum payable by way of compensation for the wrong done to any particular person or to his soil or interest in the road. It is imposed by way of punishment on the railway company for their high-handed and illegal acts in violation of the provisions of section 53, and it is intended as a deterrent against the continuance of the illegal acts. There is another point. The penalty is £20 for every day during which the offence is committed. We think it is clear, on the language of the statute itself, and without having recourse to the principle on which the leading case of "*Crepps v. Durden*" (Cowp. 640) was decided, that one penalty, and one penalty only, is inflicted for every day. Mr. Justice Wright seems to have been inclined to think that more than one penalty of £20 for each day was recoverable. We are unable to accept that suggestion, but we entirely agree with him in the opinion that the penalty is not apportionable; it is one entire sum of £20. This has an important bearing on the second part of the section, and tends to support the plaintiffs' case. The second part runs thus:—"And such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or in case of a private road the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior Courts." Before commenting on this part of section 54, we will state shortly the effect of section 55:—"If any party entitled to a right of way over any road so interfered with" suffers special damage by reason of the failure to substitute a sufficient road, he may recover the special damage by action, and that

"whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." Damages recoverable under this section are by way of compensation to the person whose right of way is interfered with and who can prove special damage; these damages are wholly distinct from the penalty, and are recoverable whether the penalty has been sued for or not. There may be a question whether the right of way spoken of in this section is a right of way in the strict legal sense of the term, or a right of passing over the road in the more popular meaning of the words. It is not necessary to express any opinion on this point, and we refrain from so doing. If the term is used in the strict sense, the owner of the soil of one half of the road could not recover the special damage in respect of his own half of the soil of the road, because a man has no right of way over his own land; but he could in a case like the present recover his special damage for obstructions of the right of way which he is entitled to over the other half of the soil of the road, and the owner of that half would be in a corresponding position. If, on the other hand, the expression "right of way" is used in the popular sense, then each owner could recover the special damage proved in respect of the entire breadth of the road. Practically there would be little, if any, difference between the amount of the special damage recoverable whichever view be taken of the meaning of the term "right of way." These considerations appear to us to remove in great measure the difficulty which Mr. Justice Wright felt in the supposed case of the railway company breaking up or stopping up a mile of road each hundred yards of which is owned by a different person. Section 55 applies to a public road and a private road without distinction, and all persons, whether landowners or not, who are entitled to a right of way or of passing over the road (whichever be the right expression) can recover the amount of the special damage sustained, whether the road be public or private, and quite irrespectively of the penalty. We revert to the second part of section 54. Under the older system of legislation the enforcement of the penalty would probably have been left to the common informer in a *qui tam* action; and had such been the case, the informer who first instituted proceedings or obtained judgment would have received the fruits of his diligence to the exclusion of all others. But here the common informer is excluded by the language used. The enactment is that the penalty shall be paid. Then a distinction is drawn between a public road and a private road. In the case of a public road the penalty is to be paid to the trustees, commissioners, surveyor, or other person having the management of the road. Exactly the same point as is raised on this appeal might arise with respect to a public road. The management of the road, conceivably, might be vested in one body up to the middle of the road on one side and in a different body up to the middle on the other side. It was stated at the Bar that such cases do in fact exist. In the case of a private road the enactment is that the penalty shall be paid "to the owner thereof," and the section concludes by making the penalties recoverable in both cases by action. Now we think that the word "thereof" relates exclusively to that particular portion of the road which is crossed, cut through, or otherwise unlawfully interfered with by the company in violation of section 53. The appellants' counsel referred to the interpretation clause (section 3) as to words importing the singular number including the plural, which is in the usual form, and argued that "the owner" meant all the owners of the part affected. They did not refer to

the same clause as to the interpretation of the term "owner," because they admitted (and rightly) that the plaintiffs were owners of the soil of half the road within the Act. Where an Act is open to two constructions, that construction ought to be adopted which is the more reasonable and the better calculated to give effect to the expressed intention, which, in this case, is that the penalty shall be paid. The result of adopting the appellants' contention would be in many cases to enable the company to escape the penalty by placing practical difficulties in the way of its recovery. As already pointed out, the owner of one-half of the soil of the road cannot compel the owner or owners of the other half to join in suing; he or they may decline to do so without assigning any reason; they may be numerous, or under some incapacity, as infancy, lunacy, or the like, or they may be interested in the company. The conclusion at which we arrive is that the Act ought so to be read as to afford facilities for suing; that the owner of the soil of part of that portion of the road interfered with can sustain an action for the penalty; and that, in analogy to the case of the common informer, the first of such owners who sues and brings his action to trial can recover. We further hold that the plaintiffs can retain the penalty for their own use, and that the defendants are not liable to more than one penalty of £20 for each day during which their wrongful acts are continued. For these reasons we think the appeal ought to be dismissed with costs.

[Solicitors—Soames, Edwards, and Jones, for Randall and Cay, Bridgend, for the plaintiff; Downing, Holman, and Co., for Downing and Handcock, Cardiff, for the defendants.]

Chan. Div. }
(Kekewich, J.) }

1898.
Feb. 3.

IN RE DE NICOLS—DE NICOLS v. CUELIER.*

International Law—Husband and wife—French law as to community of goods—Change of domicile—Will.

A Frenchman and a Frenchwoman having married in France without entering into any contract altering the French law as to community of goods between husband and wife subsequently acquired a domicile in this country, the husband taking out letters of naturalization as a British subject.

Held, that "movable goods" such as money and securities acquired by the husband during his domicile here are not affected by his will made here according to English law so as to deprive his widow of the rights originally vested in her by the French law at her marriage.

This case raised a curious and interesting question of international law—namely, whether, where a Frenchman and a Frenchwoman, having married in France without entering into any marriage contract altering the French law as to the community of goods as between husband and wife, subsequently come over to this country and acquire a domicile here, "movable goods," such as money and securities, acquired by the husband during his domicile here can be affected by his will made here according to the English law, so as to deprive his widow of the rights originally vested in her by the French law at the date of her marriage. It was stated that though there were *dicta* by Judges and text writers on the subject, the point had not previously

come before the Court for actual decision. The question now arose in consequence of the death of a testator—Mr. Daniel Nicolas de Nicols, the late proprietor of the Café Royal, Regent-street. The story of the case was a curious and romantic one. In the year 1854 Mr. de Nicols was a man of no means, earning his living as a coachmaker in Paris, at wages. On May 30 in that year he married his first cousin (both being of age), the ceremony being performed at the mayor's office of the Third District of Paris, and the marriage was duly registered at the Prefecture of the Department of the Seine. It appeared, however, that the register was destroyed by fire by the Commune at the close of the Franco-German War. No contract of marriage was executed on the marriage, but in accordance with French law and custom the municipal officer who performed the ceremony formally called upon the parties to declare whether they had executed any contract of marriage, to which they both replied in the negative, when their answers were duly recorded on the usual "Minute." The husband had at the time of the marriage no property whatever of his own, but the wife was possessed of a small piece of land at Vachy, in France, which was the birthplace of both of them, a sum of 1,000*fr.*, or about £40, in cash given to her as a *dote* by her parents, and a sum of between 1,500*fr.* and 1,800*fr.*, or between £60 and £64, representing savings by her as an assistant in a linen business. Soon after the marriage the husband and wife sold the piece of land for 500*fr.*, or about £20, and became managers of a wine and spirit business in Paris, which in a year's time they purchased from the proprietor for 6,000*fr.*, made up of the proceeds of the wife's piece of land, her *dote* and savings, and the joint earnings realized by her husband and herself in carrying on the business. In December, 1862, they sold that business for 14,500*fr.*, or about £580. In October, 1863, Mr. and Mrs. de Nicols came over to England, and with a sum of about £400, which represented their sole property, set up a small café, called the Café Royal, in Glasshouse-street, Regent-street, and under their skilful management this café expanded into the large and well-known café of that name in Regent-street. In 1865 he took out letters of naturalization as a British subject, and he and his wife remained in this country until his death, she actively assisting him in the management of the café. Out of that business and from an interest in the property upon which the Empire Theatre now stands Mr. de Nicols amassed a fortune of about £600,000. On February 28, 1897, he died, having made a will dated March 22, 1895, in the English form, in which he described himself as "of the Café Royal, No. 68, Regent-street, in the county of Middlesex, and Regent-house, Surbiton, in the county of Surrey, restaurant proprietor," and proceeded, "I hereby declare that I am a domiciled Englishman naturalized in England in the year 1865." Then, after appointing three persons his executors and trustees, and bequeathing various legacies, he gave his residuary real and personal estate to them in trust for sale and to hold the proceeds on trust for his wife for life and after her death upon trusts for his daughter, her husband, and children. He died possessed of considerable freehold and leasehold property besides investments in numerous stocks and shares. It was said that he had also £100,000 worth of wine in France. The only issue of the marriage was one child, a daughter. This was an originating summons taken out by Madame de Nicols, the widow, against the executors and trustees of the will and the daughter, to ascertain (amongst other things) what were the rights and interests of the plaintiff in the real and personal estate of the testator by reason of her marriage with him without any marriage settlement or contract, the parties being then domiciled in France. Subsequently the

question for decision was formulated in Chambers as follows:—"Did the change of domicile alter the legal position of the parties to the marriage in reference to property?" And the summons was adjourned into Court for argument on this question. Upon the summons being opened it was arranged that the argument should be confined to the effect of the change of domicile on the testator's "movable goods" only. The contention on the part of the plaintiff was that the "*communauté légale de biens*" was never dissolved during the joint lives of herself and her husband, and that such "*communauté*" regulated the property and interests of herself and her husband as from the date of the marriage up to the determination of the "*communauté*" by his death, and that she was entitled under it to one moiety of all property in the possession of her husband or of him and herself jointly at the time of his death, notwithstanding his will. On the other hand, it was contended on behalf of the defendant, the child of the marriage, that the rights of the parties were governed by the law of their changed domicile.

Mr. Renshaw, Q.C., and Mr. Ingle Joyce appeared for the plaintiff; Mr. Warrington, Q.C., Mr. E. J. Elgood, and Mr. Maugham for the defendants, the executors and trustees; and Mr. A. V. Dicey, Q.C., and Mr. Whinney for the defendant, the daughter.

MR. JUSTICE KEKEWICH said the only question he was now called on to decide was whether, with regard to the property conveniently described as "movable goods"—though the expression was not so familiar to the English law as to the writers of books on international law—of which this testator was at his death in the ostensible possession, his widow was entitled to some interest in it by virtue of French law applicable to his property at the date of the marriage, and continuing during the rest of their joint lives. It was admitted on both sides that there was no decision on the question, that is to say, no decision of a Court of competent jurisdiction in England, by which this question had been determined. There were *dicta* of Judges, but beyond a *dictum* of Lord Eldon's, the meaning of which was not quite clear, there were none which touched the point he had now to decide. There were plenty of *dicta* in the text-books, some of which, so far as they went, seemed to be in favour of the plaintiff; and, so far as a consensus of opinion could be gathered from them, it was not adverse to the plaintiff's claim in the present case. The result was that he must decide the case on principle. It might be that the principle which occurred to him as governing the case might not be the right one. If so, no doubt he would be corrected. But if one got hold of a principle governing the case, the only course was to follow that principle right through to its conclusion and apply it to the facts before the Court. The principle upon which he should base his decision was this. These spouses were French people and they intermarried in France. It was open to them to marry according to one or more regulations affecting matrimonial property—property which they might acquire during coverture. They had some choice in the matter. They might have elected to marry according to the rule as to community of goods, a rule that was applicable to their proprietary rights in the absence of any express election to the contrary; and that was, so far as was known, what took place. It might be that there was something more, because it had been mentioned that in the fire which followed the Franco-German war many documents in Paris were destroyed; and it might be that there was some evidence of a contract between the parties. But, so far as it appeared, they did marry according to the law of France so as to settle the property they then had according to the law applicable to community of goods. In his Lordship's opinion, that was a contract entered into by them, a contract which

this Court did not regard as the less effectual to include property after acquired because it was not at that time so expressed and was not in the contemplation of the parties. The contract was as effectual as regarded property after acquired as property contemplated at the time; and, if so, that contract was thenceforward binding upon property whether in possession or after acquired, even though neither party contemplated a change of domicile. There was no reason why it should be inferred that the contract did not include property after acquired as well as property existing at the date of the marriage. If the principle he had endeavoured to expound was right, the contract must be held to have related not only to property which the parties had at the time of the marriage, but also to property which they might thereafter acquire. That was the principle which, in his opinion, he ought to apply. These spouses lived here, became domiciled here, and to all intents and purposes they were an Englishman and an Englishwoman. No doubt they must look at the domicile to see what were the rights under this will and to ascertain the rights of the parties among themselves—that is, the husband, wife, and child. But they must look back to the matrimonial domicile and see what the rights were then. They must not apply the domicile doctrine to the moment of death only, by regarding the then domicile of the husband. The domicile at the death did not govern rights of his which did not exist. He did not affect to dispose of property which was not his; and to see what was his property and what was not they must look back and see what was the law that governed his proprietary rights. Those rights were, it appeared to his Lordship, fixed at the time of the marriage—that is, they were governed by the law as to the community of goods, both with regard to property the parties or either of them had at that time and to property that might be after acquired. His Lordship saw nothing to alter that contract, and there was, in his opinion, no principle requiring him to say that by a change of domicile at any time subsequently there was any surrender by the wife of that to which she was entitled under the matrimonial contract; and therefore he must hold that the husband by his will disposed only of such property as was properly his, and that it did not include what was the wife's property under the matrimonial contract—that is, her right under the law of community of goods. Therefore he would make a declaration that the plaintiff's right under that law to movable property acquired during the coverture by husband and wife, or either of them, was not affected by this will. But this decision was without prejudice to any question as to the rest of the property of the testator, and therefore the rest of the summons must stand over.

[Solicitors—Hicks, Arnold, and Mozley; Tyrrell-Lewis, Lewis, and Broadbent.]

Chan. Div. } 1898,
(Byrne, J.) } Feb. 3.

J. LYONS AND SONS V. WILKINS.*

Trade Union—Strike—Picketing—"Watching and besetting"—Conspiracy and Protection of Property Act, 1875, secs. 3 and 7.

This action was tried last sittings, when his Lordship reserved his judgment. Since the trial, the House of Lords has delivered its judgment in the case of "Allen

v. Flood," which is reported *ante*, p. 125, and [1898] A.C. 1. The Amalgamated Trade Society of Fancy Leather Workers (who are registered under the Trade Unions Act, 1871) were at one time joined as defendants to the action, but during the trial their names were struck out. As regards Messrs. A. Thompson, J. Laverick, and F. Goodhall, the trustees of the society, the pleadings were directed to be amended by stating that these defendants were sued in their representative capacity. Mr. P. C. Wilkins, another defendant, was the secretary of the society, and C. Clarke was one of its executive officers. The action was commenced in consequence of what took place in connexion with a strike in 1896 of the workmen employed by the plaintiffs, who were leather bag and portmanteau manufacturers carrying on business in Redcross-street, London, E.C. The other material facts are stated in his Lordship's judgment.

Mr. Eve, Q.C., and Mr. Ward Coldridge were for the plaintiffs; and Mr. Jenkins, Q.C., and Mr. W. H. Cozens-Hardy for the defendants.

MR. JUSTICE BYRNE gave judgment as follows:—In this case, the plaintiffs have obtained an injunction until judgment to restrain the defendants Wilkins and Clarke, their servants or agents, from watching or besetting the plaintiffs' works for the purpose of persuading, or otherwise preventing, persons from working for them, or for any purpose except merely to obtain or communicate information; and also from preventing Adolph Schoenthal or other persons from working for the plaintiffs by withdrawing his or their workmen or workwomen from their employment respectively. By a slip, the order as drawn up has been made more extensive, but the terms I have mentioned are the true terms of the order pronounced by the Court of Appeal, as appears by the judgment of Lord Justice Kay (12 *The Times* L.R., 278, and [1896] 1 Ch., 811, 832). In substance, at the trial the plaintiffs have clearly proved the case made upon the motion as to watching and besetting the plaintiffs' premises illegally, and in my judgment they are entitled to have the injunction made perpetual, so far as the first part of the injunction is concerned, for the reasons given by the Court of Appeal upon disposing of the motion; and I do not consider it necessary to add anything upon the law bearing upon this part of the case. I consider that it is clearly proved that the defendants Wilkins, Clarke, and Thompson watched and beset the plaintiffs' works, or place of business, and the approaches thereto for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, and for purposes other than that of merely obtaining or communicating information. In reference to the second part of the injunction, I think the case made upon the motion is fully proved, and I think also that it has been clearly shown that the same defendants illegally watched and beset the premises of Schoenthal for the purpose of preventing him from working for the plaintiffs, but I think it probable that the Court of Appeal would have framed the second part of the injunction granted in a different manner had the case of "Allen v. Flood" then been decided by the House of Lords. At any rate, the point has not been specifically argued whether or not, apart from the question of malice, it was unlawful to call out the workmen of Schoenthal in order to prevent him from working for the plaintiffs. Had the matter been one of importance in the present case, I should probably have required further argument, but the strike is long since over, and I have assumed that the parties would prefer not being put to the trouble and expense of a re-argument upon this point. I propose, therefore, to grant a perpetual injunction following the terms of the first part of the order of the Court

*Reported by F. EVANS, Esq., Barrister-at-Law.

of Appeal, but to frame the latter part of the injunction as follows, "and also from watching or besetting the premises of Adolph Schoenthal for the purpose of persuading or otherwise preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information." The injunction must extend to the defendant Thompson, who participated in the wrongful acts committed. The acts in question being unlawful, the other defendants, if they conspired to induce the commission of such acts, are equally liable to an injunction, and by their amended defence all the defendants make common cause and accept common responsibility in respect of the matters I have referred to, as well as in respect of the alleged libels, which still remain to be dealt with. And, indeed, it is difficult to see how, as officers of the society under an obligation to attend all meetings of the executive council, under whose directions the defendant Wilkins acted, and with power to express their opinions, they could well do otherwise, whatever the domestic constitution of the society they belong to may provide as to their voting powers. The plaintiffs further ask for an injunction to restrain the defendants from maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs, and I postponed judgment at the request of both parties until after the decision of the House of Lords in "Allen v. Flood" should be given. The effect of that decision, which has now been delivered, is, in my opinion, to show that the plaintiffs are not entitled to this injunction. It was conceded by the plaintiffs that they could not succeed unless they could show malice; and it is the law, as finally determined by the House of Lords, that the existence of a malicious motive cannot in such a case as this render unlawful an act or acts otherwise lawful. Another injunction was asked for by an amendment made by leave at the trial against the defendants Thompson, Laverick, and Goodhall, as trustees of the society, from applying the funds of the society in furtherance of the wrongful acts complained of. I am of opinion that there is no legal ground to justify such an injunction, and I refuse it, and disallow the plaintiffs the costs of the amendment made in pursuance of such leave. I now come to a part of the case which has not been dealt with upon motion—viz., the question whether or not the plaintiffs are entitled to an injunction or to damages in respect of certain alleged libels. These are contained in two letters, the first being dated January 11, 1896, written by the defendant Wilkins, as secretary of the society, to Mr. J. Thorne. The plaintiffs had at that date and still have in their employment a youth named John Joseph Thorne. The letter was meant for him, but, being addressed to Mr. J. Thorne, was received by his father. The other alleged libel is contained in a letter addressed to Mr. Rudge, the father of another youth, named Thomas Rudge, then and still in the employment of the plaintiffs. The father was, in fact, dead, and the letter was consequently received by Thomas Rudge himself. I think that those letters contain statements which are distinctly calculated to injure the plaintiffs in their trade, and to hold them up to hatred and contempt in the eyes, not only of workmen and of fair employers of labour, but also of customers and persons who might intend to become customers. It appears to me that the letter to Thorne means that he is being grossly underpaid, receiving less than half the wages which men in other firms are receiving for the work he is doing, and that the plaintiffs endeavour to get their labour for a "starvation wage." Some argument was addressed to me as to the true interpretation to be put upon the expression "starvation wage." Whatever else it means, and whatever it does not mean, I am satisfied that, as used in the letter, it does mean a

rate of wages unfair, unusual, and such as a decent employer of labour would not pay. The letter to Rudge, I think, means that Thomas Rudge was being grossly underpaid by the plaintiffs, and that the plaintiffs impose unfair conditions of labour on their workpeople. The defendants all join in the plea that the statements in both the letters are true in substance and in fact. In my view, the evidence proves generally that the rate of wages received by the persons employed to do the work required by the plaintiffs was fair and usual. On the part of the defendants there was really no substantial evidence of underpayment at all, and one of their witnesses, Arthur Davies, seems upon his own showing to have been sufficiently and properly paid, actually receiving less at the first places he went to after leaving the plaintiffs than he had received while with them. He has since improved and now earns more, but when he went to the plaintiffs he was a lad of from 13 to 14 years of age, working in a bag shop for the first time, and while with them he says he was only a beginner and improved very little. A. J. Roberts does appear to have got a substantial rise in wages when he left the plaintiffs and took a fresh employment, and he says he did "pretty well the same work as at Lyons's," but no details were given, and I do not think that the mere fact of his getting the rise is sufficient to enable me to say that he was underpaid by Lyons and Co. It appears that the plaintiffs do not pay their workpeople in the bag department directly, but that they employ a foreman, D. Murphy, to whom they pay so much per dozen or per gross for bags, he engaging and paying the hands, some of whom are employed at piecework and others at weekly wages. The plaintiffs find the business premises and pay establishment expenses. Opinions may differ, and fairly differ, according to the point of view, whether or not this is a method best calculated to regulate fairly the relations between employers and employed, but it is perfectly lawful, and if the hands are fairly paid it affords no justification for the statements made in respect of the plaintiffs. As to the particular cases of Thorne and Rudge, I have heard their evidence, and I do not consider that there is any justification for the suggestion that they were grossly or at all underpaid. Rudge was an improver, learning his business, and about 18 years old, and Thorne was a lad of about 17. The work they were doing was lad's work and not men's work, and they never complained. Rudge did get a rise of wages in January, 1896, from 12s. to 15s. a week, about the time of the commencement of the strike, but that was given to him when he asked for it, and it is in accordance with the practice to raise the boys' and improvers' wages as they learn to do their work better. He says that when he got the letter he showed it to some friends, and decided to remain at work, being then satisfied with his wages. Having regard to the facts that the libels were not repeated, that they were contained in letters which did not remain long in the hands of the recipients, and that the recipients were not induced by them to leave their employment, I think that justice will be satisfied if I award £5 damages in respect of the libels, which I accordingly do. The strike being long since over, I understand that the plaintiffs do not care actually to take an injunction. The defendants must pay the costs of the action except those I have mentioned, but they are entitled to be paid the costs of the motion to strike out the name of the society as defendants, and there must be the usual set-off. His Lordship also dealt with a question as to the costs of certain particulars. The defendants intimated that they would probably appeal, but not on the finding as to libel.

[Solicitors—Warburton and De Paula; Sharn, Roscoe, Massey, and Co.]

Q.B. Div. }
(Phillimore, J.) }

1898.
Feb. 3.

RE HOGG—EX PARTE PARKIN.*

Friendly Society—Dispute—Arbitration clause—
Friendly Societies Act, 1896, sec. 68—Jurisdiction—
Writ of prohibition to County Court
granted.

This was an application by John James Parkin, the secretary of the Pride of the Valley Court of the Ancient Order of Foresters Friendly Society, for a prohibition in an action in the County Court of Derbyshire, held at Alfreton, in which James Hogg was the plaintiff and the applicant was the defendant.

Mr. Montague Lush appeared for the applicant; and Mr. Scarlett for Hogg.

The question in the case was whether the County Court had jurisdiction to hear an action brought by James Hogg, who was a member of the Pride of the Valley Court of the Ancient Order of Foresters, against the secretary of the order, claiming certain sick pay alleged to be due, having regard to the provisions of section 68 of the Friendly Societies Act, 1896 (59 and 60 Vict., c. 25). Section 68 provides "Every dispute between (a) a member . . . and the society or branch or an officer thereof . . . shall be decided in manner directed by the rules of the society or branch . . ." and subsection 6 provides "Where the rules contain no direction as to disputes, or where no decision is made on a dispute within 40 days after application to the society or branch for a reference under its rules, the member or person aggrieved may apply either to the County Court or to a Court of summary jurisdiction, and the Court to which application is made may hear and determine the matter in dispute; but in the case of a society with branches the said 40 days shall not begin to run until application has been made in succession to all the bodies entitled to determine the dispute under the rules of the society or branch, so however that no rule shall require a greater delay than three months between each successive determination." By the general laws of the order, and by the rules of the court to which Hogg belonged, it was provided that all matters of dispute under the rules of the court should be referred to the arbitration committee of the court, subject to an appeal to the district arbitration committee and to a final appeal to a committee elected by all the districts of the order. In the year 1894 Hogg became entitled to sick pay under the rules of the court. He was paid 6s. per week, but he claimed to be entitled to 8s. per week. In August, 1895, he brought an action in the County Court against the secretary of the Court, claiming £3 2s., the balance alleged to be due from June 4, 1894, to December 29, 1894. This action was dismissed by the County Court Judge, with costs, on the ground that he had no jurisdiction to try it. In the meantime, in December, 1894, the court passed a resolution fixing Hogg's rate of sick pay at 3s. per week for life. On March 21, 1896, Hogg was suspended for refusing to pay the costs of the action brought in the County Court in August, 1895. On July 23, 1896, Hogg wrote to the Arbitration Committee of the Fritchley Lodge of Foresters as follows:—"I apply to the Arbitration Committee of the Fritchley Lodge of Foresters for an arbitration under the rules of the lodge into my claims as under. (1) A claim by me for sick pay according to the rules from June 4 to December 29, 1894, amounting to £2 2s.; (2) a claim by me for sick pay at 3s. per week deducted or unpaid by you through non-payment by me of an illegal demand for law costs in a case undecided at the time such demand

was made." No decision upon this application was ever communicated to Hogg. On November 3, 1897, Hogg brought an action in the County Court against the applicant in the present case claiming £12 12s., being sick pay at the rate of 8s. a week from March 21, 1896, to October 30, 1897. The applicant objected to the jurisdiction, but was overruled, and judgment was recovered by Hogg.

Mr. LUSH, on behalf of the applicant, contended that, there being a dispute under the rules, the County Court had no jurisdiction. He cited "*Bache v. Billingham*" ([1894], 1 Q.B., 107).

Mr. SCARLETT contended that there was no dispute, the only question before the County Court Judge being whether an action could be brought or not—"Palliser v. Dale" ([1897] 1 Q.B., 257). The applicant was estopped from asserting that Hogg was still a member of the order, for the order purported to expel him—"Willis v. Wells" ([1892] 2 Q.B., 225), "*Prentice v. London*" (L. R., 10 C. P., 679). The writ of prohibition was a discretionary writ, and the applicant, applying as he did after judgment, was too late—"Broad v. Perkins" ([21 Q. B. D., 533).

His LORDSHIP granted the writ. He said that he did so reluctantly. Hogg did put before the arbitration committee a proper claim for the 3s. per week in his letter of July 23, 1896, and it was doubtful whether that claim had ever been properly adjudicated on; but he did not exhaust his remedies. When the proper time had elapsed he was bound to appeal to the district committee and so on through successive stages. He did not satisfy the County Court Judge that he had done this. Facts were in dispute between the parties, and where that was the case arbitration was necessary. The County Court Judge, therefore, had no jurisdiction, because he could not have found the facts necessary to enable the plaintiff in this action to recover. Mr. Scarlett said that the applicant was estopped from treating Hogg as a member. It was Hogg who was estopped from denying his membership, seeing that his claim depended on his retaining that capacity. His Lordship doubted whether the writ of prohibition was discretionary, except where it was applied for by a stranger to the proceedings or where the conduct of the party was so improper as to disentitle him to the remedy. If, for instance, the party fought the action out on the merits in the Court below, this Court would be slow to grant the writ, but where, as in this case, the applicant only went to the Court in order to object to the jurisdiction he has pursued just the right course to entitle him to the writ. As to the application being too late, it must be recollected that there were no pleadings and that the proceedings were not terminated, for though judgment was recovered there was still something left to be done. There would be no order for costs.

Mr. LUSH stated, on behalf of the order, that they had no wish to stifle this claim, but the order desired to establish its claim to settle disputes among its members. This member's claim would be considered by the society.

[Solicitors—Shaw, Tremellen, and Kirkman, for S. Ward, Dudley, for the appellant; Stevens, Son, and Parkes, for Jones and Middleton, Chesterfield.]

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.JJ.) } Feb. 4.

DREDGE V. FARNELL.*

Patent—Validity—Want of invention—Method of
cutting necktie linings with a band knife.

Held (Vaughan Williams, L.J., dissenting),

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

that there was not sufficient invention to justify this patent.

This was an appeal from a decision of Mr. Justice Romer. The action was brought for an injunction to restrain an alleged infringement of a patent (No. 18,694 of 1891) for an improved method of cutting necktie linings with a band knife. By the complete specification the plaintiff alleged that on account of the peculiar material employed, which was a soft, spongy sort of cloth called "swansdown," it had not hitherto been found practicable to cut out a large number of these linings by a machine knife except in shapes which had straight or parallel edges devoid of curves or recesses, and he claimed for his process that any pattern, whether straight or curved or recessed, or partly straight and partly recessed or curved, could be rapidly cut in piles of 36 to 72 thicknesses deep. The plaintiff then gave a detailed description of his invention, which consisted of a series of templates placed in couples on the cloth before it was cut—one beneath the cloth and the other above, the upper one being directly over the other, and each couple being clamped at the ends. These templates were wider at one end than the other, and they were so arranged that the wide end of one would be next the narrow end of the adjoining one, the object of this arrangement being to cut the cloth to the greatest advantage. The templates were described as being formed by preference of thin metal plates with wood backing. In conclusion, the plaintiff declared his claim to be for the method of cutting at one operation a large number of necktie linings by means of a revolving band knife, the material being clamped firmly between two templates of identical form as therein described and set forth. The infringement was admitted, but the defendant impeached the validity of the patent. Mr. Justice Romer declared the patent void for want of invention. The plaintiff appealed.

Mr. Bousfield, Q.C., and Mr. E. Ford were for the plaintiff; and Mr. Moulton, Q.C., and Mr. A. J. Walter were for the defendant.

The COURT dismissed the appeal, LORD JUSTICE VAUGHAN WILLIAMS dissenting.

THE MASTER of the ROLLS said that the objection taken to this patent was that it was bad for want of subject matter, or, in other words, that there was no sufficient invention in it having regard to the state of public knowledge. Of all questions under the patent law that was the most difficult to decide. Stated in another way the question was whether, if the Court allowed this patent to prevail, it would amount to a public nuisance—whether it would be an intolerable burden to impose upon the public. His Lordship agreed with Mr. Justice Romer in thinking that it would. What was the problem to be solved? The patentee wanted to cut out a large number of linings for neckties with a band knife. Band knives were not new, and they had been used to cut materials more or less soft. Now, it was obvious that soft materials required to be stiffened before they could be cut, but there were several modes of stiffening which were as old as the hills. The common method was to clamp them up. That was done in many trades, and particularly in the book-binding trade. There was no novelty in the idea of stiffening soft materials by pressing them together between hard materials. Stiffening was necessary in order to make the pile of cloth sufficiently rigid to enable the knife to operate upon it. Then, as to the particular method employed in this case, the patentee wanted to cut out linings of a certain shape, and accordingly he had templates made of the required pattern and pressed the cloth between two templates, which were clamped together. It was said that this was new because the templates were screwed up in such

a way that they could be placed against the band knife by the hand without the clamps getting in the way. In his Lordship's opinion any one whose mind was addressed to the problem to be solved would have solved it in the same way as the plaintiff had done, and could have solved it in no other way. There was, therefore, no sufficient invention to justify this patent. The appeal should, therefore, be allowed.

LORD JUSTICE RIGBY agreed. A certain plausibility was given to the patent by confining it to neckties; but a patent could not be made good by applying it to one particular article, unless it was equally good for other articles of a similar description. His Lordship understood the claim to be for the use of a band knife in combination with a new machine, that machine consisting of two templates of the exact outline of the thing to be cut out and clamped together. But that was not a new machine in the sense that nobody could be allowed to make it, and it was not contended that anybody could be prevented from using a hand knife with that machine. Then what was the combination? It was a combination of a new thing which anybody might make with an old thing which anybody might make, and, there being no invention in the application of the one to the other, there was no subject-matter for a patent. It amounted to nothing more than this—the use of a band knife where a hand knife might have been used.

LORD JUSTICE VAUGHAN WILLIAMS differed. The object of this invention was to enable the band knife to be applied to the linings of neckties made of this flimsy material known as "swansdown," but in his Lordship's opinion it applied to all flimsy materials of this sort, whether converted into linings of neckties or otherwise. That had never been done before, and the utility of the invention was not disputed. In his Lordship's opinion the reason why the use of the band knife for this purpose was not previously known to the trade was not because people did not choose to use it, but because of the difficulties attending its use by reason of the clamps interfering with the cutting. There was no evidence of templates having been coupled together before. The result of this invention was that the templates, being themselves used as the clamps, served the purpose of a guide—not a guide to the eye merely, but a physical guide to the hand, the edge of the template being placed against the band knife. In his Lordship's opinion this invention taught people for the first time how to apply the band knife to consolidated layers of flimsy material, and that invention was sufficiently indicated in the specification. He thought that there was in this enough ingenuity to entitle the inventor to maintain his patent.

Q. B. Div.
(Kennedy, J.)

1898.
Feb. 4.

MOLYNEUX V. FLETCHER AND CLARK.*

Trust—Trustee—Duties and liabilities—Breach of trust—Advancement clause in will—Moneys advanced to *cestui que trust*.

Judgment was delivered in this case, which was tried before Mr. Justice Kennedy at the last summer assizes at Liverpool, and was then adjourned by his Lordship to London for further argument. The facts fully appear from the judgment.

Mr. W. F. Taylor, Q.C., and Mr. MacConkey appeared for the plaintiffs; Mr. McCall, Q.C., Mr.

*Reported by F. O. ROBINSON, Esq., Barrister at-Law.

Rotch, and Mr. H. Cunningham for the defendant Fletcher; Mr. Pickford, Q.C., Mr. Segar, and Mr. Cleave for the defendant Clark.

MR. JUSTICE KENNEDY, in giving judgment, said,—This action was brought by certain infants (by their next friend) against two gentlemen, and it was claimed that the defendant Fletcher, acting as trustee under the will of Edward Durant, the plaintiffs' grandfather, had committed breaches of trust. By the terms of Edward Durant's will, which was dated April 18, 1878, the testator appointed executors and trustees, and devised to them all his real and personal estate, with certain directions as to realization and investment, and made his children the beneficiaries under his will. The testator left two children surviving him, who were infants at the date of his death, on April 20, 1878. The two children were Fanny Jane, who came of age in 1880 and is still living and unmarried, and Amelia Margaretta, who came of age in 1881, and in 1885 married Daniel Webster Molyneux. Both she and her husband are still living, and the plaintiffs, six in number, are the children of this marriage. Neither Miss Durant nor Mrs. Molyneux are parties to this action. The defendant Fletcher was appointed a trustee of the will by order of the Court in 1887. The other defendant, Clark, became a trustee only quite recently, and long after all the events in respect of which the claim in this action is made had taken place. It is alleged on behalf of the plaintiffs that in 1887 the defendant Fletcher and his then co-trustee, Thomas Urmoston Clare, committed a breach of trust in advancing out of the capital funds £500 to Miss Durant and £250 to Mrs. Molyneux, and the question I have to determine in this action is whether in either or both of those cases a breach of trust has been committed. The will contained a direction to the trustees to apply in or towards the maintenance and education or otherwise for the benefit of each child of the testator entitled under the trusts of the will to a share, not absolutely vested, the annual income of such share. The will further declared that it should be lawful for the trustees to apply in or towards the advancement in life of each child a sum not exceeding £500 of her presumptive share, such sum or lesser sum to be paid if the trustees should think fit, notwithstanding that the child's share was settled as thereafter mentioned, and the trustees were to be the sole judges of the advisability of such payment and of what the term "advancement in life" might signify. Subject to that power, the trustees were, after the shares became vested, by the children coming of age, to pay the income to the two children in equal shares, and after their death upon trust for such of their children as they should appoint, and in default upon the same trusts for the children. If the daughters had no children, then their shares were to go as they might appoint, and in default of appointment to their next-of-kin. The claim in this action was put upon the ground that the moneys paid by Fletcher in 1887 were not paid with the single view of "advancement," but with the view of the money being used for the benefit of Fletcher himself; Fletcher was a large creditor of Mrs. Molyneux's husband, and was pressing for payment, and it was said that, though the money was nominally advanced under the power in the will, it was in reality advanced with the well-understood purpose that it should pass into the hands of Mr. Molyneux to be used by him in reduction of his debt to Fletcher. In the first place, I think it right to say that upon the construction which I put upon this will there was no power to make any advance at that time at all. It is clear on the authorities that where a power is given to trustees to apply capital money for the advancement in life of a child that power is to be construed according to a

well-understood meaning. Undoubtedly instances occur in reported cases where it was intended that the advance might be made at any time in the life of the beneficiary and not within some strictly limited period. Where there is such intention apt words, such as "or otherwise benefit," are always used to express it. In "*In re Kershaw's Trusts*" (6 Eq., 322), Vice-Chancellor Malins held that where there was a power at any period of the daughter's life to apply a portion of the trust fund for her advancement or otherwise for her benefit (which the Vice-Chancellor described as a very large power) an advance might be made to the husband to set him up in trade. And again, in "*Lowther v. Bentinck*" (19 Eq., 166), the judgment of Sir George Jessel shows that the word "advancement," where used without some larger words, has a more restricted and narrower meaning. Now, in this case the words are not only "advancement in life," but there is a further provision that the money is to be a sum not exceeding £500 of the "presumptive share." That means I think that the advancement is to be limited to the time when the share is presumptive and not vested, and I am fortified in that view by the statement in "*Davidson on Conveyancing*," 2nd edition, vol. 3, p. 555, where in dealing with the cognate subject of settlements it is pointed out that the power of advancement should be extended to vested as well as presumptive shares. I further think that in spite of the very large powers of discretion given by this will to the trustees to determine what is "advancement in life," it is doubtful whether in this case an advance of money for use by the husband in his business (quite apart from the question of the benefit to Fletcher) can be justified under the terms of the will, the fund being for the daughter's separate use without power of anticipation. In "*Talbot v. Marshfield*" (3 Ch. App., 622) Lord Hatherley, then Lord Justice Fagge Wood, held that where a share was advanced to set up a married daughter in business for her separate use that was a good execution. But that case clearly shows where the line must be drawn, for Lord Hatherley points out that the fund was settled to the daughter's separate use (as is the case here), and that, therefore, an advance for the purpose of paying the husband's debts was not justifiable. On the facts of this case I feel bound to come to the conclusion that, although the money was paid on the formal request of Mrs. Molyneux and her sister, it was perfectly well understood by Fletcher that the money was to be used in the husband's business for the payment of his debt to Fletcher. I am of opinion that that was not a proper or justifiable exercise of this power of advancement. See "*Duke of Portland v. Topham*" (11 H. L. C., 32), and "*Humphrey v. Oliver*" (28 L. J., Ch., 406). In justice to Fletcher I must add that I have no doubt he believed that whatever the husband did was done with the full consent of the two ladies. The result is that Fletcher must repay the £250 advanced to Mrs. Molyneux; but I make the order without prejudice to any proceedings for an indemnity which Fletcher may take against Mrs. Molyneux, she being a tenant for life assenting to a breach of trust. With regard to the £500 advanced out of Miss Durant's share I cannot give the plaintiffs any relief, because their interest depends only on the possibility of Miss Durant dying unmarried and without exercising her power of appointment or intestate and the plaintiffs being her next-of-kin. See "*Clowes v. Hilliard*" (4 Ch. D., 413), and "*Stockley v. Parsons*" (45 Ch. D., 51). The defendant Clark had no part in the breach of trust, but he has put in a defence in this action siding with Fletcher and pleading that there was no breach of trust. Under these circumstances I cannot give him costs, but I do not give costs against

him. I give directions for a reference to the Registrar for the appointment of new trustees.

[Solicitors—Horrocks and Christian Jones, Liverpool, for the plaintiffs; Masters and Rogers, Liverpool, for the defendants.]

Q.B. Div. (Lord Russell of Kil-
lowen, C.J., Hawkins, Mathew,
Lawrance, and Wright, JJ.) } 1898.
Feb. 5.

REG. V. CHARLES ROSE.*

Criminal Law—Evidence—Confession of prisoner
—Admissibility—Inducement.

This was a case stated by the Quarter Sessions for Norfolk raising a question as to the circumstances under which a confession of guilt by a prisoner to a prosecutor may or may not be admissible in evidence against him.

Mr. Wild appeared for the prisoner; the Crown was not represented.

On January 12, 1898, the prisoner, Charles Rose, was indicted on a charge of stealing from his master, a farmer named Corney, certain corn, chaff, sheep, poultry, and grass seeds. He was found guilty, and sentenced to two months' imprisonment. The evidence showed that on November 16 the prosecutor, in the presence of a police-constable, asked the prisoner how he accounted for the number of sheep on the farm not being so large as it should be, and the prisoner in answer admitted that he had sent a fat lamb and a live ewe to a butcher, who had given him money for them. The prosecutor then asked about the corn, and the prisoner confessed to stealing some, but under circumstances hereafter set out in the judgment, which prevented the confession being admissible.

Mr. Wild read the case.

Mr. JUSTICE MATHEW then asked whether the prisoner was out on bail or in prison.

Mr. Wild said that bail had been refused. He had asked for it, and was told to apply to a Judge in Chambers, which the prisoner could not afford to do. Moreover, the prisoner had been in prison since November 17.

Mr. JUSTICE MATHEW said it was unreasonable that bail was not given. It was in vain that Judges laid down time after time at assizes and elsewhere that justices should take bail whenever it was practicable.

The COURT, after a short consultation and without calling on Mr. Wild to argue, quashed the conviction.

The LORD CHIEF JUSTICE said,—The conviction could not stand. These were the facts; the prisoner, who was in the employ of a farmer in a more or less confidential capacity, was charged at the Norfolk Quarter Sessions, on January 12, with stealing a number of things, the property of his employer, and selling them in the neighbourhood. The things were corn, chaff, sheep, poultry, and grass seeds. In the course of the trial the master stated that, having reason to suspect the prisoner, he taxed him with the theft. It appeared that with regard to some of the stolen articles, the prisoner confessed voluntarily and without any inducement or threat being held out by any person in authority. Upon this he was pressed to make a clean breast as to the other matters. As to this the case stated:—"On cross-examination the prosecutor admitted that when he asked the prisoner about the corn he might have said, 'You had better tell me about all the corn that is gone,' and he further stated that he would not swear that he did not induce the prisoner to confess about the corn." The nephew

of the prosecutor, who was present at the interview, said that the prosecutor then "asked Rose to speak the truth, and said it would be better for him if he did so." Assuming for the moment that that amounted to a statement made under circumstances which prevented it being given in evidence as a voluntary confession, the question arose as to what course the presiding magistrate ought to take. It was easier to say what he ought not to do than to define exactly what he should do. One thing was clear, and that was that he ought not to allow the whole of the evidence to go to the jury. Whether he ought to content himself with striking out the evidence and telling the jury to disregard it or whether he ought to discharge the jury and impanel a fresh one was not a matter which was now before the Court. At any rate, it was clearly wrong to admit it at all. The question then arose whether the evidence in this case was such as ought to have been left to the jury or not. It was the opinion of the Court that the evidence was not such as should properly be left to the jury. The rule was a very old one that a confession of a prisoner in order to be admissible must be free and voluntary. If it be said to him that it will be better or worse for him if he do or do not confess it was not admissible. East's Pleading the Crown, vol. ii., 659. His Lordship then referred to the cases of "Reg. v. Baldry" ([1852] 21 L.J., M.C., 130), "Reg. v. Jarvis" (1 L.R., C.C.R., 96), and "Reg. v. Thompson" ([1893] 2 Q.B., 12), and on their authority held that the evidence was not properly admissible. He added that counsel and solicitors conducting prosecutions should remember that a confession by a prisoner before it could be put in evidence must be affirmatively proved to have been made voluntarily, and they should be careful to make sure of their position in this respect when confessions of guilt formed part of the evidence on which they relied. Lastly, he thought it was a great pity that bail had not been originally accepted in this case by the magistrates, and it was a greater pity that that was not done by the quarter sessions when the case was reserved for this Court. Bail was not intended to be punitive, but only to secure the attendance of the prisoner at the trial.

The other learned JUDGES concurred.

[Solicitor—W. A. Watts, for the defendant.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } Feb. 7.

THE GUARDIANS OF THE POOR OF DORKING UNION V.
THE GUARDIANS OF THE POOR OF ST. SAVIOUR'S
UNION.*

Poor Law—Settlement—Parish—Sub-division
under Local Government Act, 1894—Loss of
settlement.

Decision of Divisional Court (13 *The Times*
L.R., 558) affirmed.

This was an appeal by the guardians of St. Saviour's Union from a decision of the Divisional Court—Lord Justice (then Mr. Justice) Collins and Mr. Justice Ridley—dated July 30 last and reported in *The Times* of the following day; also in *The Times Law Reports*, vol. 13, p. 558. A special case was stated by quarter sessions of the County of London for the opinion of the Divisional Court raising a question as to the result for purposes of pauper settlement law of the division of a parish under the Local Government Act, 1894. The case was stated on an appeal from the order of justices. It appeared therefrom that A. E. Bridger, a pauper, was born on December 26, 1879, at Westcott,

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.

a hamlet then forming part of the parish of Dorking, in the Dorking Union, in the county of Surrey. He never acquired a settlement elsewhere. In August, 1896, he became chargeable to the St. Saviour's Union, in the County of London, which on August 18 obtained an order for his removal to the Dorking Union. It was against this order that the appeal was brought. At the time of the passing of the Local Government Act, 1894 (56 and 57 Vict., c. 73), the parish of Dorking was situate partly within and partly without the Dorking Rural Sanitary District and had overseers who levied a rate for the entire parish. By the operation of section 1 (3) of the Local Government Act, 1894, the part of the parish which was within the said rural sanitary district and the part which was not became two separate parishes and the old parish ceased to exist. The names of the new parishes, by order of the County Council, became "Dorking" and "Dorking Rural" respectively. They each had separate sets of overseers and rates. Westcott, where the pauper was born, is situate in Dorking Rural. It was contended by the guardians of Dorking Union—(1) That, as the hamlet of Westcott was within the parish of Dorking Rural and not the parish of Dorking, the order of the justices was bad, inasmuch as the pauper, if settled at all in any parish of Dorking Union, was settled in the parish of Dorking Rural, not in Dorking; that, there being no evidence before the justices who made the order that the old parish of Dorking had been divided as aforesaid and that the new parish of Dorking Rural had been formed and was in existence, the said order could not be amended by the insertion of the word "rural." (2) That in consequence of the division of the old parish it had ceased to exist, and the pauper had lost his birth settlement in the old parish, and that, as there was not at the time of his birth any parish of Dorking Rural, he could not have any settlement in that parish now, not having acquired one since its formation. The Court of quarter sessions held that they could amend the order by adding the word "rural." As to the second contention, that Court held, upon the authority of "Reg. v. Hunnington" (5 Q.B., 279), "Stourbridge v. Droitwich Union" (L.R., 6 Q.B., 769), "Reg. v. Tipton" (3 Q.B., 215), "Reg. v. St. Martin's-new-Sarum" (9 Q.B., 241), that the pauper had no settlement in Dorking Rural, and could not be removed to the Dorking Union in virtue of his birth settlement in the old parish of Dorking, that parish for the purposes of settlement having been destroyed and the pauper's settlement gained in it by birth being wholly lost. On the special case stated by the Court of Quarter Sessions the Divisional Court decided that when the principle of the authorities above cited was that when the parish in which a pauper was born was divided the entity maintaining its own poor in which the pauper had acquired his settlement no longer existed; that whether those cases were rightly decided or not they had been law for so long it would be quite impossible for the Court not to follow them; and that, as therefore the place to which the pauper in the present case ought to be sent no longer existed, he must remain chargeable to the union where he was—viz., St. Saviour's. From that decision the guardians of St. Saviour's Union now appealed.

Mr. Macmorran, Q.C. (with him Mr. G. Elliott) was for the appellants; Mr. Bosanquet, Q.C. (with him Mr. W. F. Barry) was for the respondents. Their LORDSHIPS affirmed the decision of the Divisional Court and dismissed the appeal.

The MASTER of the ROLLS, in giving judgment, said that in his opinion the case of "Reg. v. Tipton" (*ubi supra*) placed a very narrow construction on the old Act of 14 Charles II., c. 12. But it was clear that

under that decision, where a settlement had been acquired by birth, if the old parish was abolished the settlement no longer existed. It could not be said that the pauper was settled in the part in which he was born. There was nothing in the Local Government Act, 1894, which so enacted. Inferences from section 68 of the Act of 1894 did not meet the case. One must bear in mind that the Legislature in passing that Act knew how the Poor Law stood at the time, and they did not put in the statute that where a parish was divided a person should have a settlement in that part in which he was born. The decision of the learned Judges in the Court below was therefore right, and the appeal must be dismissed with costs.

LORD JUSTICE RIGBY, in the course of his judgment, said that in 1842 a rule had been laid down in "Reg. v. Tipton" (*ubi supra*) which had never been departed from. Whether it was right or wrong, time had confirmed it, and it could not be altered now.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Howard C. Jones; Langhams, for G. Scales, Dorking.]

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.J.J.) }

1898.
Feb. 7.

BURBOW V. TILSON.*

Ecclesiastical Law—Sequestration—Accounts of sequestrators appointed by Chancellor's Court—County Court proceedings—*Res judicata*.

This was an appeal from a judgment of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrance) on the hearing of an appeal from the County Court of Birmingham. The action was brought to recover a sum of £49 under the following circumstances. The plaintiff was the vicar of St. Andrew's, Bordesley, Birmingham. The curate of the parish, being unable to obtain payment of his stipend, took proceedings against the vicar in the Court of the Chancellor of the Bishop of Worcester. The Chancellor ordered a writ of sequestration to issue for the amount of stipend due and costs. The defendants in the present action were appointed as sequestrators. The sequestrators proceeded to execute the writ, and under it they received into their possession out of the living a sum of £79. They then carried in their account before the Chancellor showing a balance of £10 10s. due to the vicar. The Chancellor made his certificate allowing the account and adjudicating that the sum of £10 10s. was due to the vicar from the sequestrators. The vicar, being dissatisfied with this, brought the present action in the County Court to recover £49, which he alleged to be the balance properly due to him. The County Court Judge held that he had no jurisdiction to entertain the action, the matter in dispute having already been determined in a Court of record. The Divisional Court affirmed the judgment of the County Court Judge, but gave the plaintiff leave to appeal. It was now argued on his behalf that the civil Court was the proper tribunal to inquire into the accounts of sequestrators, and the following cases were cited:—"Beaurain v. Scott" (1 Camp., 388); "Kimber v. Paravicini" (15 Q.B.D., 222); "Jones v. Dangerfield" (1 Ch. D., 438).

Mr. Yeatman appeared for the plaintiff; Mr. F. Hinde for the defendants.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was really an action to re-open the certificate which had been

made by the Bishop's Chancellor in his Court and to have the sequestrators' account taken over again notwithstanding that certificate. In his opinion, the County Court Judge and the Divisional Court had come to the right conclusion. The cases of "Kimber v. Paravicini" and "Jones v. Dangerfield" were actions dealing with the Ecclesiastical Dilapidations Act, and in his opinion had nothing to do with this case.

LORDS JUSTICES CHITTY and COLLINS delivered judgments to the same effect.

[Solicitors—D. E. Chandler, for the plaintiff; Emery Davies, for the defendant.]

Court of Appeal (Chitty
and Collins, L.J.J.) }

1898.
Feb. 7.

HALL V. LAUNSPACH.*

Mayor's Court—Costs—Jurisdiction—Libel—
Less than £5 recovered as damages—Mayor's
Court Act, 1857, sec. 11.

This was an appeal from an order of Mr. Justice Ridley at Chambers prohibiting the Mayor's Court from taxing the plaintiff's costs in an action of libel in which the plaintiff recovered a verdict for £2 10s. The Judge in the Mayor's Court entered judgment for the plaintiff for £2 10s. and certified for counsel. The Registrar taxed the plaintiff's costs on the scale applicable to cases where under £20 was recovered. The defendant contended that there was no scale upon which the costs could be taxed where £5 or under was recovered, and that therefore the Mayor's Court had no jurisdiction to tax the plaintiff's costs, except those costs relating to allowances to witnesses and Court fees. The plaintiff contended that under Order 8, rule 1, of the Mayor's Court Rules, 1892, the costs followed the event, and the costs would be taxed upon the scale applicable where less than £20 was recovered. Mr. Justice Ridley held that the defendant's contention was correct and ordered the prohibition to issue. The plaintiff appealed.

Mr. H. Reed, Q.C., and Mr. M. R. Emanuel appeared for the plaintiff; Mr. S. Lynch appeared for the defendant.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE CHITTY read the following judgment:—
This is an appeal by the plaintiff in an action in the Mayor's Court from an order of the Judge in Chambers directing a writ of prohibition to issue. The Judge gave leave to appeal. The terms of the order are special. The writ is to prohibit the Court from further proceeding in the matter of granting an allocatur for the amount of the plaintiff's taxed costs as taxed upon a judgment for £2 10s. and costs obtained by him in the action and of proceeding upon the judgment to enforce costs, except in respect of Court fees paid and allowances to witnesses. The sole question then is whether the Mayor's Court had jurisdiction to order any costs to be paid to the plaintiff beyond Court fees and allowances to witnesses. The action was for a libel. It was not and could not be disputed that the Mayor's Court had jurisdiction to try such an action (see Section 11 of the Mayor's Court Act, 1857). The action was tried before a Judge with a jury. The jury found a verdict for the plaintiff, with 50s. damages. The Judge gave no certificate as to costs, except that he certified for counsel. The judgment was entered for the damages and costs. The Registrar, who is the taxing officer,

allowed to the plaintiff costs beyond the Court fees and allowances to witnesses. The defendant brought the Registrar's allocatur before the Judge for review of the taxation on the point now in question, but the Judge refused to disturb the taxation. It was in these circumstances that the defendant applied for the prohibition. The burden of showing want of jurisdiction rests on the party applying for the prohibition. See "Taylor v. Nicholls" (1 C.P.D., 242). The contention of the defendant was that if the Mayor's Court had an ancient jurisdiction to give costs it had lost it or had been deprived of it by the rules now in force in that Court. The question of ancient jurisdiction was touched upon slightly, but was not seriously argued, by the defendant's counsel. He entirely failed to satisfy us that the Court had no such jurisdiction. It was conceded that it was the practice of the Court to give costs. In the absence of anything to the contrary, the presumption arising from the practice would be in favour of the jurisdiction. The presumption is supported by section 11 of the Act of 1857, already referred to, which assumes the jurisdiction to give costs. The effect of the section, stated shortly and so far as is material for the present question, is that if in an action founded on contract the plaintiff shall recover less than £5, or if in an action on tort, except certain specified actions, among which exceptions is an action for libel, the plaintiff shall recover less than 40s., the plaintiff shall have no costs unless the Judge certifies that there was sufficient reason for bringing the action in the Mayor's Court. This negative but limited enactment takes away the jurisdiction of the Court as to costs, which it presupposes, but in certain specified cases only; it does not take it away in such an action as the present, because this is an action for libel, and the plaintiff has recovered more than 40s. damages. The presumption, then, being that the jurisdiction existed down to the passing of the Act of 1857, and the defendant having failed to prove the want of original jurisdiction, the only remaining question is whether the jurisdiction has been taken away by the rules of Court passed for the regulation of the practice and procedure of the Court. The subsisting rules are those of 1890 and 1892. These rules were made by the Mayor's Court under section 45 of the Act of 1857, and were sanctioned by the Rule Committee under the provisions of section 24 of the Judicature Act, 1884. The first rule of 1890 was this:—"In every action or matter in the Mayor's Court all costs shall be taxed by the Registrar of such Court according to the scales of fees and costs set out in the schedules hereto annexed, subject to the review of such taxation by one of the Judges of the Court." There are three schedules. Schedule A relates to fees of Court. Schedule B relates to costs where the amount recovered exceeds £5 and is less than £10, and prescribes that the only costs (exclusive of Court fees) to be allowed in that case shall be those specified. Schedule C prescribes that "the following costs only exclusive of Court fees" shall be allowed where the amount recovered is £10 and upwards, and it then sets forth in a tabular form three scales, the first where the amount is under £20, the second where it is £20 and under £50, and the third where it is £50 and above. It is plain, then, in my opinion, that there is no scale of costs (exclusive of Court fees) applicable where the amount recovered is £5 or under £5—in other words, that there is no scale of costs which applies to the present case. There is no rule among those of 1890 or 1892 to the effect that no costs shall be allowed other than those for which scales are prescribed. I think that rule 1 of 1890, that all costs shall be taxed according to the scales of costs, is confined to cases where the scales apply, and that where the scales do not apply the taxation is left unfettered.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

Rule 1 of Order 8 of the rules of 1892 is founded on the lines of Order 65, rule 1, of the rules of the Supreme Court. It provides that, subject to the provisions of section 11 of the Mayor's Court Act, 1857, and of section 117 of the County Courts Act, 1888, costs of proceedings in the Court shall be in the discretion of the Court. This is followed by a proviso as to the costs of trustees and by a proviso that where the action is tried with a jury "the costs" shall follow the event unless the Judge shall for good cause otherwise order. The costs in the second proviso means costs according to the scales where they apply. The references to section 11 of the Act of 1857 and to section 117 of the County Courts Act, 1888, subject to which the discretion over costs is exercisable, are material. The provisions of these enactments were plainly within the view of the authorities who framed and sanctioned the rules. As already pointed out, section 11 precludes the allowance of costs where the sum recovered does not exceed 40s. in the cases to which it applies; and it does not apply at all in the case of libel, even where the sum recovered is less than 40s. The other cases of tort excepted from section 11 are malicious prosecution, slander, criminal conversation, and seduction, so that in these cases as well as libel the Legislature thought fit to leave the jurisdiction of the Mayor's Court wholly unfettered, although the amount recovered did not exceed 40s. The provisions of section 117 of the County Courts Act, 1888, do apply to the Mayor's Court, but they do not touch this case, because the action could not have been brought in a County Court, such Court having no jurisdiction to try a libel action. But section 11 and section 117 show that, where it is intended to take away a jurisdiction as to costs, plain and direct words are used. There are no such words in the rules of 1890 and 1892. It is difficult to suppose that the Mayor's Court in framing the existing rules, or the Rule Committee in sanctioning them, intended to take away the jurisdiction by inference; and it is on inference only that the respondent's arguments on the effect of the rules is founded. For these reasons I think that the argument cannot be sustained. It would seem advisable that the rules should be amended by providing a scale of costs to cover cases like the present. The appeal must be allowed with costs here and below.

LEAD JUSTICE COLLINS read a judgment to the same effect.

[Solicitors—Emanuel, Round, and Nathan, for the plaintiff; Swepstone and Stone, for the defendant.]

Q.B. Div. } 1898.
(Channell, J.) } Feb. 7.

BONNER AND ANOTHER v. THE TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.*

Landlord and Tenant—Lease—Assignment—Mortgage by sub-demise.

A lessee having been compelled to pay the rent of premises the lease of which he had assigned, held that he could not recover it from persons to whom the assignee had mortgaged the premises by way of sub-demise.

This was an action by the lessees of certain premises to recover from the defendants, who were mortgagees of one Price to whom the plaintiffs had assigned their lease, ground-rent which the plaintiffs had been compelled to pay the lessor. The facts, which were not disputed,

were shortly as follows. By lease dated April 3, 1882, Henry Moore demised the premises to the plaintiffs at the yearly rent of £20, payable quarterly, for a term of 99 years. On April 5, 1889, the plaintiffs assigned the remainder of the term to Price, who covenanted to pay the rent of £20 and to indemnify the plaintiffs. On October 18, 1889, Price mortgaged the premises to the defendants by a sub-demise of the whole term, except the last day, as security for certain advances. The indenture of mortgage also contained an agreement on the part of Price, on demand by the defendants, to do all things necessary for conveying and assuring to them the whole of the remainder of the term. The defendants also covenanted with Price that if they entered into possession of the premises, and received the rents and profits thereof, they would pay the rent of £20 per annum reserved by the lease of April 3, 1882. On November 13, 1891, Price became a bankrupt. About the same date the defendants entered into possession of the premises and remained in possession and in receipt of the rents and profits. The defendants having neglected to pay the rent of £20 reserved under the lease of April 3, 1882, the plaintiffs paid it to avoid a forfeiture.

Mr. BRAY, Q.C. (Mr. Tindal Atkinson with him), for the plaintiffs, contended that the plaintiffs having paid rent which the defendants could have been compelled to pay they could recover it back from the defendants. The damage arose through the default of the defendants, and the person who paid in consequence of the legal default of another was entitled to recover from the person by whose default the damage was occasioned the sum so paid. The defendants being in possession it was their duty to perform the covenants. "*Moule v. Garrett*" (L.R., 5 Exch., 132, and 7 Exch., 101). The payment by the plaintiffs preserved the lease, which otherwise would have been forfeited, and the benefit enured for the defendants. The mortgage contained in express terms an agreement to assign the last day upon demand being made by the defendants. He cited notes to "*Lamplough v. Brathwait*" (Smith's Leading Cases, vol. 1, page 139).

Mr. JELF, Q.C. (Mr. Spencer Bower with him), for the defendants, contended that the principle turned upon whether or not the defendants were under any liability to the lessor. There was no privity between the defendants and the lessor. The mortgagee, who was going to take the property by way of security from a person who had the leasehold interest, would naturally take a lesser estate which would create a privity of contract between himself and the person who actually let to him. There was no implied authority to pay. The case of "*Moule v. Garrett*" (*supra*) did not apply, as there was neither privity of contract or estate.

MR. JUSTICE CHANNELL, in giving judgment, said,—The case of "*Moule v. Garrett*" depended on the fact that the defendant in that case was liable, as assignee, to the lessor for rent. This was not like the case where both parties were directly liable to pay the rent, and one paid and had a remedy over against the other. First treating the defendants as mortgagees by sub-demise they would not be liable for the rent. The mortgagee by sub-demise had a sort of option and would sometimes let the security go. It was impossible to contend that a lessee being compelled to pay rent could recover against a mortgagee by sub-demise. He did not think the case was altered by the contract that if the defendants took possession they would pay the rent. The covenant with Price was only putting into express terms what he was liable for under the Conveyancing Act. The contract was between Price and the defendants. It seemed to him that when it was said that a person who paid could recover from the person ultimately liable that meant

*Reported by R. BARBER, Esq., Barrister-at-Law.

that the person ultimately liable was liable to pay the person whom the plaintiff had paid. It did not mean through a series of contracts. He thought this case was an endeavour to extend the principle laid down in "Moule v. Garrett."

Judgment for the defendants, with costs.

[Solicitors—Albert Saunders, for the plaintiffs; Howard and Shelton, for the defendants.]

Q.B. Div. }
(Kennedy, J.) }

1898.
Feb. 8.

GREY V. BUTLER'S WHARF (LIMITED).*

Shipping—Discharge of cargo—Remuneration of lightermen—Overtime—Custom held not proved.

This action, the hearing of which commenced before his Lordship yesterday, raised a question of considerable importance as to the remuneration to be paid to lightermen in the Thames for overtime. The circumstances were as follows:—In July, 1897, the plaintiff, who is a master lighterman, was employed by the consignees of certain West Indian sugar in bags to take delivery of their goods into craft from the steamship Torgorm, which was discharging her cargo, brought from the West Indies, at Middleton's Wharf in the river Thames. The defendants are the owners of that wharf, and had undertaken to discharge the Torgorm on behalf of her owners. The vessel arrived in the Thames, and on July 28 and 29 discharged cargo at Churchhole Tiers. On July 30 she moved to Middleton's Wharf, where the plaintiff's lighters worked alongside the steamer until 7 p.m. The lightermen refused to work after that hour unless the defendants agreed to pay them a shilling an hour for overtime, in addition to the payment they received from their employers in accordance with the terms of Lord Brassey's award. The defendants declined to make such payment, and landed a certain portion of the sugar which the plaintiff had to receive on to the wharf. The plaintiff, in order to get delivery of the sugar so landed, paid under protest the defendants' landing charges, amounting to £20 12s. 6d. This sum was now sought to be recovered back. The plaintiff alleged that by the custom of the river Thames, where a "foreign" or "over-sea" cargo of sugar or similar heavy goods was discharged into lighters, the lightermen were entitled to receive a shilling an hour for all time over and above the usual working hours, from the persons who got the benefit of the overtime. Witnesses were called in support of the alleged custom. They stated that the custom did not apply to vessels trading from the Continent of Europe. Witnesses for the defendants denied the existence of the custom.

Mr. Bucknill, Q.C., and Mr. Lacy Smith appeared for the plaintiff; Mr. Boyd, Q.C., and Mr. Bremner for the defendants.

HIS LORDSHIP, in giving judgment, after stating the facts, said that it was clear law that in the absence of any custom the shipowner was bound to deliver into lighters; he was not entitled, apart from custom, to insist on discharging into warehouses or other place so as to involve the consignee in the expense of warehouse or landing charges. It had been alleged that the defendants had wrongfully landed 700 of these bags of sugar on to their wharf during the day. That was denied. That was not the question at issue in this case. The question related solely to goods landed after 7 p.m. It appeared that the plaintiff and his

men were bound by their contract with the consignees to take delivery during the night. The men were paid for overtime in accordance with Lord Brassey's award, and the consignees would have to pay for that overtime. There was no question that, as between the ship and the consignees, the consignees were bound to take delivery during the night. All parties were willing that discharge should go on during the night except the lightermen. It appeared to be usual in the Thames to go on working till 10 p.m. or even later. That was contemplated in Lord Brassey's award, which laid down a scale of payment for overtime. The plaintiff was really trying to establish a custom to pay a gratuity to lightermen for doing work which they were bound by contract to do. Such a custom appeared to him to be unreasonable. Moreover, it was too vague, as it did not clearly appear as to what goods it was said to apply or who was to make the payment. On the evidence before him he had come to the conclusion that no such custom as was alleged in fact existed. There would be judgment for the defendants, with costs.

Q.B. Div. }
(Ridley, J.) }

1898.
Feb. 8.

MARSHALL V. ROGERS AND CO.*

Company—Debentures—Charge on "the undertaking"—Effect of—Debentureholders and judgment creditor.

This was an interpleader issue to try the title to the stock-in-trade, plant, furniture, and machinery at 65, Banner-street, Golden-square, which had been seized by the sheriff as the result of a judgment obtained against Thomas and Co. (Limited) by Stephen Rogers and Co. The claimant (and plaintiff) was Mr. J. S. Marshall, a receiver appointed by Colonel C. N. Kidd, the debentureholder of Thomas and Co. (Limited). The question raised in the case was as to the meaning of the word "undertaking" in a debenture. In the series of debentures in this case the words of charge, after specifying certain payments, were as follows:—"The company hereby charges all the said payments, its undertaking, and all its profits, whatsoever and wheresoever, both present and future, including its uncalled capital, if any, for the time being." The receiver was appointed on October 25, 1897, and took possession on the morning of the next day, under a power given by the debenture to take possession of the property charged thereby. Later, on the 26th, the sheriff carried out the seizure. The question was whether the receiver had a good title to the effects as against the defendants, the execution creditors.

MR. A. H. SPOKES, for the plaintiff, said that the effect of inserting the word "undertaking" was a floating charge on all the assets of the company, though it did not become a specific charge until a receiver was appointed or there was a winding-up order. The case of "*In re Panama, New Zealand, and Australian Royal Mail Company*" (L.R., 5 Ch. Appls, 318) showed that the word "undertaking" had reference to all the property of the company, including that acquired after the date of the debenture. The effect of debentures that were a charge on the undertaking was that the debentureholders had a charge on what should be the property of the company at the time when they realized their security, i.e., when they appointed the receiver—"In re Mersey Wood Working Company" (1 *The Times Law Reports*, 566). The word "undertaking" was equivalent to

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

"estate, property, and effects"—"*In re* Florence Land and Public Works Company" (10 Ch.D., 546). The floating charge became a specific charge when a receiver was appointed or there was a winding up—"*Brunton v. Electrical Engineering Corporation*" ([1892] 1 Ch., 439). Until a sale by the sheriff the security of the debentureholder prevailed over that of the execution creditor—"*Taunton v. Sheriff of Warwick*" ([1895] 2 Ch., 321). The execution creditor took subject to all equities—"*In re* Standard Manufacturing Company" ([1891] 1 Ch., 641). The fact that the receiver was appointed by the debentureholder and not by the Court made no difference.

Mr. JOHN ROSKILL, for the defendants, said that in "*In re* Panama, New Zealand, and Australian Royal Mail Company" and "*In re* Florence Land and Public Works Company" other words were used besides "undertaking." There was no such thing as a general definition of undertaking apart from the particular case. The debentureholder and not the receiver should be the plaintiff in the interpleader issue. The debentures were not properly secured, as they only charged the property generally.

Mr. JUSTICE RIDLEY said that the question was whether Mr. Marshall had a right as against the sheriff. He had such a right if he was in as receiver for the debentureholder and if the debentureholder had a right as against the sheriff. The question turned on the meaning of the word "undertaking." As to that he must follow the decided cases. These effects were the property of the debentureholder, who by the appointment and possession of the receiver had perfected his title to them. There must therefore be judgment for the plaintiff with costs.

[Solicitors—Fraser and Christian, for the plaintiff; West, King, Adams, and Co., for the defendants.]

Chan. Div. }
(Wright, J.) }

1898.
Feb. 9.

IN RE ANGLO-CONTINENTAL CORPORATION OF WESTERN AUSTRALIA (LIMITED).*

Company—Winding up—Surplus assets—Distribution by direction of the Court—Articles of association, construction of.

This was an application by the liquidator for the direction of the Court as to the distribution of the surplus assets of the company in its winding up. Clause 129 of the articles of association was as follows:—"If upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid up capital, the excess shall be distributed among the members in proportion to the capital paid or which ought to have been paid on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions." The company was registered with a capital of 500,000 shares

of £1 each. One hundred thousand shares were issued with 5s. per share paid up, and 25,000 further shares were issued to persons who paid for them in full. After providing for debts and expenses, there was not enough surplus in the hands of the liquidator to return in full the capital paid up, and the question arose how the surplus was to be distributed.

Mr. Kirby was for the liquidator, Mr. A. Beddall for the fully-paid shareholders, and Mr. Arthur J. Chitty for the partly-paid shareholders.

MR. JUSTICE WRIGHT, in delivering judgment, said the case raised a question of importance as to the proper construction of a form of surplus assets clause which had been adopted with variations since the decision of the House of Lords in "*Birch v. Cropper*" (L.R., 14 App. Cas., 525) with the view of avoiding the effect of that decision. After stating the effect of that case and of "*Ex parte Maude*" (L.R., 6 Ch., 51), and pointing out that in neither of those cases was there a provision in the articles for regulating the distribution of the surplus assets, his Lordship said that there was in the present case such a provision in article 129. Under the circumstances there was no room for the application of "*Birch v. Cropper*." Had there been a real surplus after returning the paid up capital, it would, by the express terms of the contract, have been divisible, not according to the nominal amounts of the shares, but according to the amounts which had been paid up (subject to correction in respect of any arrears or advances), and which, therefore, had presumably had the principal merit in earning the profit. But there being no surplus, but a deficit on the whole adventure, there still remained an equity to be satisfied in order to equalize the loss, and the uncalled capital ought on general principles to be called up or treated as called up so far as was necessary for that purpose, unless the contract had otherwise provided. It had not otherwise provided. What was the meaning of "capital paid"? According to "*Ex parte Lowenfeld*" (70 L.T., 3) the term did not mean merely capital paid before the liquidation or called up in the liquidation for payment of debts and expenses, but included capital called up or treated as called up for the purpose of satisfying equities in the repayment of capital. And in the present case there was in truth no surplus, but a mitigation of loss. The loss and the mitigation of it were to be distributed equally, but subject to equalization of the capital account, and not irrespectively of such equalization, and a call (actual or in account) was necessary for that equalization which was an essential part of a winding up unless excluded by the contract; and the amount of that call must be included in the words "capital paid or which ought to have been paid." The liquidator must therefore proceed to make a call (either actual or imaginary, as the case might be) on the 100,000 shares sufficient to equalize the capital account. If all the shareholders were solvent the call would in this case be one of 3s. per share on the 100,000 shares, making them 8s. paid. The amount so obtained would be sufficient to repay to the holders of the 25,000 shares 12s. per share, leaving them also with 8s. paid. The assets in hand would then be divisible equally amongst the whole 125,000 shares, and the ultimate loss of each shareholder would be the difference between the 8s. and the dividend so paid. Assuming the moneys in hand to be £25,000, then each of the holders of the 100,000 shares would as a result of the whole have received back 1s. per share, and each of the holders of the 25,000 shares 16s. per share, and every shareholder would have lost 4s. per share.

[Solicitors—Ashurst, Morris, Crisp, and Co.; Batchelor and Cousins; J. J. Ridley.]

*Reported by F. EVANS, Esq., Barrister-at-Law.

Prob., Divorce, and Adm. Div. (The
Right Hon. the President, Sir Francis
Jenne) 1898.
Feb. 9.

THE RIPON CITY*

Ship—Mortgage—Mortgage of eight shares—
Claims on ship paid off by owners of remaining
shares—Sale of ship—Distribution of proceeds.

This was an appeal from the decision of the Registrar of the Court as to the distribution of the proceeds of the sale of the steamship Ripon City. The facts of the case appear in the judgment.

Mr. F. Laing appeared for the plaintiffs; Mr. Aspinall, Q.C., and Mr. Dawson Miller for the interveners.

THE PRESIDENT said,—It is necessary to state the circumstances which led up to this sale so far as they are relevant to the questions now raised. Before October 10, 1895, 60 shares in the Ripon City belonged to Furness, Withy, and Co., and on that day an agreement was entered into with Niel M'Lean and Co. to purchase the Ripon City. Under this agreement Niel M'Lean and Co. received possession of the vessel, and proceeded to work her, and on payment of part of the purchase money in October, 1896, eight shares were transferred to them. In November Niel M'Lean and Co. mortgaged four of their eight shares, and in February, 1897, these shares were transferred to Robert K. Donald, a plaintiff in the present action, and the remaining four shares were mortgaged to Mrs. Elizabeth Balls, another of the plaintiffs. On February 2, Niel M'Lean and Co. suspended payment, and Thomas M'Clintoch, a plaintiff, was appointed sequestrator. On February 5, Furness, Withy, and Co. took possession of the ship. When Furness, Withy, and Co. took possession there were certain claims against the ship incurred during the management of Niel M'Lean and Co. For these claims proceedings were taken and were decided by Mr. Justice Barnes on May 6, 1897 ([1897] P., 226). Furness, Withy, and Co. paid these claims. They also paid £325 for the cancellation of the charter and repaired the ship. On April 17, 1897, Furness, Withy, and Co. sold the ship to an Italian for £8,650. On July 20 the plaintiffs brought an action in this Court claiming a declaration that the sale of the ship was void. Furness, Withy, and Co. intervened and counter-claimed. The case came before me, and by consent a decree was made that judgment should be entered against the interveners for £1,081 6s., being one-eighth of £8,650 plus interest, less such deductions as the interveners might be able in law to establish as proper from the respective shares. It was referred to the Registrar and merchants to determine the amount of these deductions. The deductions in question are divisible under four heads:—First.—A sum of £216 6s. claimed as brokerage at 2½ per cent. of the purchase money. This sum has been allowed by the learned Registrar, and I think rightly. The effect of the decree by consent was, in my opinion, that the plaintiffs are to be treated as acquiescing in the sale as a sale, but with a reservation of all rights as to distribution of the proceeds, the gross sum realized being £8,650. It was argued before me that the plaintiffs as mortgagees could on a sale add their costs of it to their claim on the purchase money, and should be permitted to do so now. No doubt the plaintiffs could do this as against their mortgagor, but not as against the owners of the other shares in the ship. Secondly.—The learned Registrar has allowed the deduction of the amounts secured by lien which were paid by the interveners to Messrs. Cory in consequence of the decision of Mr. Justice Barnes, and also of

Messrs. Cory's costs, on the ground that this lien was in existence at the time of the sale to the Italian purchaser. But there appears to me to be no distinction between the different maritime liens imposed by the conduct of Niel M'Lean and Co., and the case is the same as if the interveners had, instead of giving bail, then paid all such liens. There is thus but one question of law involved. Mr. Aspinall addressed to me his main argument on this question. He contended that, on the true construction of the transaction between the interveners and Niel M'Lean and Co., the interveners ceased to be owners, and became either mortgagees, or, at least, unpaid vendors with a security for payment of the purchase money, that they took possession in order to enforce their security, that they could not enforce their security by sale without clearing off the maritime liens on the ship, and so, having not indeed relieved the mortgagees of the eight shares from personal liability, but, having relieved their property from a prior encumbrance, they were entitled to deduct what they had paid in respect of the liens from the purchase money received by them before dividing it. I have considered the agreement of October 10, and it appears to me clear that the property in the vessel never passed to Niel M'Lean and Co., nor could specific performance ever have been enforced as the interveners were never in a position to sell the whole ship. The position of things I think was that for the original intention of the whole ship being transferred to Niel M'Lean and Co. and the interveners becoming mortgagees for the unpaid purchase money there was substituted an arrangement under which the interveners until they acquired all the shares remained the owners, except in so far as on proportionate payment there was a transfer of shares, Niel M'Lean and Co. being meantime allowed to work the vessel. It confirms this view to find that in their pleadings in the present action the interveners describe themselves as at all times owners of the vessel, and their argument before Mr. Justice Barnes in the "Ripon City" ([1897] P., 226) proceeded on the basis of them and not Niel M'Lean and Co. being the owners. It was contended before me that Mr. Justice Barnes ("Ripon City" [1897] P., 226) held that the interveners were the mortgagees and Niel M'Lean and Co. the owners of the ship. But it is clear to me that the language of the learned Judge has been misapprehended on this point. For the purposes of this case, however, it does not appear to me material whether the interveners are to be regarded as mortgagees or as owners in the position I have described. In one view, they may be regarded as owners of the equity of redemption in regard to the plaintiffs' mortgagees because they had a claim against Niel M'Lean and Co. for any surplus after discharge of those mortgages. But they may also be regarded as having rights resembling those of a mortgagee and so being in a somewhat similar position to that of the plaintiffs. Their legal position cannot, I think, be put higher than that. Further, it is clear that they were not personally liable on the liens discharged by them, and that to free their interests in the ship from these liens it was necessary to free the plaintiffs' interests as well, but that the plaintiffs did not expressly request them to discharge these liens. The question is, Have they, under these circumstances, on any legal principle, a right to claim that the amount of the liens paid off by them shall be deducted from the purchase money before division, and so a proportion of the expense incurred by them thrown on the plaintiffs? The argument of Mr. Aspinall was based on a contention that this payment might be treated as a payment at the implied request of the plaintiffs, and he relied on the authorities of "Johnson v. Royal Mail Steam Packet Company" (3 L.R., P.C., 38) and the "Orchis" (15 P.D., 38). [The President then dis-

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

cussed these cases.] But what was, I think, an essential feature in those cases, the personal liability of the defendant to pay the sum which the plaintiff was considered to be compelled to pay and did pay, is wanting in the present instance. It is true that, by the satisfaction of a maritime lien, the property of every mortgagee is relieved from what, so long as it remains, is a prior charge, but a request by the mortgagee for the payment off of the lien is not to be inferred for that reason. It may be reasonable enough if there be personal liability for a debt to infer that the person under it desires, and impliedly requests, its discharge. But it is a further step, and one, I believe, erroneous, to contend that where there is no liability but only the bare fact of benefit to property a similar request is to be implied. People cannot be forced to buy even certain benefits against their will. In the present case, too, the benefit was doubtful. If the ship had sold for enough to provide for the lien and the mortgages—and there is evidence to show this was at least contemplated as possible—the plaintiffs as mortgagees would have gained nothing by the discharge of the lien. I have considered whether the satisfaction of this lien might not be treated as money paid to keep the property in existence, like the payment of premiums on policies of insurance. The analogy, however, seems to me imperfect, because different considerations may arise in the case of a payment necessary to preserve a property in existence from one which only relieves it of a burden. But were the analogy more complete than it is, I think that the decision of the Court of Appeal in “*Falcke v. Scottish Insurance Company*” (34 Chan. Div., 234) has finally dispelled the inferences connected with the employment of the term salvage in earlier cases, and decided that the payment of premiums by the owner of the equity of redemption in a mortgaged policy gives him no prior right, and that payment of premiums confers such a right only on one or other of the principles enumerated by Lord Justice Fry in the previous case of “*In re Leslie*” (25 Ch. Div., 552)—principles which have no application in the present instance. Nor does the practice of the Admiralty Court appear to me to afford any guide in the matter. It has always been held that a person advancing money to the master to pay wages has been allowed to claim in priority for his advance, but this is, I think, because he is considered to be identified with the master. It is true also that a bottomry bondholder who discharges a claim for wages becomes entitled to priority in respect of such payment; but this is only when he has been allowed by the Court to make it. I have also endeavoured to see whether the present case may not be considered as analogous to that of the holder of an equity of redemption who pays off a first mortgage with the intention of keeping it alive as against mesne encumbrances. I take the general principle of equity to be as laid down by Jessel, M. R., in “*Adams v. Angell*” (5 Ch. Div., 634, 645), the decision of which case was afterwards approved by the House of Lords in “*Thorne v. Cann*” (App. Cas., [1896] p. 11). [The President then read lines 18 to 32 of the judgment of the Master of the Rolls in the case of “*Adams v. Angell*” (5 Ch. D., 645). In the present case there was, no doubt, strong reason on the part of the interveners for keeping alive the charge enforceable by lien, and no doubt also the interveners could have taken an assignment of the rights of the lienholders, whom they paid off to a trustee, or even perhaps to themselves. But is there enough, or indeed anything beyond the fact of the payment off, to show that the interveners in giving bail, which I have treated as equivalent to paying off the maritime liens, intended to keep them alive for the purpose of maintaining a priority for such payment as against the mortgagees? I cannot think that there is. The interveners when they

gave bail probably did not believe in the validity of the arrest, but, in determining to put an end to it, I think that their real, or at least an obvious and sufficient, object was to keep the conduct of the sale of the ship in their own hands, and so certainly obtain the brokerage, and probably get a better price for the vessel, instead of allowing her to run the risk of being condemned by the Court, and sold by auction; and they did this, no doubt, prudently enough for their own benefit, partly as holders of at least 52-64ths of her, and partly as entitled to claim against Niel M’Lean and Co. anything their equity of redemption of the eight shares might produce. It would be a mere fiction, I think, to suppose that it was intended to keep the liens alive for any purpose. I can, therefore, discover no ground on which the interveners can claim a priority over the mortgagees for any of their payments in discharge of liens. Thirdly.—With regard to the charterparty, for which the interveners paid £325 for its cancellation on April 9, 1897, it was contended that before that date both Mrs. Balls and Mr. Donald had become mortgagees in possession. This turns on certain correspondence. I do not think the cancellation of the charterparty was consented to, and I do not think that the interests of either of them can be held liable. Fourthly.—The remaining point turns on the claim to make deductions in respect of the repairs to the vessel. This clearly must be limited to the costs of any repairs done in consequence of the promise in the agreement for sale to the Italian purchaser. I think such costs should be deducted if it could be proved that they were incurred after and in pursuance of the agreement for sale. But I agree with the finding of the learned Registrar that no such proof has been given; and I have no doubt that the repairs were practically completed before the agreement for sale. I am of opinion, therefore, that the only deduction to be allowed is the claim for brokerage (£216 5s.), and the account must be reformed accordingly. The plaintiffs, of course, cannot have more than the amount of their mortgages and interest. I think that the plaintiffs are entitled to the costs of the action, of the reference before the Registrar, and of these objections.

[Solicitors—Ince, Colt, and Ince, for the plaintiffs; W. H. Crump and Sons, for the interveners.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } Feb. 10.

ROBEY V. ARNOLD AND ANOTHER.*

Contract—Agreement—Construction—Music-hall agency—Commission on “re-engagements.”

On appeal from a judgment of Darling, J. (*ante*, p. 39), *Semble*, that it was a question for the jury whether certain engagements were “re-engagements” within the meaning of the contract.

This was an application by the plaintiff for a new trial in an action tried before Mr. Justice Darling and a common jury. The case is reported *ante*, p. 39. The plaintiff was a music-hall artist, and the defendants were the receivers, in a partnership action, of the property and business of the firm of Hugh J. Didcott and Co., a firm which consisted of two partners, the partnership having been dissolved in 1894. Messrs. Didcott and Co. were theatrical agents, and in November, 1892, they obtained for the plaintiff engagements for 1894 and 1895 at the Oxford, Pavilion, and Tivoli Music-halls. On November 15, 1892, the plaintiff made three contracts in writing with Didcott and Co., each being in the same form, and relating respectively to

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

the engagements at the Oxford, Pavilion, and Tivoli Music-halls. The contract relating to the Oxford Music-hall stated that the plaintiff agreed to accept through Hugh J. Didcott and Co., his agents, an engagement to appear at the Oxford Music-hall, Mr. Ibbetson, having instructed Didcott and Co. to engage the plaintiff at a certain salary for a certain period; time to be mutually arranged. The contract contained the following clause:—"I agree to pay to you, or your heirs, executors, administrators, or assigns, 10 per cent. commission on all moneys accruing from this engagement; and I hereby authorize Mr. Ibbetson to deduct and pay Hugh J. Didcott and Co., or order, the same from my salary in any manner Hugh J. Didcott and Co. may deem expedient. I also agree to pay you, your heirs, executors, administrators, or assigns, the same rate of commission on all my re-engagements at the above establishment or with Mr. Ibbetson. . . . (Signed) GEORGE ROBEY." On December 15, 1893, the plaintiff made an engagement, without the intervention of Didcott and Co., with the Pavilion Music-hall, to come into operation in April, 1896. On October 4, 1895, the plaintiff was indebted to Didcott and Co. in the sum of £48 15s. 7d. for commission, and by an indenture of that date he covenanted with the defendants, as receivers of the late firm of Hugh J. Didcott and Co., to pay to them £48 15s. 7d. for commission accrued due, and also such further sums as had been accrued due or were accruing due, by instalments of £10 per week, and as security he assigned his present and future salaries at music-halls or theatres at which he should be performing during the continuance of the security; and there was a proviso that if the plaintiff paid the said instalments the defendants would not give notice of the security, and, further, that when the defendants did give notice they might at their option give notice at any of the halls or theatres at which the plaintiff might be performing, and might request the proprietors to pay to them part of the salary that the plaintiff might be earning. On October 23, 1895, the plaintiff obtained for himself engagements with the Oxford and Tivoli Music-halls, to come into operation in May, 1896, on similar terms to the Pavilion engagement. It was admitted that the sum of £48 15s. 7d. and all commissions due up to December 31, 1895, had been paid by the plaintiff, but the defendants contended that they were entitled to 10 per cent. commission upon the salary the plaintiff received from the engagements at the three music-halls in question in 1896, upon the ground that they were "re-engagements" within the meaning of the agreements of November 15, 1892. In January, 1897, the defendants accordingly wrote to the manager of the Theatre Royal, Birmingham, where the plaintiff was performing in the Christmas pantomime for 1896-97, requesting him to pay one-half of the plaintiff's salary, which was £45 a week, to them. The plaintiff on the other hand contended that the agreements of November 15, 1892, only covered commission due upon the engagements for 1894 and 1895 obtained through Didcott and Co. The plaintiff brought this action (1) for a declaration that the mortgage of October 4, 1895, was no longer a subsisting or continuing security, and that all moneys secured thereby had been duly paid; and (2) for an injunction to restrain the defendants from serving notices as above on the managers or proprietors of any music-hall or theatre at which the plaintiff might be performing. The defendants counter-claimed for commission on the plaintiff's engagements at the Oxford, Pavilion, and Tivoli Music-halls for 1896. Mr. Justice Darling, without leaving any question to the jury, gave judgment for the defendants on the counter-claim, holding that there had been "re-engagements" within the meaning of the contract; but

granted an injunction as claimed by the plaintiff upon the ground that the commissions due under the re-engagements were not included in the mortgage deed so as to entitle the defendants to give notice. The plaintiff appealed, and the defendants gave cross-notice of appeal.

Mr. COCK, Q.C., and Mr. MONTAGUE LUSH, for the plaintiff, contended that the defendants' contention would make the plaintiff liable to pay commission whenever he at any future time obtained an engagement at any one of the music-halls in question. A "re-engagement" meant a renewal of the engagement brought about by the agent. It could not include the case of an artiste obtaining an engagement by his own efforts. The question whether the engagements for 1896 were "re-engagements" ought to have been left to the jury. That question depended upon whether the terms were the same and upon other circumstances. As regards the mortgage of October 4, 1895, that came to an end when the commission due on the 1894 and 1895 engagements were paid.

Mr. JOSEPH WALTON, Q.C., and Mr. RUFUS ISAACS, for the defendants, contended that the engagements for 1896 were "re-engagements." That term implied a renewal, a carrying on. Here, upon the facts, the engagements for 1896 were practically continuous upon those for 1894-95, and were therefore re-engagements. There was no question for the jury, as the terms of the various engagements were substantially the same. If the question were left to the jury they could only come to one conclusion—namely, that these were re-engagements. They referred to "*Bilbee v. Hasse and Co.*" (5 *The Times* L.R., 677). As regards the mortgage deed of October 4, 1895, that deed covered the claim for commissions on re-engagements, and the defendants were entitled to give the notice as the security was a subsisting and continuing security.

Mr. MONTAGUE LUSH, in reply, cited "*Morris v. Hunt and Co.*" (12 *The Times* L.R., 187).

The COURT allowed the plaintiff's appeal and dismissed the defendants' cross-appeal.

LORD JUSTICE A. L. SMITH said that, though it was not necessary to decide the point, yet as there were other contracts similar to this he desired to say that, in his opinion, the question whether the engagements of 1896 were fresh engagements or re-engagements would be a question for the jury. He further thought that the word "re-engagements" in the contracts of November 15, 1892, could not be read as meaning re-engagements through Didcott and Co. The defendants' counter-claim, however, depended upon the mortgage deed of October 4, 1895. If the deed was satisfied, the defendants had no claim. That depended upon whether the deed covered commissions on salaries earned by the plaintiff on new engagements or re-engagements, whatever they might be called, or only upon the original engagements brought about by Didcott and Co. In his opinion, the deed only covered commissions due on the original engagements, and did not cover commissions on new engagements or re-engagements. The terms "accrued due" and "accruing due" in the deed meant commissions accrued due or accruing due under the original engagements obtained through Didcott and Co. Those commissions had been paid. The defendants therefore failed upon their counter-claim. The plaintiff was, consequently, right in his claim for an injunction. The plaintiff's appeal would be allowed, and the defendants' appeal would be dismissed with costs here and below.

LORD JUSTICE CHITTY and LORD JUSTICE COLLINS concurred.

[Solicitors—Stanley, Woodhouse, and Hedderwick, for the plaintiff; Hicks, Arnold, and Mozley, for the defendants.]

Q.B. Div. }
(Kennedy, J.) }

1898.
Feb. 10.

SMITH AND SCARAMANGA V. FENNING AND OTHERS.*

Insurance—Marine—Policy on freight—Construction—"Difference of freight"—Policy against total loss.

This action was brought to recover a total loss under a policy of marine insurance on "difference of freight" underwritten by the defendants. The plaintiffs are merchants in London and are large importers of grain from Southern Russia, and in June, 1896, being of opinion that freights from the Black Sea were likely to advance by the autumn of that year, they entered into a contract with certain ship-owners, which was embodied in a "berth note," dated June 12, 1896, whereby the owners "engaged with the plaintiffs for a steamer, to be named thereafter, the following full cargo, viz.:—*maximum* 4,800 tons of wheat and for other grain, to be loaded at a safe port in the Sea of Azoff for United Kingdom or Continent, at 12s. per unit. If steamer did not arrive at port of loading (to be named) on or before midnight of November 10, the shippers were to have the option to cancel the engagement. Ten lay days, Sundays and holidays excepted, were allowed for loading. The conditions of 1890 Azoff charterparty to apply until cargo should be on board and thereafter general produce bill of lading." The material clauses of the 1890 Azoff charterparty are as follows:—"The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load, on or before midnight of next (new style)." "B. In the event of ice (except in the spring) preventing the steamer entering the port of loading, or ice in the Azoff on steamer's arrival (except in the spring) preventing the cargo from being sent alongside, this charter shall be null and void. Should frost ensue (except in the spring) after steamer has arrived at port of loading, and the vessel is compelled to leave to avoid being frozen in, the master is at liberty to leave without cargo, in which cases the charter shall be null and void, or with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff, or Mediterranean port for United Kingdom, Continent, or Mediterranean, but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers, freight being paid on quantity delivered under this charter." By October, 1896, freights had risen to 24s. and the plaintiffs were in a position to make large profits on the Berth Note Contract. The steamship Gladys Royle was named by the owners as the vessel which should fulfil the contract, and Taganrog chosen by the plaintiffs as the port of loading. On October 23 it was doubtful whether the Gladys Royle would arrive at Taganrog before November 10, the cancelling date. On October 23 the plaintiffs effected with the defendants the policy now sued on, which was in the following terms, so far as material:—"Cardiff to Port Said while there and thence to Taganrog upon the Gladys Royle steamship." "The said ship &c., are and shall be valued at—on difference of freight—to pay a total loss in the event of steamer being unable to fulfil her charter through non-arrival or inability to load by November 20 from any cause whatever. Policy £150." The Gladys Royle arrived at Taganrog on

November 8, and commenced to load. In ordinary course her loading would have been completed by November 20, but was delayed by ice in the harbour. On November 20 she had loaded half, and on November 24 four-fifths of her cargo, when she was compelled by ice to leave the port. She afterwards filled up at Novorossisk for steamer's benefit.

Mr. H. F. BOYD, Q.C. (Mr. F. Laing with him), contended for the plaintiffs that the policy was a contract to pay £150 if certain events happened. One of those events was being unable to fulfil her charter by inability to load by November 20. On November 20 she had not loaded, and had not fulfilled her charter. The plaintiffs had lost some difference of freight; whether they could recover a partial loss was doubtful.

Mr. JOSEPH WALTON, Q.C., and LORD ROBERT CECIL for the defendants contended that the policy was against total loss and there had been no total loss. The risk was a voyage to Taganrog and *prima facie* no loss after arrival would be covered. The vessel must either not arrive or not be in a condition to load by November 20. In either of those cases the charter would be entirely lost. Such a loss would be covered by the policy. To constitute a loss she must have been unable to fulfil her charter by reason of one of the two causes named. Looking at clause B of the Azoff charterparty she had fulfilled her charter.

His LORDSHIP, in giving judgment, said the point was a difficult one and not free from doubt, but the defendants' view appeared to him to be the more reasonable one. The plaintiffs wanted protection against a total loss of freight from inability to fulfil the charter within the meaning of clause B. November 20 was a date on which ice might reasonably be expected to interfere with the adventure. The meaning of the policy was that if by that date she did not arrive or was unable to load so that the plaintiffs got no profit out of the adventure, then a total loss was to be paid. The fact that the risk insured was a voyage to Taganrog made for that view. As the claim had been put forward on the basis of there being a total loss or nothing, judgment would be for the defendants with costs as far as total loss was concerned, with liberty to apply, in case it should be determined to put forward a claim for a partial loss.

Rail. and Canal Commission (Wright, J., } 1898.
the Right Hon. Sir F. Peel, and the } Feb. 10.
Right Hon. Viscount Cobham)

THE POSTMASTER-GENERAL V. THE CORPORATION OF LONDON.*

Telegraph (Post Office)—Telephone—Corporation of London—Power to impose conditions—Telegraph Act, 1863, sec. 5, subs. 3.

In this case the Court sat to determine a difference which had arisen between the parties within the meaning of the Telegraph Act, 1878. By a Treasury minute dated May 23, 1892, the respective rights and duties of the Post Office and of the National Telephone Company had been defined, and subsequently an agreement had been entered into, upon the basis of the minute, by which the main trunk lines of wires used for telephonic purposes were to be laid down by the Post Office and to be the property of that department, while local systems of exchange were to be constructed by the company and to

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

*Reported by T. WAGHORN, Esq., Barrister-at-Law.

be worked for their benefit. By the Telegraph Act of 1863 a highway authority might sanction the placing of telegraph wires under a street or road. Section 5, subsection 3, provides:—"Any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful), or subject to such stipulations as to the time or mode of execution of any work, or as to the removal or alteration in any event of any work, or as to any other thing connected with or relative to any work, as the person or body giving consent thinks fit." By the Telegraph Act, 1878, in the case of the withholding of a consent to the Postmaster-General or of the attaching to the consent any terms, conditions, or stipulations to which the Postmaster-General objects, the difference so arising falls to be determined ultimately by the Railway Commission. In the early part of 1897 the Post Office authorities decided to make various changes in the working of the exchange system in London, and applied for consent to open up the streets in order to do the necessary work. The Commissioners of Sewers (now succeeded by the Corporation), as the highway authority, desired to attach to their consent the condition "that the pipes in question were to be used for public purposes only by the Post Office authorities, and that they would not be let or handed over to others." Later on the Post Office were informed by letter "that the Commission do not object to the opening of streets by the Post Office authorities for laying underground telegraph wires for their own purposes, but that the Commission still objects to giving any consent to wires being laid for the use of the National Telephone Company unless the telephone company are prepared to provide an improved service at a reduced cost, in accordance with the evidence given on behalf of the Commission to the Select Committee of the House of Commons in 1895."

Mr. CRIPPS, Q.C. (Mr. Lyttelton Chubb with him), contended that in laying down wires to be subsequently rented and solely used by the telephone company the Postmaster-General was not acting in his official capacity but was virtually the agent of the telephone company, and as regards these subsidiary lines the work to be performed was subject to the right of absolute veto by the Corporation, and that the pecuniary terms and conditions mentioned in the Act of 1863 were wide enough to cover the claim of the Corporation to attach to their consent stipulations involving the reduction of the telephone tariff.

The SOLICITOR-GENERAL (Mr. Casserley with him) was stopped by the Court.

Mr. JUSTICE WRIGHT said that the Corporation, in seeking to restrict the consent given to the Post Office, had no doubt been actuated by no capacious or unfriendly spirit, but had striven to give effect to their view that when companies were making a profit by using streets for public purposes they should be compelled to give good value in return for concessions allowed to them. But the question arose as to whether they had the right of control which they claimed. It was clear that the stipulations mentioned in the latter part of subsection 3 had reference merely to matters in connexion with the construction of the work, and, reading the whole section together, it was clear also that the "pecuniary" terms and conditions mentioned were intended to be of a class with which the authorities could concern themselves in their character of road authorities. Even if it were open to them to seek to impose such conditions as were in question in this case, the Court were of opinion that they were not reasonable, and would, according to the terms of the Act, "consent" that the streets should be opened by the post-office authorized under the conditions usually imposed in such cases.

Chan. Div. } 1898.
(Byrne, J.) } Feb. 11,

BIRMINGHAM BREWERIES (LIMITED) v. JAMESON.*

Landlord and Tenant—Lease—Covenant by lessee to buy beer of landlord or his assigns—Assignment of lease and reversion—Construction of agreement.

This was a case of some interest and importance to the tenants and owners of "tied" houses. By a lease dated November 5, 1889, and made between Alfred Hood, therein described as of "The Brewery, Nechells, Birmingham, in the county of Warwick, brewer (hereinafter called 'the lessor')," of the one part, and John S. Nock, therein described as of "100, Nechells-park-road, Nechells, Aston-juxta-Birmingham, beer retailer (hereinafter called 'the lessee')," of the other part, the lessor demised unto the lessee a beerhouse at 82, Guildford-street, Lozells, for 14 years from June 21, 1889. The lease contained the following covenant:—"And the lessee hereby covenants with the lessor . . . that he, the lessee, his executors, administrators, lessees, tenants, and assigns, and all other persons for the time being carrying on the business of a beer retailer or publican upon the said premises will and shall during the said term of years hereby granted deal exclusively with the lessor or his firm of Messrs. Hood and Sons or his or their successors in business for all beers, ales, porter, stout (except bottled stout), and other like articles which shall be sold or consumed upon the said hereby demised premises, or shall be brought thereon to be so sold or consumed; and will not nor shall during the said term on any pretence whatsoever purchase, take in, or receive, or have in his or their possession, or directly or indirectly sell or dispose of, or permit the sale, disposal, or consumption, in or upon the said premises of any such articles other than such as shall have been purchased or taken of the lessor or his firm or his or their successors in business, provided that he or they shall be willing to supply the same at the price and terms usually charged by the lessor or his firm to his or their tenants." The lease also contained a declaration that "where the context allows the expressions 'the lessor' and 'the lessee' used in these premises include besides the said Alfred Hood his executors, administrators, and assigns, besides the said John Sidney Nock his executors, administrators, and assigns." The lease was afterwards assigned to the defendant, John Jameson, who carried on on the premises the business of a beer retailer and publican. A. Hood, in 1894, assigned the reversion expectant on the lease to a company, which, in 1896, assigned such reversion to the plaintiff company; Messrs. Hood and Sons were still carrying on their business at the brewery at Nechells. The defendant had refused to deal exclusively with the plaintiff company for his beers, whereupon that company brought the present action for an injunction to restrain him from buying his beers elsewhere. He was willing to buy his beers from Messrs. Hood and Sons. The question in dispute was whether the covenant compelled him to deal only with the plaintiff company.

Mr. Dunham was for the plaintiff company; and Mr. Douglas for the defendant.

Mr. JUSTICE BYRNE, in delivering judgment, said no question was raised as to whether the plaintiff company could sue on the covenant or whether the benefit of the covenant ran with the reversion. As Lord Justice Cotton said in "Clegg v. Hands" (L.R., 44 Ch.D., 503,

517), cases, so far as they gave us a rule of construction, were very useful, but it was very seldom that a case upon the construction of one particular document told much about the construction of another document unless it laid down some principle to guide us; and accordingly the Lord Justice had proceeded to distinguish the case before him from "Doe v. Reid" (10 B. and C., 849), which had been cited by Mr. Douglas in the present case, pointing out that the lease in that case contained different words and that no rule was thereby laid down which he was bound to follow. The question here was, Had his Lordship, throughout the lease, to use the words "executors, administrators, and assigns"? He must do so where the context allowed this to be done. At first he had been struck with the contention that it would be reasonable to say that the context of the covenant did not allow the interpretation clause to apply to that part of the lease. The covenant was by the lessee, and was that he, "his executors, administrators, lessees, tenants, and assigns, and all other persons for the time being carrying on the business," would purchase the beers. These words were inserted to show that underlessees and others were to fulfil the obligations under the lease. That being so, the covenant would, as explained by the interpretation clause, run so as to relate to dealing with the lessor, his executors, administrators, or assigns, or his firm, and it was said that although the lessor, his executors, administrators, or assigns were the only persons who could sue on the covenant, yet the obligation was fulfilled if the lessee traded with Hood, or with his firm even if Hood had left the firm. Lord Justice Lindley in "Clegg v. Hands" said:—"I agree with Mr. Collins in thinking that this case is one of very great importance both to brewers and tenants who take tied houses, because it certainly is rather a startling thing to anybody to be told that when you have agreed to buy beer of a particular brewer you may find yourself bound to take beer from somebody else. Whether you are or are not depends upon the agreement into which you have entered. The whole question here turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into a contract with certain persons, relying upon their personal skill and reputation, and agreed to buy beer of them and them alone, or whether he did not enter into a very much wider contract and agree to buy beer from them or anybody to whom they might assign the business or the publichouse. The answer to the question whether this is a personal unassignable contract or not must be gathered from the instrument itself, having regard of course to the position of both parties." The argument as presented by one side was that it was startling that a man who knew the quality of one person's beers might be obliged to take other persons' beers. But that argument could only prevail on ambiguities and could not affect the words of the covenant. In the present case there was a covenant with the lessor, his executors, administrators, and assigns, which they might enforce, that they were to be the persons to dictate to the tenant as to the beers which he was to take, and his Lordship might point out that the tenant was not to take beer which had been brewed at a particular place, but which was to be supplied only. The contract was for the benefit of the lessor, and not for the benefit of his firm except in so far as he was a member of that firm. The injunction must therefore be granted and the defendant must pay the costs. His Lordship suspended the injunction in the event of notice of appeal being given within a fortnight.

[Solicitors—Hurrell and Co.; Ward and Bowie, for Lane, Clutterbuck, and Tomlinson, Birmingham.]

Q.B.Div. (Hawkins and }
Channell, J.J.)

1898.
Feb. 11.

THE MUNICIPAL CORPORATIONS ACT, 1882. IN THE MATTER OF AN ELECTION PETITION TOUCHING THE ELECTION FOR THE OFFICE OF MEMBERS OF THE SCHOOL BOARD FOR LONDON—LORD MONKSWELL AND OTHERS V. THOMPSON.*

Election Law—School Board—Recount—Voting papers—Validity.

After a school-board election for five seats, there being eight candidates, the sixth on the poll petitioned for a recount as between himself and the fifth. The recount resulted in his favour.

Held, that to unseat the respondent it was not necessary for the petitioner further to show that the respondent was not among the first five.

This was a special case stated under an order made by Mr. Justice Kennedy on December 21, 1897, which was affirmed by the Court of Appeal (see *ante*, p. 163), in the matter of an election petition presented by Lord Monkswell and other persons against the return of Mr. William Whitaker Thompson, the respondent, in the election of members of the Chelsea Division of the School Board of London, held on November 25, 1897. The petition further prayed that Mr. Leslie Morton Johnson might be declared duly elected.

Mr. S. Day and Mr. Kenrick appeared for the petitioners; and Mr. Yarborough Anderson for the respondent.

There were eight candidates for election, and five seats. The respondent was fifth on the poll, with 13,221 votes, and Mr. Johnson was sixth, with 13,218. The fourth candidate, Viscount Morpeth, polled 13,292 votes. A recount as between Mr. Johnson and the respondent was called for on behalf of Mr. Johnson, the result of which was to show that Mr. Johnson had polled 13,183 votes and the respondent 13,176, giving Mr. Johnson a majority of seven votes over the respondent. Twenty-three ballot papers remained in dispute. Of these, Mr. Johnson claimed 11, as recording in the aggregate 23 votes in his favour, and the respondent the remainder as recording 22 votes in his favour. The Court were asked to decide upon the disputed ballot papers. The respondent contended, in addition, that even if Mr. Johnson should retain his majority over the respondent he was not entitled to either of the prayers prayed for in the petition, because he failed to show that the respondent was not among the first five candidates. It was decided to adjudicate upon the ballot papers before discussing the point of law. The result of the adjudications was to give Mr. Johnson 14 additional votes and the respondent 16, so that Mr. Johnson still retained a majority of five over the respondent. The first voting paper had a mark opposite the name of Mr. Johnson, which might have been either a 3 or a 5. There were no other marks on the paper.

Mr. ANDERSON claimed that the paper was void for uncertainty, but the mark was held to be a 5.

In the second paper the voter had given two votes to Johnson, two to Howard, and one to Maitland. Opposite the name of Thompson (the respondent), but outside the parallelogram provided for votes, and to the right of it, he had placed a cross and a line.

MR. JUSTICE HAWKINS said that the cross and line, under the circumstances, afforded no indication that the voter intended to vote for Thompson, and, it not having been suggested that the mark was intended to be an indication of the name of the voter, the voting

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

paper was allowed. A voting paper in which the voter had placed the figure 1 against three names and against the fourth had put 1 2, was held to be bad, because as the figures stood the voter appeared to have recorded 15 votes, being only entitled to five. Another paper had a cross opposite the name of Mr. Johnson, and opposite that of another candidate the figures 1 2 3. It was suggested that the voter intended to record three votes for that candidate, but the paper was disallowed. Another paper had, opposite the name of Mr. Johnson, two crosses, and over them was written the figure 3, two votes being recorded for Maitland. This paper was held to be good, as recording three votes for Mr. Johnson, their Lordships considering that the voter had intended in the first instance to vote by means of crosses, but, changing his mind before he had completed his vote, voted by means of a figure. An incomplete 5 with a cross over it was held to be one vote for Mr. Johnson. A paper containing a cross, over which the figure 2 had been placed, was held to confer two votes on Mr. Johnson, but where a 2 opposite Mr. Johnson's name was superseded by a cross, three other votes being recorded on the paper, the votes for Mr. Johnson were held to have been cancelled. Three papers, containing votes for the respondent, contained other votes, by figures, up to the number of five, but opposite the names of the remaining candidates crosses were inserted. It was held that the papers were good, no votes being intended to be recorded by means of the crosses.

All the voting papers having been disposed of, Mr. ANDERSON proceeded to argue the point of law. He said that the petition was filed under section 87 of the Municipal Corporations Act, 1882, and the election was questioned therein, on the ground that the respondent was "not duly elected by a majority of lawful votes." That was the same thing as to say that the respondent was not among the first five candidates. The question, therefore, was whether there should be a recount of the votes of all the candidates or whether the recount should be limited to the votes of Mr. Johnson and the respondent, the fifth and sixth candidates. When the matter came before Mr. Justice Kennedy the respondent offered to abandon a recount as to the first three candidates provided the recount were granted as to the fourth, fifth, and sixth candidates. But Mr. Justice Kennedy's order limited the recount to the votes of the fifth and sixth candidates. The Court of Appeal affirmed that order, saying that it would be open to the respondent to raise the point of law he now raised in the High Court. Counsel put the case of a candidate, sixth on the return, there being five seats, who petitioned against that candidate only who was first on the return, and on the recount, owing to the discovery of a large number of votes which ought to have been counted in favour of the first-named candidate, it was found that he himself was entitled to occupy the first place. If the petitioners were right the first-named candidate would be entitled to turn out the candidate lately at the head of the poll, even though such last-named candidate retained a sufficient number of votes to entitle him to the second place. He would not, at any rate, have the right to turn out the fifth candidate, because *ex hypothesi* no petition was presented against him.

MR. JUSTICE CHANNELL.—But the candidate who was beaten on the recount would still have the right to petition against the remaining candidates.

Mr. ANDERSON, continuing, said that a petitioner undertook to proceed against the right man. A candidate who was in ought not to be compelled to petition against the other candidates.

Mr. Willoughby Williams, for the petitioners, was not called upon to argue.

MR. JUSTICE HAWKINS said that he was of opinion

that the application of the respondent to have a recount of the votes of all the candidates must fail. The Ballot Act, 1872, section 2, set forth the manner in which the election was to be held. After the close of the poll the ballot-boxes were to be sealed up and taken in charge by the returning officer, and such officer, in the presence of the representatives of the candidates, was to open the boxes and count the votes and was forthwith to declare the candidate or candidates to be elected for whom the largest number of votes had been polled, and he was to declare their names to the clerk of the Crown in Chancery. It was declared that the decision of the returning officer should be final, subject to its reversal on a petition questioning the election or return. On the returning officer's original return the respondent was three votes ahead of Mr. Johnson. As regarded the first four candidates, the 21 days had elapsed during which petitions might have been presented, and nobody suggested that any question arose as to their votes, so that the decision of the returning officer, so far as regards the votes of these candidates, was final. But the respondent's votes were attacked. The result of the recount was to show that the name of Mr. Johnson ought to have been in front of that of the respondent. His Lordship doubted whether they had any power to interfere. But supposing they had, he was of opinion that the Legislature intended that there should be finality as regarded the votes not petitioned against within 21 days.

Mr. ANDERSON.—I do not ask now for a recount. I ask that the petition should be dismissed for want of proof.

MR. JUSTICE HAWKINS.—Then the question is much easier. Continuing, he said that the person who asserted a fact must prove it. Mr. Johnson had shown that he was above the respondent. Therefore, unless the respondent could show some ground for saying that by means of further inquiry it would be found that he himself had polled more votes than Lord Morpeth or some others of the candidates placed above him on the return, his objection failed. But there was no suggestion or complaint of any error with regard to the votes of the first four candidates. The figures in the return had remained unchallenged. Nothing appeared in the case to show that any good would come to any one from a recount of those votes. The returning officer's return was *prima facie* evidence of the number of those votes. The return as regards them being unchallenged the numbers stated therein were *prima facie* correct. There was no suggestion of any particular mischief. There was nothing but the merest surmise that if they were recounted they might possibly be found not to exceed the votes of the respondent. The judgment of the Court, therefore, was in favour of the petitioners, because on the recount it had been shown that there was an error in the former count putting the respondent in a majority over the candidate on whose behalf the petition was presented, and no ground was shown why the petitioners should go to the expense of challenging the return as regards the votes of the other candidates.

MR. JUSTICE CHANNELL said, I am of the same opinion. The respondent ought to be unseated, and Mr. Johnson ought to be seated in his place. The facts we go on are that, as it is now ascertained, Mr. Johnson had a few more votes than the respondent and that there were four other candidates with considerably more votes, according to the return. I think we ought to take the figures appearing in the return as the basis of our judgment. It is the duty of the returning officer to count the votes, and unless an error is shown the figures returned by him must be taken to be correct. If a person makes an allegation, the burden of proving it is on him. We start with the returning officer's figures. Who says they are wrong? The petitioners do not. They have shown that the figures denoting the number of votes polled by the fifth and sixth

candidates were wrong. But they do not challenge the figures in the case of the first four candidates, nor does the respondent show that the figures in the case of the first four candidates are wrong. If he had done so, and had succeeded in showing that any one of the four had polled a less number of votes than he himself had polled, subject to his having adopted the proper proceeding, the result would follow that he could not have been unseated. But it is not sufficient for him to show that he may have had more votes than one of the candidates placed above him. That disposes of the dilemma put by the learned counsel in this case, suggested by him, of a petition in which the petitioners proceeded against the candidate who was head of the poll. If such a petition were presented, and no petition were presented against the other successful candidates, and the result of a recount were that the votes of the candidates lately at the head of the poll were reduced so that he was no longer among the first five candidates, he would have to go out. But if he retained his place as regards the remainder of the successful candidates, he would have the right to petition against any of those candidates. There would then be no difficulty about the judgment. The only difficulty here is to understand what the Court of Appeal intended to do in this case. That Court seem to have understood Mr. Anderson to be raising the point he raises here—namely, that it was necessary for the petitioners to go into the number of votes polled by the other successful candidates. But Mr. Anderson states that he intended to make a separate application for a recount of the votes of the other candidates. We accept that statement. Still, there are passages in the judgments of the Court of Appeal which clearly show they were dealing with the other proposition. If they decided that the respondent ought not to have the recount he asked for, they were, no doubt, right. It may be that he ought not to have the recount because he failed to present a petition within the proper time. It is true he might not have the opportunity of presenting such a petition if the petition against himself were deferred until the last moment. But that would be his misfortune. It is sufficient to say that it has not been shown that there is any error in the figures in the return, and the presumption is that they are correct. The first four figures are correct, and the fifth and sixth have been altered so as to reverse the position of the candidates. Mr. Johnson, therefore, must be seated, and the respondent unseated.

Mr. WILLOUGHBY WILLIAMS asked for costs.

Mr. ANDERSON opposed the application on the ground that neither party were to blame.

Costs were granted against the respondent.

Leave to appeal was also granted, after some demur, on the question whether it was the duty of the petitioner to show that the result of the recount was that the respondent was not among the first five candidates, taking into consideration the votes polled by all the candidates.

MR. JUSTICE CHANNELL said that he thought there ought to be leave to appeal, not because he entertained any doubts, but because he may have misunderstood the views of the Court of Appeal.

[Solicitors—Radford and Frankland, for petitioners; Lewin and Co., for respondent.]

Q.B. Div. }
(Kennedy, J.) }

1898.
Feb. 11.

THE LOWER RHINE AND WÜRTTEMBERG INSURANCE
ASSOCIATION V. SEDGWICK.*

Insurance—Marine—Re-insurance—Lapse of
original policies—Fresh policies.

Defendant re-insured certain risks with plain-

tiffs. Of the two original policies covering these risks one lapsed and the other was cancelled, the defendants issuing a fresh policy to the assured which contained provisions differing from those in the two original policies. No notice of these facts was sent to plaintiffs.

Held, that defendants having paid a total loss were entitled to recover from the plaintiffs.

This was an action brought to recover back money paid by the plaintiffs to the defendant under a mistake of fact. The circumstances were as follows:—The defendant, who is an underwriter at Lloyd's, subscribed, together with other underwriters, certain policies of marine insurance upon the steamship *Collynie*—namely, (1) a policy running from noon on February 20, 1896, until noon on February 20, 1897, upon steamer valued at, hull £3,600, machinery £2,000—total, £5,600. The amount insured was £350, of which the defendant's "line" was £50, the remaining £300 being subscribed by his six other "names." The premium was nine guineas per cent. The policy included the conditions of time clauses as attached. (2) A policy running from June 20, 1896, until June 20, 1897. The valuation and provision as to time clauses were the same as in the first policy. The amount insured was £850, of which the defendant's line was £25, the line taken by his names being £150. The premium was nine guineas per cent. The "time clauses" attached to the two original policies provided that "the insured value should be taken as the repaired value in ascertaining whether the vessel is a constructive total loss," and made provision for the return of a certain portion of premium in certain events. On November 27, 1896, the defendant and his six other names effected with the plaintiffs a policy of re-insurance upon the *Collynie* running from November 4, 1896, until June 20, 1897. The valuation of hull and machinery was £5,600. The amount insured was £250. The policy contained the following clause:—"Being a re-insurance of policy or policies, and subject to the same terms, conditions, and clauses, as original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon." This clause was stamped on the margin with a rubber stamp, and is known as one of the rubber clauses. The slip was in these terms:—"4 Nov. to 20 June, '97. On hull, &c., valued at £5,600. Time clauses as original. 10 guineas. £250 Lower Rhine, 4-11. In the event of any inaccuracy in description of voyage, interest, name of vessel, clauses, or conditions, it is agreed to hold the assured covered at a premium to be arranged." The defendant's original policies were not asked for or shown to the plaintiffs. The plaintiffs themselves again re-insured, under a policy dated November 12, 1896, against total loss only. On February 20, 1897, the first of the original policies expired and the second was cancelled, and their place was taken by a fresh policy dated February 20, 1897, and running from noon on February 20, 1897, to noon on February 20, 1898. The valuation of hull and machinery was reduced to £5,000; the premium was 10 guineas per cent. without discount. The amount insured was £1,040, of which the line of the defendant was £50, and of his other names £50 each, or £350 in all. No notice of the cancellation and expiration of the first two policies and of the issue of a fresh policy was sent to the plaintiffs. On May 3, 1897, the *Collynie* became a total loss, and the defendant paid his assured for a total loss. The plaintiffs paid the defendant and his other "names" a total loss on the policy of November 27, 1896, without asking for production of original policies. When the plaintiffs sought to recover from their re-insurers, their re-insurers re-

*Reported by E. H. BALLOCH, Esq., Barrister-at-Law.

quired to be shown the original policies, whereupon the plaintiffs ascertained the facts relating to the cancellation of the policy dated June 20 and the substitution of the policy of February 20, 1897, and this action was brought to recover back the moneys paid to the defendant.

Mr. English Harrison, Q.C., and Mr. Joseph Hurst appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. T. E. Scrutton for the defendant.

Mr. HARRISON, Q.C., argued that the terms of the re-insurance policy showed that it was based on the existence at the date of that re-insurance of some actual policy or policies and only covered the risks insured by such policy or policies. The original policies came to an end on February 20, 1897, and the defendant had no right to impose a new risk on the plaintiffs, certainly not a more onerous risk, as the risk under the policy of February 20, 1897, was.

Mr. SCRUTTON said that no point would be made of payment having been made by the plaintiffs; the only question was, Was the defendant entitled to recover on his re-insurance? All he had to show was that at the time of the loss he was interested in the subject-matter of insurance to the amount insured, and that the loss came within the policy. The defendant was interested as re-insurer. An assured might change his interest during the currency of the policy. He was entitled to recover if he had paid a loss, provided there was no term in the re-insurance policy to prevent him from recovering.

The case was argued on February 8 and 10, and at the conclusion of the arguments his Lordship reserved judgment.

His LORDSHIP, in giving judgment, having stated the facts, said that the only question was whether the defendant could have legally claimed against the plaintiffs on the policy of re-insurance. The plaintiffs claimed to be entitled to recover back the moneys they had paid on the following grounds:—(1) They said that their re-insurance policy was only effectual in respect of payments made by the defendant under policies which were in existence at the time the re-insurance policy was effected, and there was no doubt that neither of the policies underwritten by the defendant before the date of the re-insurance policy was in existence at the time of the loss; (2) they said that the policy which was in existence at the date of the loss, and under which the defendant had paid, contained provisions differing from those contained in the first two policies and from those which appeared to be embodied in the re-insurance policy, the main points of difference being the amount of the valuation, the rate of premium, and the amounts to be returned in case the vessel should be laid up. They contended that, even if the defendant could claim upon a policy effected after the date of the re-insurance policy, he could only do so if his new policy contained no such points of difference from his original policies. In the opinion of the learned Judge these contentions were not well founded. If this were treated as an action in which the defendant was seeking to recover from the plaintiffs, how could a good legal plea be framed in answer to the defendant's claim? He had an insurable interest as insurer in the subject-matter of insurance at the time of the loss. That was sufficient. It was unnecessary to aver interest at the time of effecting the policy. Even if that were not so, and it was necessary for him to show an insurable interest as insurer at the time of effecting the policy of re-insurance, the defendant had such an interest under the first two policies. It was immaterial that such an interest should have increased or diminished by the time of the loss; he was interested at both times, and if there had been any change it was a change which only affected his relations with his own assured,

and did not affect his insurable interest. The reference in the re-insurance policy to the original policy was, in his Lordship's opinion, a reference to such policy as might happen to be in existence at the date of the loss, and the stipulation that it was to be "subject to the same clauses" and "to pay as may be paid" meant that whatever claims the defendant paid as original insurer the plaintiffs would pay as re-insurers, unless there was something in the terms of the re-insurance policy to diminish or qualify their liability. Great stress has been laid on the differences in valuation and its possible effect in the case of a claim for constructive total loss, and no doubt difficult questions might arise, but in this case there was an actual total loss, and no such difficulty arose. There was nothing in the slip to alter the relations of the parties. The rate of premium and of return of premium was not a matter which concerned the plaintiffs at all. The learned Judge said that in his opinion it would have been impossible to frame a good plea in answer to the defendant's claim. There would be judgment for the defendant, with costs.

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.J.J.) }

1898.
Feb. 14.

ASHWORTH V. WELLS.*

Damages—Measure of—Sale of orchid—Breach of warranty.

The plaintiff bought at a sale an orchid, which was warranted by the defendant as a *Cattleya Aclandiae alba*, for 20 guineas. After two years' cultivation by the plaintiff it flowered, and turned out to be an ordinary purple one, which was worth about 7s. 6d. In an action for breach of warranty the County Court Judge found that if the plant had been an *alba* it would have been worth £50 at the time of sale, but that until it showed its real nature there was no probability that any orchid grower would give more than 20 guineas for it.

Held, that the true meaning of the warranty was that if and when the orchid flowered it would flower white, that there had been no breach of the warranty until two years after the sale, and that the plaintiff was, therefore, entitled to judgment for £50 damages.

Judgment of the Divisional Court (*ante*, p. 170) varied.

This was an appeal from an order of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrence) on an appeal from the Manchester County Court (reported *ante*, p. 170). The plaintiff, an amateur orchid-grower, bought an orchid at a sale of the defendant's collection of orchids in June, 1895. It was warranted by the defendant as a "*Cattleya Aclandiae alba*, seven bulbs and three leaves, the only known plant," and it was knocked down to the plaintiff for 20 guineas. It had never flowered while in the possession of the defendant, and it turned out after two years' cultivation by the plaintiff to be not an *alba* or white *Cattleya*, but the ordinary purple one, which was worth only 7s. 6d. The plaintiff having brought this action for damages, the defendant admitted liability and paid into Court £23 2s. The County Court Judge held that if the plant had been an *alba* it would have been worth more than £50 at the time of the sale, but that until it showed its real nature there was no probability that any

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

orchid-grower would give more than 20 guineas for it. He thought that the sum paid in was enough and gave judgment for the defendant. The Divisional Court thought that the case ought to be tried again, and sent it back to the County Court Judge. The defendant appealed.

Mr. Montague Lush appeared for the defendant; Mr. C. A. Russell, Q.C., and Mr. Tweedale for the plaintiff.

LORD JUSTICE A. L. SMITH said that, in his opinion, judgment ought to be entered for the plaintiff for £50. There had been a public sale by auction of a collection of orchids belonging to the defendant. It was admitted by the defendant that one of the entries in the catalogue constituted a warranty with regard to a certain orchid. It was as follows:—“*Cattleya Aclandiae alba*, seven bulbs and three leaves, the only known plant.” The purple *Cattleya* was a common plant; the white *Cattleya* was exceedingly rare, or rather, if the catalogue was correct, unknown. The plaintiff attended the sale and bought this orchid on the faith of the warranty for 20 guineas. If it was purple it was only worth 7s. 6d. Now what was the nature of the warranty? In his judgment, according to the true reading of the clause in the catalogue, it was a warranty by the defendant that this orchid, when it flowered, would flower white. There was no warranty that it would flower, or even that it would live. The plaintiff therefore had to wait the ordinary course of events for the plant to flower, and in two years’ time it did flower, not, however, according to the warranty, but it flowered purple. The plaintiff complained that there had been a breach of the warranty, and brought this action in the County Court for £50. The defendant paid into Court the sum of 20 guineas, the price which the plaintiff had paid for the orchid, and a sum of two guineas for interest, and a further small sum to cover the costs of the plaint. The real question in the case was whether the plaintiff was in law entitled to any damages beyond the 20 guineas which he had paid for the plant on the faith of the warranty. The County Court Judge thought that the plaintiff was not entitled to any further damages, and he gave judgment for the defendant on the ground that the sum which he had paid into Court was sufficient to satisfy the plaintiff’s claim. The Divisional Court had made an order that the case should be sent back for a new trial. In his opinion it should not go back for a new trial, but judgment should be entered for the plaintiff for £50. At the trial there had been abundant evidence, which was uncontradicted, that the orchid, if it was white, was worth 100 guineas. But no one could possibly tell at the time of the sale whether it was white or not. The plaintiff had to wait to find that out, and after waiting he found that the warranty was broken. Under those circumstances, What were the damages to which the plaintiff was entitled? It was said that he was only entitled to such damages as he could show that he had suffered at the time when the article was delivered. In the great majority of cases that was the proper rule, the market value being the chief factor to be considered. But the plaintiff in this case was, in his opinion, entitled to prove that he had suffered special damages, and he might wait a reasonable time to see what those damages were. This orchid could not properly be said to have any market value at all. The County Court Judge found as a fact that, if it was an *alba*, it was at the time of the sale worth more than £50. The evidence showed that it would have been worth more than £100, but with regard to the jurisdiction of the County Court it was sufficient to say it was worth more than £50. That finding seemed to him to dispose of the case, and he thought that the County Court Judge ought thereupon to have given judgment for the plaintiff for £50. But he went on, and proceeded to find further that

until the plant showed its real nature there was no probability that any orchid grower would give more than 20 guineas for it. He thought that the County Court Judge, in coming to this further finding, had misdirected himself. The warranty was that, when the plant flowered, it would flower white. The plaintiff was entitled to wait until it did flower, which did not happen for two years, and it was a mistake to say, when it did flower and the warranty proved to be broken, that the measure of damages was to be regulated by what the plaintiff had given for the plant two years before. The price which he gave was no criterion of the loss which he sustained. In his opinion, therefore, the appeal failed, and judgment must be entered as he had stated.

LORD JUSTICE CHITTY said it had been argued that the only damages which had been sustained were represented by the difference between the value of the plant at the time of the sale and what would have been its value if it had answered to the warranty at the time of the sale. He thought that this was not a case in which that general principle could be applied. This was a special kind of warranty, and, in his opinion, the plaintiff had shown special damage. He thought that the first part of the finding of the County Court Judge settled the question, and that what followed gave rise to the difficulty which had been felt in the case. The plaintiff could not bring his action until he had ascertained that the orchid bore a purple flower. He therefore agreed with the judgment which had been delivered by Lord Justice A. L. Smith.

LORD JUSTICE COLLINS said he agreed in the main with his learned brethren, but he felt some difficulty in coming to the conclusion that the County Court Judge, in whose hands the question of damages rested, and who had found £20 to be the sum to which the plaintiff was entitled, had misdirected himself. The general principle seemed clear enough—that in cases of breach of warranty the measure of damages was the difference between the contract price of the thing sold with the warranty and the market price or real value if it could be ascertained, and any special damages following from the buyer acting on the warranty might be added. Here the distinction seemed to be between the value of the plant with the contingency that it might flower and the value of the plant when it had flowered. If the County Court Judge meant that, and came to the conclusion that the true value of the plant with that uncertainty was no more than the money paid into Court, he felt a difficulty in saying that he was wrong. But he was satisfied that they were not giving the plaintiff too much, and he would not differ from the judgments which had been delivered.

House of Lords (Earl of Halsbury, L.C., } 1898.
Lords Watson, Herschell, Morris, }
Shand, and James of Hereford) Feb. 15.

TAYLOR V. BURGER.*

Ship—Collision at entrance to harbour—Duty of outgoing and incoming ships.

This was an appeal from an interlocutor of the Second Division of the Court of Session in conjoined actions in the Court of Session, in the first of which the respondents, shipowners of Rotterdam, registered owners of the steamship *Talisman*, of Rotterdam, were pursuers, and the appellant, registered owner of the steam tug *Tyne*, of Grangemouth, was defender; and in the second, the latter was pursuer and the former defenders. The actions were for damages sustained by

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

the *Talisman* and the *Tyne* respectively in consequence of a collision between the two vessels at or near the entrance into the Albert Basin, Leith. The Lord Ordinary (Lord Stormonth Darling) found that the collision was not caused by the fault of any one for whom the owner of the *Tyne* was responsible, and he was therefore assolized in the action at the instance of the owner of the *Talisman*; and he was held entitled to have decree in his own action for the damage, which the Lord Ordinary assessed at £86 16s. 8d. In the Second Division a majority of their Lordships—the Lord Justice Clerk (Lord Macdonald) and Lords Young and Trayner, Lord Moncreiff dissenting, reversed the decision of the Lord Ordinary, and held that the *Tyne* was liable for the damage done to the *Talisman*.

Mr. Pyke, Q.C., and Mr. Henry Aitken (of the Scottish Bar) were for the appellant; Mr. Aspinall, Q.C., and Mr. Ure, Q.C., for the respondents.

The arguments lasted the whole of yesterday, and were concluded this morning.

The LORD CHANCELLOR, in moving that the decision of the Second Division should be reversed and the interlocutor of the Lord Ordinary restored, said that the decision appealed from was based on a misapprehension of the place where the accident happened and the proximity of the vessels. The two vessels which were in collision were respectively of 28ft. and of 36ft. beam. The passage through which they were expected to pass was only 60ft. across. The question therefore arose which was to give way to the other. The universal rule was that an outgoing vessel should get clear of a dock or harbour before the incomer entered. In addition to this general rule there was to be considered the harbour-master's conduct. He called out to the *Fiery Cross*, another tug then in the harbour, and to the *Tyne*, "Why don't you go out?" Both vessels did their best to obey the order. The *Fiery Cross* cleared the *Talisman* without collision, but the *Tyne* was not able to do so. It was the primary duty of the master of the *Tyne* to obey the order, and not to exercise his own judgment as to its expediency, and any other view would be fatal to the authority of a harbour-master. An order was also given to the *Talisman* to go astern, which order was not fully obeyed, as it could not be said that merely bringing the vessel into a stationary position was a compliance with it. In a sense the responsibility lay with the harbour-master, who gave the order to the several vessels. But in his Lordship's view the harbour-master had acted rightly. In a question of this kind greater weight ought to be attached to the judgment of the learned Judge, who saw and heard the witnesses, than had been attributed to it by the Lords of the Second Division. The *Tyne*, in his opinion, was in no way to blame, and the *Talisman* had created the whole difficulty by not fully obeying the order to go astern.

LORD WATSON said that the master of the *Tyne* was ordered, or at least invited, to leave the dock. He was justified in obeying that order or invitation even if the space were insufficient to enable him to get clear, and in circumstances in which, if he had acted on his own responsibility, he would have been guilty of negligence. In point of fact there was not sufficient room left for the *Tyne* to pass out of the lock into the basin, and it was possible that the harbour-master was mistaken as to the available space. He did not agree with Lord Young that the harbour-master's evidence ought to be accepted simply because he was an official. The *Talisman*, without any direction from the harbour-master, advanced so near to the west end of the lock as to become a possible source of danger. There was a weak tide, and the *Fiery Cross* passed, contrary to the usual regulations, and after she had passed the order was given to the *Talisman* to go astern. The

master of the *Talisman* gave his engines a backward touch which stopped her way, so that she became stationary. When the harbour-master invited the *Tyne* to proceed he had not the opportunity of observing any forward movement of the *Talisman*, whose position had not necessarily remained unchanged by wind and tide. He concurred with the motion of the Lord Chancellor.

LORD HERSCHELL said that the question was which of the vessels was to blame or whether both of them were in fault. The *Talisman* was in a position which she ought not to have occupied; and thus the initial blame, at all events, rested with her. It had been said that she was in that position with the approval of the harbour-master, and that such approval was equivalent to an order. He could not accept that argument. The *Talisman's* duty was clearly to leave room for the *Tyne* to pass, and the only order she received was to go astern. The master of the *Tyne* had acted with care and prudence, and even if he had been guilty of any error of detail or management, of which his Lordship believed him guiltless, the blame would still rest with the *Talisman*, which was in a wrong position, and had not obeyed the order to go astern.

LORD MORRIS concurred.

LORD SHAND said that the *Talisman* had clearly advanced too close to the dock, and there was a wind driving her in that direction. Ordinary prudence and care for others should have held her back, apart from the harbour-master's order to go astern which had not been obeyed. He agreed that the *Tyne* was not in any way to blame.

LORD JAMES OF HERFORD concurred.

[Solicitors—Pritchard and Sons, for the appellant; Thos. Cooper and Co., for the respondent.]

Leicester Assizes }	1898.
(Hawkins, J.) }	Feb. 15.

REG. V. MOORE.

Criminal Law—Manslaughter—Deceased killed in football match—Violence causing death—Proper direction to jury.

At Leicester, on Feb. 15, before Mr. Justice Hawkins, Henry Moore was indicted for the manslaughter of John Briggs. The deceased was killed in a football match, and a strange feature of the case was that a young man named Veasey who was playing in the same match, and who had given strong evidence against the prisoner before the magistrates, was himself killed a few weeks later in another football match. A large number of witnesses were called for the prosecution and their evidence showed that in a match between Aylestone and Enderby, the prisoner was playing back for Enderby and the deceased was playing forward for Aylestone. The ball had been passed to Briggs and he dribbled it past Moore. Moore ran after Briggs, who kicked the ball rather hard towards the Enderby goal. The goalkeeper ran forward to kick the ball and save his goal. Just as he kicked, Moore jumped with his knees up against Briggs's back, and threw him violently forward against the knee of the goalkeeper. Briggs fell to the ground, but Moore was said not to have fallen at all. Briggs was seriously injured internally and died a few days afterwards. The witnesses for the defence gave a different version of what had occurred. They said that Briggs ran against the goalkeeper's knee before Moore touched him at all, that Briggs then fell to the ground, and while he was on the ground Moore tripped over him and also fell.

The learned JUDGE, in summing up, said that the rules of the game were quite immaterial, and it did not

matter whether the prisoner broke the rules or not. Football was a lawful game, but it was a rough one, and persons who played it must be careful to restrain themselves so as not to do bodily harm to any other person. No one had a right to use force which was likely to injure another, and if he did use such force and death resulted the crime of manslaughter had been committed. If a blow were struck recklessly which caused a man to fall, and if in falling he struck against something, and was injured and died, the person who struck the blow was guilty of manslaughter, even though the blow itself would not have caused injury. The Judge, having commented upon the discrepancies in the evidence and of the roughness of the game (upon which a strong light was thrown by the fact that a player in the same club had been since killed) asked the jury whether or not the prisoner had used illegal violence.

The jury found a verdict of *Guilty*. The vicar of Enderby gave the convicted young man a most excellent character, and the Judge postponed sentence. Mr. Garrett and Mr. Disney were counsel for the Crown; and Mr. Buszard, Q.C., and Mr. Hugo Young were for the prisoner. It is remarkable that the only other case which is reported of a trial for manslaughter because of violence in the football field was a Leicester case. This was "*Reg. v. Bradshaw*" (14 Cox, C.C., 83) tried in the year 1878 before Baron Bramwell. In that case the learned Judge gave directions to the jury very similar to those given in the present case, but the accused was acquitted.

Q.B. Div. (Mathew and)
Wright, J.J.)

1898.
Feb. 15.

MANDER V. RIDGWAY.*

County Court—Practice—Appeal—Stamp—
Ruling of Judge.

There is no appeal from the decision of a County Court Judge on the sufficiency of a stamp affixed to a document tendered in evidence.

This was an appeal from a County Court, and the question was raised whether there was any right of appeal from the decision of a County Court Judge on the sufficiency of a stamp affixed to a document. The Judge had held that a certain document was properly stamped. This was an appeal against his decision.

Mr. WILLIAM GRAHAM appeared for the defendant, and contended that such an appeal existed.

Mr. Macaskie appeared on the other side.

Mr. GRAHAM said there was a general right of appeal given by section 120 of the County Courts Act, 1889, with certain exceptions, of which this was not one; therefore then a right of appeal existed.

Mr. MACASKIE contended that there was no appeal. There was no authority in support of any such right though County Courts had been established 50 years. It was clear that there was no appeal in the High Court. It would be very remarkable if it could be done in cases of very minor importance and not in High Court cases. He cited "*Siordet v. Kuczynski*" (17 C.B., 251), and "*Blewitt v. Tritton*" ([1892] 2 Q.B., 327), which showed that when a Judge trying an action in the High Court ruled that the stamp was sufficient his decision was final. Section 164 of the County Court Act provided that the principles of the High Court practice should be applied to County Courts where no rule or statute was applicable.

The COURT held that there was no appeal.

MR. JUSTICE MATHEW said section 164 of the County Courts Act applied the principles of the High Court to

the County Court in matters not provided for otherwise. The County Court Judge here had decided that the document was properly stamped. In the High Court such a decision would be final; therefore it was final in the County Court, and there was, therefore, no right of appeal.

MR. JUSTICE WRIGHT concurred.

[Solicitors—Digby and Liddle, for H. and M. H. Small, for the appellant; Field, Roscoe, and Co., for Whitehorn, for the respondent.]

Q.B. Div. (Mathew and)
Wright, J.J.)

1898.
Feb. 15.

COLBECK V. ASHFORD.*

Fishery—Nets—Bye-law—North-Eastern Sea
Fisheries district—Trawl net.

This was a special case stated by justices for the East Riding of Yorkshire, sitting at Bridlington, who had convicted the appellant, a solicitor, of breaking a bye-law, made in 1894, of the North-Eastern Sea Fisheries district in fishing with a trawl net on August 4 eastward of the south landing at Flamborough. The question was whether the particular net which was used by him was within the words of the bye-law, which is as follows:—"A person shall not use in fishing for sea fish any trawl or trawl net, or any net having a beam which is pulled or pushed or otherwise propelled along or over the bottom of or in the sea or along or over the seashore, or any seine net, sand-eel net, spurling net, baffle net or offal net." Certain exceptions not material in this case followed.

Mr. R. D. Isaacs appeared for the appellant; Mr. H. T. Kemp for the respondent.

It appeared that the appellant was engaged off the pier with a steam yacht about 50ft. long experimenting and catching fish with an "otter" trawl net of a new construction. It was stated that the inventor, who had just been through a course of litigation in support of his patent, was on board. This particular net was one which had no beam across from side to side as in the usual form of trawl net, but two "otter" boards, fixed by a new mechanical system and kept apart by their motion through the water, held a line across instead of a beam. The justices, notwithstanding the absence of a beam, convicted the appellant, fined him £10, and confiscated his gear.

Mr. ISAACS contended that the words of the bye-law only applied to a trawl net with a beam. This was a new invention as applied to a trawl net. He cited dictionary definitions to show that a beam was always a part of a trawl net.

The COURT dismissed the appeal.

MR. JUSTICE MATHEW referred to the words of the bye-law and said the Court was asked to say that this net was not within those words. The bye-laws, however, were made in 1894, and this kind of net was probably known then. They must be construed in their natural sense. He was not satisfied that a beam was an essential part of a trawl net. The conviction must be affirmed. A severe penalty had been inflicted, but with that this Court had nothing to do.

MR. JUSTICE WRIGHT concurred. He thought that perhaps the authority to whom the fine went might be induced to consider favourably an application for remission of some part of the fine.

[Solicitors—C. J. Smith and Hudson, for Hearfields and Lambert, for the appellant; Sharpe, Parker, Pritchards, and Barham, for Alfred West, for the respondent.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Collins, L.J., with Nautical } Feb. 16.
Assessors)

THE GLENGYLE—THE NEPTUNE SALVAGE COMPANY OF STOCKHOLM AND OTHERS V. THE OWNERS OF THE STEAMSHIP GLENGYLE.*

Ship—Salvage—Award—Vessels specially built and equipped for salvage services—Award confirmed.

This was an appeal from the judgment of Mr. Justice Barnes in an action of salvage, reported in *The Times* of December 7. The action was brought by the plaintiffs, who were two foreign companies, as the owners of the salvage steamers *Hermes* and *Newa*, and by the masters and crews of the steamers, to recover salvage for services rendered to the steamship *Glengyle*, her cargo and freight, in August, 1897. The *Hermes* was a screw steamer of 394 tons register, fitted with engines working up to 750 indicated horse power with a pumping capacity of 2,750 tons per hour and manned by a crew of 23 hands, and of the value of £22,000. The *Newa* was a screw steamer of 459 tons register, fitted with engines working up to 750 indicated horse power with a pumping capacity of 5,000 tons per hour and manned by a crew of 21 hands, and of the value of £20,000. Both the said steamers were specially built for and solely employed in rendering salvage services, and were equipped with divers and diving apparatus and powerful engines and pumps and other salving appliances. On August 26 the steamship *Glengyle*, of 3,455 tons gross register, on her voyage with passengers and cargo from London to China, came into collision with the steamship *Coronet* in the Straits of Gibraltar, and sustained serious damage in the way of the engine-room and commenced to sink. The *Hermes* and the *Newa* were lying at Gibraltar with steam up, and shortly after 3 a.m., in response to signals from the signal-station at Gibraltar, they proceeded to sea and found the *Glengyle* several miles away to the southwest with her engine-room full of water, her fires drowned out, large quantities of water in her holds, and no one on board of her. She was gradually settling down. They arrived at the *Glengyle* at 4 10 a.m. The master of the *Glengyle* from a boat requested that his vessel should be towed to Gibraltar if she would keep afloat long enough. The *Hermes* and *Newa* were made fast, the former ahead and the latter lashed to the starboard side of the *Glengyle*. As it appeared improbable that the *Glengyle* could reach Gibraltar, it was arranged to steer for Getares Bay, the nearest shore with a sandy bottom, where the *Glengyle* could be beached. The steering of the *Glengyle* caused the *Hermes* to break adrift twice, and the *Glengyle* was eventually beached in Getares Bay at 6 a.m. on the 26th. The holes in her sides were patched by divers, the pumping gear of the salving steamers set to work, and at night the *Glengyle* was floated and on the 27th was taken to Gibraltar Bay, where further work was done by the divers to the damaged places, and the pumping was continued until the 28th, when the *Glengyle* was able to keep down the water with her donkey-pump. The value of the *Glengyle* and of her cargo and freight, when salved, was agreed at £76,596. Mr. Justice Barnes, in giving judgment, said that the establishment and maintenance of salvage steamers such as the *Hermes* and *Newa* were for the general benefit of owners and underwriters and others interested in sea-going vessels and their cargoes and the crews and passengers of such vessels, and the Admiralty Court would be liberal in its awards in respect of services rendered by salvage steamers, even though the

awards might fall somewhat heavily on individual owners. He accordingly awarded the sum of £19,000 to the owners, masters, and crews of the *Hermes* and *Newa* in equal moieties to each ship. He also awarded £300 to the owners, masters, and crews of two tugs, the *Hercules* and *Nellie*, who also came to the assistance of the *Glengyle*, and who were also plaintiffs in a salvage action. The defendants appealed and contended that the award was excessive.

Sir R. T. Reid, Q.C., and Mr. Aspinall, Q.C. (Mr. Butler Aspinall with them), appeared for the defendants; Mr. F. W. Raikes, Q.C., and Mr. Dawson Miller appeared for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that his mind during the argument had fluctuated, but, in the result, he came to the conclusion that this salvage award, though large, must stand. It was said that this case was in the nature of a new departure, because the case of salvage vessels, built and kept exclusively for salvage purposes, had never before come up for consideration in the Admiralty Court. The facts here showed that these two salvage steamers, which were valued at £22,000 and £20,000 respectively, and which were specially built and equipped for salvage purposes, with a skilled crew, were kept at large expense at Gibraltar for salvage purposes. They came to the assistance of the *Glengyle* at 4 10 a.m. The sea was smooth, but the *Glengyle* was in such a moribund state that, if the salvage vessels had not come alongside the *Glengyle*, the latter would have sunk, and she and her cargo would have been lost. It was proved that both the salvage vessels incurred risk in getting the *Glengyle* ashore, and the crews of those vessels incurred considerable danger. The assessors had so advised them as to the risk run by the vessels. There was, therefore, imminent danger to and probable loss of the *Glengyle*, and danger to and possible loss of the two salvage vessels. The *Glengyle* was run ashore at 6 a.m. Further salvage services were subsequently rendered. In these circumstances the question was, what amount should be awarded to the plaintiffs? If this had been a case of ordinary salvage services rendered by ordinary tugs or by another vessel, speaking for himself he would have thought that upon the authorities £19,000 would be too much. Carrying out the rule of the Court, though it was not really a rule of the Court at all in the proper sense of that term, but merely a rule of thumb, in his opinion £19,000 would be too large. But in this case these salvage vessels were kept at great expense for salvage purposes exclusively, and he could not shut his eyes to the fact that unless these salvage vessels had been kept at Gibraltar for that purpose the *Glengyle* with her cargo and freight, valued at over £76,000, would have been lost. Taking all these circumstances into consideration he could not say that the learned Judge, who had taken all proper considerations into account in arriving at the sum, had awarded too large a sum.

LORD JUSTICE CHITTY concurred. The question was, not whether they would have awarded the same sum, but whether they were satisfied that the sum was in excess, and largely in excess, of what should be awarded. In his opinion, there was no new departure in the principle upon which this case should be decided. There was merely an important new factor in this case. There were here two salvage vessels, valued at £42,000, fitted and kept exclusively for salvage purposes. It was, in his opinion, a matter of high importance to encourage persons to keep vessels of this kind at a port like Gibraltar. These salvage vessels had all the requisite appliances, and had divers on board and specially skilled crews. All that constituted an element to be taken into consideration, to which the learned

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Judge in the Court below had not attributed too much importance. This Court could not say that the same award was excessive.

LORD JUSTICE COLLINS concurred.

Mr. ASPINALL, Q.C., asked for a stay of execution pending an appeal to the House of Lords, upon the ground that the plaintiffs were foreign companies.

The COURT granted a stay upon condition that the appeal was brought within three weeks.

[Solicitors—W. A. Crump and Son, for the plaintiffs; Hollams, Sons, Coward, and Hawksley, for the defendants.]

Chan. Div. }
(Stirling, J.) }

1898.
Feb. 16.

IN RE THE PERRY ALMSHOUSES CHARITY.*

Charity—"Ecclesiastical charity," what is—
Local Government Act, 1894, sec. 70 (2) and
75 (2) (c)—Trust deed—Construction.

This was a petition by the present trustees of the above-named charity, which exists in the parish of Winterbourne, in Gloucestershire. The petition was presented under section 70, subsection 2, of the Local Government Act, 1894, by way of appeal from a decision of the Charity Commissioners. The charity was founded by an indenture dated July 31, 1851, whereby Mrs. Mary Ann Jones conveyed to trustees a piece of land and ten cottages or dwelling-houses thereon, upon trust, that they should "from time to time, and at all times thereafter, permit and suffer such poor men and women of sound minds who should have attained the age of 60 years or be incapable of wholly maintaining themselves respectively by the manual labour of themselves respectively, and who, having been born within the limits of the original parish of Winterbourne aforesaid, should have resided within such limits for the last five years of their respective lives, or, having been born elsewhere, should have resided within the limits aforesaid for the last ten years of their respective lives, and who (not being let by sickness or some other urgent cause) should have attended Divine service at the church of the parish of their respective residences for the time being every Sunday for the last five years of their respective lives, and been partakers of the Holy Communion, and lived a godly, righteous, and sober life to the glory of God's holy name, as the trustees for the time being of the charity hereby established or any three of them shall from time to time select, to occupy the said cottages or dwelling-houses, with the appointments thereto respectively belonging, rent free during their respective lives if they respectively should so long conform to and abide by such rules and regulations as the trustees for the time being of the said charity or any three of them should from time to time make for their comfort and wellbeing." The deed also provided that all future trustees of the charity should be members of the United Church of England and Ireland. A question having arisen as to the appointment of trustees to the charity, the petitioners requested the Charity Commissioners to determine it in accordance with the provisions of the Local Government Act, 1894. The Commissioners decided that the charity was not an "ecclesiastical charity" within the meaning of that Act.

Mr. Swinfen Eady, Q.C., and Mr. Danckwerts were for the petitioners; and Mr. Cozens-Hardy, Q.C., and Mr. Vaughan Hawkins for the Charity Commissioners.

MR. JUSTICE STIRLING, in giving judgment, said that the question was whether the endowment of the charity was held for the benefit of any members, as such, of any particular Church or denomina-

tion within the meaning of section 75, subsection 2 (c), of the Local Government Act, 1894. That section provided that "the expression 'ecclesiastical charity' includes a charity the endowment whereof is held for some one or more of the following purposes:—
or (c) otherwise for the benefit of any particular Church or denomination, or of any members thereof as such." It might be remarked with reference to that section, first, that all Churches and denominations were for the purposes of it placed on the same footing, and consequently that the present case must be dealt with according to the same principles as would apply if the charity were for the benefit of any Church or denomination other than the Church of England; and, secondly, that the words "as such" were important, the meaning being that, in order to bring a charity within the definition of an ecclesiastical charity, those for whose benefit it was limited must be limited to a class of persons holding the *status* of members in a particular Church or denomination. The charity was eleemosynary in its nature, and the rules of law with reference to religious qualifications for the enjoyment of the benefit of such charities were laid down by Lord Romilly in the case of "A. G. v. Calvert" (23 Beav., 248), and were accepted by counsel on both sides as applicable to the present case. Having regard to those rules, therefore, the question was whether, upon the true construction of the instrument of foundation, there was found a clear expression of intention that the benefits of the charity should be limited to members of the Church of England. Although the deed prescribed that the trustees should be members of the Church of England it did not in terms declare that membership of that Church should be a necessary qualification of those who were to benefit under it. The religious qualification required was threefold—(1) regular attendance at the parish church; and (2), participation in the Holy Communion. The third was expressed in familiar words drawn from the Prayer Book—having lived "a godly, righteous, and sober life to the glory of God's holy name." It was therefore to be determined whether the possession of those qualifications did or did not involve membership of the Church of England; and, though regard must be paid to all three, the most important from this point of view was the second. It was contended on behalf of the Charity Commissioners that the requirements of the deed were satisfied by conformity to the Church of England without membership of it. If by conformity was meant a mere external conformity such as was the fruit of the legislation of the time of King Charles II., now repealed, his Lordship thought that such a construction was excluded by the third of the qualifications to which he had referred. The language in which that qualification was expressed appeared to show that the objects of the founder's bounty were intended to be not mere outward conformists but honest and sincere worshippers at the parish church. The argument, however, was mainly directed to show that the first and second of the religious qualifications might be truly possessed by persons who were not members of the Church of England. As regarded attendance at church, his Lordship thought that that might be so. By law, the parish church was open to every parishioner who desired to enter for the purpose of attending the ordinary services, "Taylor v. Timson" (L.R., 20 Q.B.D., 671). Those services had been so framed that members of other religious denominations could and did honestly and sincerely join in them from time to time, and might, under special circumstances, do so with regularity. Participation in the Holy Communion, on the other hand, was not open to all. The rubric at the end of the office for Confirmation in the Prayer Book prescribed that "there shall none be admitted to the Holy Communion until such time as he be confirmed,

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

or be ready and desirous to be confirmed." The rubrics were incorporated in the Act of Uniformity, 13 and 14 Charles II., c. 4 (see "*Escott v. Martin*," 4 Moore P.C.C., 104), and, so far as that statute remained unrepealed, must be duly regarded by a Court of law. It seemed to his Lordship that the effect of that rubric was to prevent any one from claiming as of right to partake of the Communion in the Church of England unless he had been confirmed or was ready and desirous to be confirmed. Confirmation implied baptism, which, however (as was established by the case of "*Escott v. Martin*"), might validly be administered by a layman. Whatever difficulty there might be in giving a strict legal definition of what constituted legal membership of the Church of England his Lordship thought that a person who had been baptized, had been confirmed, or was ready and desirous so to do, and was an actual communicant, did hold the *status* of a member of that Church, and would be ordinarily regarded and spoken of as such. It was urged that a person not a member of the Church of England might honestly and sincerely partake of the Communion, although not confirmed nor ready nor desirous to be confirmed. It was said that as a matter of history persons who did not possess that qualification had been admitted to the Communion by clergymen who were well aware of the fact, and cases were put which were not of impossible occurrence with reference to persons who might seek the benefit of this charity. Still, even if that were admitted to the full, the participation would be granted as a matter of grace and not as of right. All such cases appeared to be in their nature of such an exceptional character that they could not fairly be regarded as within the contemplation of the framers of an instrument such as that with which the Court had now to deal. The partaking of the Communion here spoken of was, his Lordship thought, such as took place in the ordinary and rightful course, regard being had to the rules of the Church. The conclusion to which his Lordship came on the construction of the instrument was that the persons intended to take the benefit of the charity were to possess qualifications which implied that they should be members of the Church of England. On any other view he failed to see how the founder of a charity intending to confine its benefits to the members of any Church or denomination as such could do so, except by using these very words; and, indeed, the argument was carried to that extent. His Lordship could not think that this was a reasonable intention to ascribe to the Legislature. He understood that the Charity Commissioners rested their decision on a passage in the judgment of Lord Romilly in "*Attorney-General v. Calvert*." He did not differ from anything there laid down nor from the application made of it by Lord Romilly in that case. In the present case, however, the founders had gone much further than in the instruments which were considered in "*Attorney-General v. Calvert*," and had imposed on the trustees the duty of inquiring and determining (so far as human judgment would permit) whether the qualifications with which his Lordship had been dealing did or did not exist. For the reasons given his Lordship was unable, with the most sincere respect, to agree with the decision of the Charity Commissioners.

[Solicitors—Tatham and Procter, for Abbot, Brown, Pope, and Abbot; Clabon.]

Set-off against principal of debt due from agent
—Custom held not proved.

This case raised a question of importance to persons engaged in the hop trade. The plaintiff was a hop grower and the defendants were hop merchants. The action was brought to recover £184, the balance due for 255 pockets of hops alleged to have been sold by the plaintiff to the defendants. It appeared that in November, 1896, the plaintiff instructed one Collard, a hop factor, to sell the hops on his behalf. Collard sold them to the defendants, who settled with Collard for them partly by a cash payment, partly by a bill, and partly by setting off a sum of £184 owing by Collard to the defendants on other transactions. Collard handed the cash and bill to the plaintiff and subsequently became bankrupt. The question in this case was whether the plaintiff could recover from the defendants the sum of £184 which had been treated as a set-off on the settlement of accounts between the defendants and Collard. The defence was that the defendants dealt with Collard as principal and had no notice that the plaintiff, and not Collard, was the owner of the hops, and further, that, if there was any contract between them and the plaintiff, the contract was subject to a custom of the hop trade whereby the purchaser of hops deals solely with the hop factor through whom the sale is made, as if the factor was the principal, and the defendants said that they had discharged their liability in respect of these hops by payment and set-off in account with Collard. A considerable body of conflicting evidence was given, the effect of which is stated in his Lordship's judgment.

Mr. Dickens, Q.C., and Mr. G. F. Hohler appeared for the plaintiff; Mr. J. Eldon Bankes and Mr. Hugh Hole for the defendants.

MR. JUSTICE KENNEDY, in giving judgment, said that there was nothing on the face of the sale note which the factor gave to the defendants to inform the defendants that the hops were being sold by the factor on behalf of the plaintiff as principal. The note did, it was true, contain the words "Sold for and on account of," but no name of any principal was inserted, and these words only appeared in the sale note because factors sometimes sold on their own account, but more generally for a principal. The sale note did also contain the name and address of the plaintiff, but they were only put in as descriptive of the hops, and would not convey to a purchaser that the contract of sale was made on behalf of the plaintiff as owner of the hops. On that part of the case, and on that part only, his Lordship agreed with the defendants' view. Now Collard was a factor, and as such he had a right, in the absence of express instructions, to sell in his own name and also, having had the goods consigned to him, to receive payment for them; but he had no right, in the absence of any well-established custom, to effect a settlement with the purchaser by taking a set-off of a private debt. The only case in which a principal could be met by a set-off between the buyer and the agent was stated by Lord Halsbury in "*Cooke v. Eschelby*" (L.R., 12 App. Cas., at p. 275), where he said:—"The ground upon which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief." In the present case those conditions were not fulfilled. His Lordship was of opinion that defendants had not dealt with Collard in the belief that Collard was selling his own hops and not those of an undisclosed principal, because the defendants were in reality relying on the alleged

Q.B. Div. }
(Kennedy, J.)

1898.
Feb. 16.

COOPER V. STRAUSS AND CO.*

Principal and Agent—Undisclosed principal—

*Reported by F. O. ROBINSON, Esq., Barrister at Law.

custom that, in any case, they were entitled to the benefit of their set-off against the factor. That point was, however, immaterial, because his Lordship on the evidence came to the conclusion that Collard had in fact told the defendants that he was only selling on behalf of the real owner of the hops. It was a question of recollection of what passed at the interviews, and his Lordship, without impugning the honesty of the defendants, accepted the version given by Collard, which was, moreover, supported by the plaintiff's own evidence. Then the defendants relied on the custom which they said existed in the hop market, that where a merchant was dealing with a hop factor he had a right to treat the factor as the only principal, and to settle for hops bought by payment or composition with the factor only. One of the defendants went so far as to say that the custom prevailed even when the name of the real owner of the hops was expressly disclosed. His Lordship was of opinion that the custom had not been proved to exist, and, even if it had been, he thought that it would be far too wide to be reasonable. The truth seemed to be that business in the hop trade was carried on in accordance with the general law that where a factor sold in his own name he could not escape liability by saying that he was acting for an undisclosed principal. It was also true that, as was held in "*Pike v. Ongley*" (18 Q.B.D., 708), where a hop factor purported to act for a principal whose name was not disclosed, there was a remedy against the factor as well as against the principal. That really was the way in which business was carried on in the hop market. In this case the defendants knew that the plaintiff was the owner of the hops sold, and the result was that the plaintiff was entitled to judgment for the amount claimed with costs.

[Solicitors—Bonner, Thompson, Burnie, and Co., for R. M. Mercer, Canterbury, for the plaintiff; Bird, Moore, and Strode, for the defendants.]

Court of Appeal (A. L. Smith, Chitty, and Collins, L.J.J.)

1898.
Feb. 17.

KELLY V. THE LONDON PAVILION (LIMITED)—SAME V. THE OXFORD (LIMITED)—SAME V. THE NEW TIVOLI (LIMITED).*

Contract—Agreement—Construction—Music-hall artiste—Agreement not to "perform" elsewhere.

By the plaintiff's contract of engagement with the defendants she undertook not to perform elsewhere during the engagement.

Held, that this stipulation applied only to the days for which she was engaged by the contract, viz., weekdays, and did not apply to Sundays.

Decision of Hawkins, J. (13 *The Times* L.R., 584), affirmed.

These were three appeals from the judgment of Mr. Justice Hawkins in favour of the plaintiff, reported in 13 *The Times* Law Reports, 584. The plaintiff, a music-hall artiste, professionally known as Miss Sybil Arundale, claimed damages against the proprietors of three music-halls for wrongful dismissal and breach of contract. The defence was that the plaintiff had, while her engagement was running, in contravention of the terms of her contracts with the several music-halls, performed at an entertainment on a Sunday evening at the New Lyric Club. By the terms of the contracts the defendants had the option of cancelling the plaintiff's engagements if she committed a breach of her contracts

in any respect. They therefore claimed they had a right to dismiss her. The learned Judge gave judgment for the plaintiff for £32 in each case. The following facts are taken from the judgment of Mr. Justice Hawkins. On December 19, 1895, the plaintiff, a girl about 15 years of age, entered into a set of three separate contracts with each of the defendant companies. Each contract was in the same form, and each contained the same stipulation and conditions. By the contract the plaintiff agreed to perform at the music-hall mentioned in it for ten weeks certain, commencing on December 21, 1896 (that is, a year after the date of the contract), every evening at the time notified by the management, in "her usual entertainment as mimic" at the Pavilion and the New Tivoli, and as "singer and mimic" at the Oxford, at a salary of £8 per week in respect of each hall, subject (among others) to the following condition—viz., "That the said artiste shall not perform before or during this engagement at any theatre, music-hall, club, concert, or place of entertainment within one mile from the said music-halls respectively." Each contract concluded with this clause:—"In the event of the above-named artiste not observing these conditions in every respect the company shall have the option of cancelling this agreement." The two other contracts of each set were in the same language, but for later periods of time, one being for eight weeks commencing on June 7, 1897, the other for eight weeks commencing on November 1, 1897. The plaintiff entered upon her first engagement on December 21, 1896, and continued to fulfil them until and including the night of Saturday, January 9, 1897. On the evening of Sunday, January 10, accompanied by her mother, she accepted an invitation and went to a smoking concert at the New Lyric Club in Coventry-street, within a mile of each of the said halls. Other music-hall artistes were also present by similar invitations. The Lyric Club consists of over 1,000 members, some being professional, others being amateur actors, singers, and musicians. One of the objects of the club was the providing for its members periodical musical and dramatic entertainments. In all other respects it is a mere social club. Every member of it is at liberty to invite guests on any night selected for a *soirée*, and many avail themselves of this privilege, and, as such guests, many professional artistes, not members of the club, are so invited in the hope and expectation, but without any stipulation, that many of them will voluntarily, if requested, assist in the entertainments of the evening. Under no circumstances do they receive any remuneration for their assistance. Nobody except members and their guests is ever admitted to the club, and no admission money to the club or concert is paid by or for any member or guest. Sunday evenings are generally selected for these *soirées* or smoking concerts, which are usually held in the big concert-room in the club-house, in which a suitable platform or stage is fitted up, and those who are likely to take part in the entertainment are provided with seats conveniently arranged near the platform. Twice in 1896, after the making of the present contracts, whilst under engagements at the music-halls and before the commencement of her engagements under the present contracts, the plaintiff had been present at this club on Sundays as an invited guest, and had assisted at entertainments of a similar character to those of January 10 without any previous permission or subsequent complaint—viz., in May and October, 1896. Upon one occasion—on a weekday—during the year 1896, and just before the commencement of her engagement, she sang and acted at the Garrick Theatre, by permission of the managing director of the Tivoli, in a piece called *Lord Tom*

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Noddy, and in it she sang a little song, which had been expressly written for her, called "Darling 'ickle sweethearts," addressed to four little dolls, and danced in ordinary evening dress, without any make-up. To the concert in question on January 10 she had been invited by a member of the club. At this concert she merely sang the song "Darling 'ickle sweethearts" with her dolls and danced for a few minutes, but did not exhibit or perform as a mimic at all. She had no idea that in doing what she did she was violating the contract, being under the impression that Sundays were days for which no permission was needed to assist in such entertainments. On the evening of the following day, Monday, January 11, the plaintiff, accompanied by her mother, attended at each of the three music-halls to continue her usual performances under her contracts. Before performing at the Pavilion she saw Mr. Swanborough, the manager, who as such had signed her engagement contract for that hall. He asked her whether she had sung the night before at the Lyric Club; she replied that she had done so. Mr. Swanborough asked if she was aware that it was against the rules, to which her mother replied she was not, because it was Sunday night; whereupon he said she must not do it again. She then went through her usual performance. Nothing seems to have been said on that night by the managers of the Oxford or the Tivoli, but at those halls she was allowed to and did perform that night as usual, and no complaint of any sort was made to her until the following evening, when, on presenting herself for her performances at each of the three halls, a written letter, purporting to be signed by the manager of the hall (Mr. Swanborough signing for the Pavilion, Mr. Lundy, who had signed her contract, for the Oxford, and Mr. Dowsett for the Tivoli), was handed to her cancelling, by the desire of the directors as regards the Pavilion, all her contracts, and as regards the Tivoli and the Oxford the contract under which she was then performing. The managers of the Oxford and the Tivoli at the same time said they would have granted permission if it had been asked for. There was no contradiction to this evidence offered by the defendants, and neither of the three managers was called, but a Mr. Payue, the managing director of the halls, gave evidence to the effect that he alone, and not the managers, had authority to give permission to perform at other places of entertainment, and that such permission was sometimes given. The learned Judge held that the engagement to perform "every evening" must be interpreted as exclusive of Sundays; that, though the New Lyric Club was a "club" within the meaning of the condition in the contract, the plaintiff had not "performed" at the club within the meaning of the contract; and that, even if the plaintiff had broken the condition in the contract, the fact that the manager of the Pavilion allowed her to perform there on Monday, January 11, with knowledge of what she had done on the Sunday night, was some evidence of waiver of the breach in the case of the Pavilion, and the learned Judge came to the conclusion that there had been a waiver on the part of the managers of all the music-halls, and that the managers had authority to waive. He assessed the damages at £32 in each case, and gave judgment for the plaintiff. The defendants appealed.

Mr. DICKENS, Q.C., and Mr. REGINALD BROWN, for the defendants, contended that the plaintiff had "performed" at a "club" within the meaning of the contract, and the defendants had power to cancel her contracts. If an artiste were allowed to perform on Sunday evenings, the protection sought for by the contract would be rendered futile, as the artiste might sing at the club the very same songs which he or she was singing at the music-halls. A performance on

Sunday was included in the contract. If the law were altered so as to allow performances on Sunday, the defendants could call upon the plaintiff to perform on Sunday under the contract. They also contended that there had been no waiver of the breach, the only real evidence of waiver being that the manager of the Pavilion allowed the plaintiff to perform there on the Monday. This was not sufficient evidence of waiver; and further, the evidence showed that the managing director alone, and not the manager, had power to waive breaches of contract.

Mr. J. LAWSON WALTON, Q.C., and Mr. RUFUS ISAACS, for the plaintiff, contended, first, that this contract was not intended to interfere with the social recreations of the artiste, but merely to limit her professional engagements. Where at a social entertainment an artiste, who was a guest, sang for the purpose of entertaining the other guests, that would not be a "performance" within the meaning of this contract. The artiste would not be there in the capacity of an artiste, but for social purposes. If the gathering was for the purpose of mutual entertainment and social recreation, singing a song would not be a "performance." The case would be different where the performance was for the entertainment of the public. Secondly, the contract did not apply to Sunday and did not restrict the artiste's right to perform on Sundays. Thirdly, as regards the question of waiver, the managers of the halls were not called to give evidence as to whether they knew of the plaintiff having sung at the New Lyric Club, and therefore it was open to the Judge upon the evidence to find that they knew of and waived the breach, and that they had authority to do so.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that three questions had been argued. The first question was, What was the true construction of the contract? Secondly, Did the plaintiff commit a breach of the contract? And thirdly, Assuming that there was a breach, was there a waiver of it? At the time when these contracts were entered into, on December 19, 1895, theatres and music-halls were, to the knowledge of everybody, not opened for performances on Sundays. To what days of the week, then, did the contract apply? Did it apply to every day of the week including Sunday, on which latter day the artistes would have a day off as regards performances, or was Sunday excluded? Did the week include or exclude Sunday? In his opinion the true reading of the contract was that from first to last Sundays were not brought within the ambit of the contract, and only those days were brought within it upon which the entertainment could take place. It was said that the protection of the defendants would not be complete unless the artiste was prevented from performing on Sunday. That, however, could not affect the construction of the contract. In his opinion the words "every evening" meant that the plaintiff would perform from Monday to Saturday both inclusive in each week, and did not include Sunday. That part of the contract, therefore, did not include Sundays. Then there was the condition prohibiting the plaintiff from performing "before or during this engagement" at certain places. Did that condition mean that the plaintiff would not perform at any of those places during the entire week including Sundays? In his opinion the words "during this engagement" meant the engagement for "every evening". In the sense in which he had construed those words—that is, for every week day evening, not including Sunday. These remarks were also applicable to the time before the engagement. That clause therefore did not include Sundays. In his opinion the true construction of the contract was that Sunday was not brought in, and that

the parties were dealing with a week in which Sunday was not included. That really concluded the case, but as the other questions were argued he would refer to them. The second question was whether the plaintiff had broken the contract. It was said that she had not done so because she had not "performed" within the meaning of the contract. Mr. Justice Hawkins came to the conclusion that what the plaintiff did was not a "performance" within the meaning of the contract. He (the Lord Justice) did not differ from him upon that point, but he did not base his judgment upon it. The last question was whether, assuming a breach, there was a waiver. Mr. Justice Hawkins came to the conclusion that there had been a waiver. He (the Lord Justice) thought that there was some evidence that what took place on the Monday amounted to a waiver on the part of the manager of the Pavilion. It was said that the manager had no authority to waive a breach. Mr. Justice Hawkins stated his reasons for saying that the manager had authority to waive. In his opinion there was evidence of waiver, but he did not rest his judgment upon this point. He rested his judgment upon the first point. The judgment of the learned Judge was therefore right.

LOED JUSTICE CHITTY concurred. With regard to the construction of the contract, they were entitled to look at the surrounding circumstances. It was common knowledge that music-halls were not open for entertainments on Sundays. In his opinion the engagement into which this young lady entered was to perform upon the ordinary days of the week, and the management could not have called upon her to perform on Sundays. She was entitled to have that day of rest. When once they arrived at the conclusion that Sundays were excluded from that part of the contract which dealt affirmatively with what the plaintiff undertook to do, it seemed to him to follow that the negative clause prohibiting her from performing at certain places only included and applied to a performance above referred to—namely, on a weekday and not on a Sunday. Therefore this last clause only covered performances at the places mentioned on a weekday. As regards the other points raised, he agreed with Lord Justice A. L. Smith, though it was unnecessary to decide them.

LOED JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Smith and Gofton, for the plaintiff; Linklaters, Addison, Brown, and Jones, for the defendants.]

Chan. Div. }
(Wright, J.) }

1898.
Feb. 17.

IN RE OLYMPIA (LIMITED) (REGISTERED 1893).*

Company—Directors—Liability—Misfeasance summons.

Application dismissed on the ground that the respondent was not in fact a promoter and did not occupy any fiduciary position.

This was the hearing of a summons taken out by the official receiver and liquidator asking for a declaration that Mr. Montague Gluckstein was guilty of misfeasance or breach of trust, in that he and Messrs. Joseph Lyons, John Hart, and Harold Thomas Hartley, being promoters and directors of the company, had secretly obtained and retained for their own use out of the purchase-money paid by the company for Olympia the sum of £6,341, which was alleged to have been divided among them; and that Mr. Gluckstein might be ordered to pay the whole amount, with interest. In

1892 Olympia was the property of the National Agricultural-hall Company (Limited), then in liquidation, subject to debentures for £100,000 and a second mortgage for £10,000. A syndicate of 33 persons, afterwards called the Freehold Syndicate, was formed, of which Mr. Gluckstein and the other persons mentioned in the summons were the founders and trustees, as well as members, and this syndicate, by purchasing the debentures and the mortgage, was alleged to have made a profit of about £20,000. The £6,341 named in the summons was said to be the share of Gluckstein and the other trustees in this profit. A form of agreement, dated January 19, 1893, was drawn up for signature, each on a separate print, by the 33 members of the syndicate. This agreement recited that the syndicate "proposes to purchase Olympia, Kensington, Middlesex, with a view to the resale thereof either to a company to be registered under the Companies Acts, or to some other purchaser." Each subscriber was to subscribe a certain amount, paying a deposit on signing the agreement, and the trustees were to do their best to purchase Olympia on behalf of the syndicate and to resell it at such reasonable advance in price as would cover the charges and expenses and yield a bonus for division amongst the subscribers to the agreement. The trustees had also power to purchase as an interim investment any first mortgage bonds of the National Agricultural-hall Company (Limited). In February, 1893, the Olympia property was sold by auction by the chief clerk in the debenture-holders' action against the National Agricultural-hall Company for £140,000 to Mr. John Hart, acting for the trustees of the syndicate, and this sum was sufficient to pay the expenses of the liquidation and to pay in respect of the debentures and the mortgage a sum sufficient to give the profit of about £20,000 above mentioned. On March 20, 1893, the syndicate trustees entered into an agreement with Mr. Charles Close, as trustee for an intended company (afterwards registered in 1893 as Olympia, Limited), for the sale of the Olympia property to the company for £180,000, made up of (a) £20,000 paid into Court as deposit under the agreement for sale with the liquidator of the National Agricultural-hall Company; (b) as to £120,000 paid into Court or as might be directed by the Judge; and (c) as to the balance of about £40,000 paid to the vendors, the trustees of the syndicate. Clause 7 provided that the vendors were to pay the preliminary expenses, and that "the validity of this agreement shall not be impeached on the ground that the vendors parties hereto, as promoters or otherwise, stand in a fiduciary relation to the company, nor shall the vendors parties hereto be required to account for any profit made or to be made by them by the purchase of any debentures of the National Agricultural-hall Company (Limited), or of any other charges upon any of the property of the last-mentioned company, which are to be satisfied wholly or in part out of the fund paid or to be paid into Court in the said action." Olympia (Limited) was registered shortly afterwards with a capital of £155,000 in £5 shares, one of the objects of the company, as stated in its memorandum of association, being to adopt and carry into effect the agreement of March 20, 1893. The agreement was afterwards adopted by the company. In March the company issued a prospectus to the public inviting subscriptions for shares and debentures. The directors were stated to be Messrs. Joseph Lyons, John Hart, H. T. Hartley, and Montague Gluckstein, and the prospectus disclosed the fact that the directors were also the vendors and that £140,000 had been paid for the property, and also the price to be paid by Olympia (Limited). It did not, however, state the profit made out of the debentures and mortgage, but it stated the date of and the names of parties to the agreement of March 20, 1893.

*Reported by F. EVANS, Esq., Barrister-at-Law.

Mr. A. T. Lawrence, Q.C., and Mr. Kirby were for the official receiver and liquidator; and Mr. Cozens-Hardy, Q.C., Mr. Muir Mackenzie, and Mr. Cassell for the respondent.

MR. JUSTICE WRIGHT, in delivering judgment, said it was impossible to say what would have been the result if the respondent had been a promoter of the company, but in his judgment he was not a promoter. The position of the parties in February, 1893, was that Mr. Gluckstein and the other persons named in the summons had out of their own moneys bought up the debentures and mortgage in the old company and had contracted to buy the property of the old company. Probably their idea was to form a company, but up to that time they were perfectly free to do what they liked with the property, and they were not in a fiduciary position. If they had been promoters his Lordship would be sorry to say that the provision in the agreement of March 20, 1893, would have been sufficient to protect them, having regard to the fact that the agreement was only made with their nominee. The application must be dismissed.

[Solicitors—Roderic Oliver; Lewis and Lewis.]

Q.B. Div. } 1898.
(Phillimore, J.) } Feb. 17.

CARR BROTHERS V. DOUGHERTY.*

Practice—Costs—Arbitration—No award by arbitrator of costs—Costs following the event.

This was a summons adjourned into Court. The plaintiffs brought an action against the defendant to recover £33 4s. 5d., the price of goods sold and delivered. The defendant paid £30 into Court, with a denial of liability, and counter-claimed for damages for defective work and delay in the execution thereof by the plaintiffs. The action was referred to an arbitrator under section 14 of the Arbitration Act, 1889, by an order which was silent as to costs. In his award the arbitrator did not deal with the costs. The plaintiffs took out a summons asking for the costs of the action, reference, and award, the arbitrator having awarded the plaintiffs £47 1s. in addition to the £30 paid into Court by the defendant and the defendant £17 5s. on his counter-claim.

Mr. T. W. Chitty appeared for the plaintiffs; Mr. H. Tindal Atkinson for the defendant.

MR. JUSTICE PHILLIMORE held that, as by section 15, subsection 2, of the Arbitration Act, 1889, the award was equivalent to the verdict of a jury and the arbitrator had not exercised his discretion as to costs under R.S.C. Order 36, rules 55a and 55b, the costs followed the event, and that, therefore, the plaintiffs were entitled to the costs of the action, reference, and award and the defendant to the costs of the counter-claim.

[Solicitors—Gordon, Hunter, and Maomaster, Bradford, for the plaintiff; Seaton Taylor, agent for E. and T. Clark, Goole, for the defendant.]

Judicial Committee of the Privy Council } 1898.
(Lords Hobhouse, Macnaghten, Morris, and Sir R. Couch) } Feb. 18.

RAO BALWANT SINGH V. RANI KISHORI.†

Privy Council Appeals—Hindu law—Mitakshara—Self-acquired immovable property—Power of alienation.

By the law of the Mitakshara a Hindu has

power to dispose of his self-acquired property, whether movable or immovable, according to his own pleasure.

These were consolidated appeals from judgments of the High Court for the North-West Provinces of India of August 14, 1893, reviewing a decree of the District Judge of Mainpuri.

Mr. G. E. A. Ross appeared for the appellant; Mr. Mayne and Mr. Herbert Cowell for the respondent.

The arguments were heard in December last before a Board consisting of Lord Hobhouse, Lord Macnaghten, Lord Davey, and Sir Richard Couch, when judgment was reserved.

LORD HOBHOUSE, in giving their Lordships' judgment, said in the suit which gave rise to the appeal the plaintiff (now appellant) claimed as heir-at-law of Rajah Jaswant Rao to be entitled to properties valued at 40 lakhs of rupees, of which Jaswant's widow, Kishori, the defendant below and the respondent here, had become possessed. As regarded the larger portion of the property, principally movable, the plaintiff had failed in both Courts below, and raised no further question. He still claimed—(1) the proprietary right in five villages conveyed as a gift by Jaswant to Kishori by deed dated September 4, 1875; (2) the proprietary right in two other villages purchased by the defendant after Jaswant's death; and (3) a perpetual charge by way of *malikana* amounting to 10 per cent. of the revenue of seven other villages, which were the subject of a grant by the Government of India to Jaswant dated April 6, 1861. The District Judge decided against the plaintiff as to all these properties except one of the five villages, named Bakewar. As to that village the District Judge held that it was ancestral property which Jaswant had no power to alienate by way of gift, and he decreed possession of it to the plaintiff. Both parties appealed to the High Court. The plaintiff's appeal was dismissed; the defendant's was allowed; so that the plaintiff's suit stood dismissed as to all his claims. The plaintiff had appealed from both orders. Except as regards the village of Bakewar, which had been the subject of difference between the two Courts below, the facts of the case might be briefly stated:—All the villages in suit were at one time the estate of Khaman Singh, the father of Jaswant. Through extravagance or misfortune Khaman fell into poverty, and he parted with the villages; whether in fact or only in appearance was matter of dispute in the suit. Jaswant became a successful man of business, and he also rendered active and valuable services to the Government at the time of the Sepoy mutiny. Thus he became able to repurchase himself of the estates which Khaman had enjoyed, and the Government acknowledged his services by the grant in question. Khaman died in December, 1844. His eldest son, Lal Barian, married Adhar Kuuwar, a lady of considerable private fortune, and died without issue. Jaswant was the only other son, and he married Kishori as his third wife. He died in August, 1879. The plaintiff's claim under the grant stood on an entirely different footing from his other claims, and it might be disposed of at once. The Sanad of April, 1861, recited the services of Jaswant and that they had been recognized by the bestowal of the title of "Rajah," and were worthy of further recognition by the grant of a jagir. It then continued:—"Be it known that the possession and revenue of the five villages granted for generation after generation shall for ever be given up and remitted, and that the revenue of the seven villages granted for lifetime shall remain under remission till his lifetime—to wit, their zemindars, who now pay the revenue to British Government, shall pay it to him, and after him they shall ever pay 10 per cent. as *malikana* allowance to his heir, after the deduction of Govern-

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.
†Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

ment revenue, for generation after generation." The five villages were the five villages before mentioned as contained in the deed of gift. Mr. Ross did not contend that the words "generation after generation" conferred any interest less than absolute ownership, nor did he sustain the contention urged in the lower Courts that the revenue of the five villages did not pass to Jaswant in absolute ownership. His contention was that as regards the seven villages there were two distinct gifts—one to Jaswant for his life and the other after his death, and that at his death the *malikana* was given in absolute ownership to the person who might then happen to be his heir. That would attribute to the Government the strange intention of acknowledging the personal merits of Jaswant by conferring a benefit on some unknown heir for whom he might or might not have a regard. The construction also appeared to their Lordships to be as strained as it was impossible. They thought that the obvious meaning of the expression "his heir for generation after generation" was that the *malikana* was to form part of his heritable property, and that, whereas he took the whole income for his life only, he was to take the 10 per cent. *malikana* in absolute ownership. Both the Courts below had taken substantially the same view, and the appeal failed on that point. The next question was whether Jaswant could lawfully give the property in question to his wife. The district Judge stated that the point was one on which there had been a great conflict of opinion, and, without discussing it further, he said that he followed the latest rulings in holding that if the property comprised in the gift was Jaswant's self-acquired property he could deal with it as he saw fit. The High Court had given no opinion on the point except so far as an opinion was involved in their affirmation of the district Judge's decree, nor did they hear argument upon it. It was one point of appeal by the plaintiff, but his counsel did not open it till at the very end of his reply, when the Court ruled that it was not competent for him to argue it. In delivering judgment, they stated their opinion that the plaintiff by not addressing to them any remarks in support of that argument must be taken virtually to have abandoned it. Mr. Ross had raised the question again in the appeal, and had addressed to their Lordships a serious argument which required consideration. His proposition was that a member of an undivided family subject to Mitakshara law had not the power of disposition over self-acquired immovable property at his will. The Indian Courts had differed on that question, and there was no decision of that Board which after examination of the authorities affirmed the power in unqualified terms. It was not surprising that conflicts of opinion should have arisen, seeing that the texts of the Mitakshara itself, as translated by Colebrooke, whose translation had long been accepted as correct, were apparently and literally in conflict with one another. The passage cited by Mr. Ross was found in chapter I, section 1, clause 27, and was as follows:—"Speaking of the father of a family, it says that 'he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor. Since it is ordained 'though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unborn, and they who are still in the womb, require the means of support. No gift or sale should therefore be made.' " And immediately below the commentator insisted on a man's duty not to leave his family without means of support. Mr. Ross further pointed out that the rule so stated as to immovable property was accepted as law by Sir Thomas

Strange (see vol. i., p. 261, vol. ii., pp. 436 and following). On the other hand, they found in the same source of law quite opposite precepts. In clause 21 of the same chapter and section the commentator quotes two texts, one from Yajñavalkya himself, to the same effect with clause 27, and then adds:—"They both relate to immovables which have descended from the paternal grandfather." In section 5 of the same chapter, clause 9, the commentator, speaking of a donation made by a father, says:—"The son has no right of interference if the effects were acquired by the father." And in clause 10 the same precept was repeated with more particularity. So in section 4, where the commentator appeared to be dealing with the principle which lay at the root of the system of joint family property. He there explained what might not be divided, and in clause 1 he said:—"Whatever else is acquired by the coparcener himself . . . does not appertain to the heirs, . . . nor shall he who recovers hereditary property which had been taken away give it up to the parceners." Pausing there to consider the authorities apart from decisions, their Lordships observed that the rule laid down in section I, clause 27 of the Mitakshara rested upon an ulterior reason, "since it is ordained," and so forth, and the reason ranged so far beyond the rule as seriously to weaken its support of a positive rule. The necessity of support to children applied in principle to the alienation of movable property as well as immovable. And the assertion of rights in those who were unbegotten conflicted with the principle uncontradicted, as their Lordships understood, by any decision that a man might alienate even his descended estate if he had no child, or at least if he had no coparcener, in existence (Mayne's Hindu Law, section 315). All those old text-books and commentaries were apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir W. Macnaghten says:—"It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible" (Hindu Law, Principles and Precedents, p. 6 of preliminary remarks). He illustrated that position by the example of the very subject of the present discussion. It was, as their Lordships thought, the most reasonable inference that the passage in section I, belonged to the former class of precepts and those of sections IV. and V. to the latter. As regarded the authority of Sir T. Strange, which undoubtedly was great, their Lordships observed that though he did not bring the conflicting texts of the Mitakshara into comparison with one another, he introduced similar contradictions into the body of his own work. In his Addenda he corrected his own opinions by the authority of Sir Francis Macnaghten's work "Considerations on Hindu Law," which he had seen after he had written his own. He said that he had used Macnaghten's work for supplementing, for correcting, or for confirming his own. (Addenda, p. 4.) Among the passages which he adopted was the following:—"It is desirable that the extent to which a Hindu in his lifetime may give or make an unequal distribution of his property should be ascertained. I think it clear that he has a right to dispose of his self-acquired property, whether movable or immovable, according to his own pleasure, and that he has the same right as to ancestral movable property." (Addenda, p. 8.) It seemed then that Strange intended to accept for Madras the opinion of Macnaghten who, though a Pengu Judge, wrote of the Benares as well as the Bengal school. Macnaghten's opinion, clearly applying to the Mitakshara law, was that the father of a family, with regard to all kinds of

property acquired by himself, was at liberty to make any alienation he might think fit, subject only to spiritual responsibility. To turn to the decided cases, there was no decision of the Judicial Committee which was adverse to the power of alienation claimed by the defendant. Mr. Ross referred to the language of the board in the Hunsapore case (12 Moore, I.A., p. 38) decided in 1867. Sir James Colville, after showing that by that time testamentary powers long disputed had been established in Hindu law, spoke thus :—"Accordingly it has been settled that even in those parts of India which are governed by the stricter law of the Mitakshara a Hindu without male descendants may dispose by will of his separate and self-acquired property whether movable or immovable; and that one having male descendants may so dispose of self-acquired property if movable; subject, perhaps, to the restriction that he cannot wholly disinherit any one of such descendants." It was argued that that passage showed that in the opinion of the board the power of disposition by will did not extend to land, and did not exist if there were male descendants. In that case, however, the board gave no judicial opinion upon the point, because they held that the property in dispute was an indivisible Raj, subject to the custom of primogeniture, and that, as the heir was a consenting party to the disposition in dispute, the question of the testator's power did not arise. It was true that they did not affirm the proposition now contended for by the defendant. In the Bithoor case (9 Moo., I. A., p. 96, A.D. 1862) there came into question the validity of a will devising self-acquired property. There was a long and intricate discussion as to the genuineness of the will, which was ultimately established. It appeared also that objection was taken to the legal power of the testator, but it did not appear on what grounds that point was argued. The only passage in the judgment bearing on that question was as follows :—"The rest of the evidence consists of the testimony of Pundits, who say that the Soobadar was always obedient to the Shasters, and that the Shasters forbid a father who has several sons to appropriate by will to one the property which by law ought to be equally divided amongst all. It is clear that in this district a strong feeling prevails among the Brahmins upon the subject of testamentary disposition, which, though at length established by law as to self-acquired property, is opposed to the ancient usages and feelings of the country." There was a decision in favour of the power to make such a will, but the grounds of it did not appear; the attention of the Board would seem to have been directed to the general question of testamentary power, rather than to distinctions between ancestral and self-acquired estate; and in the Hunsapore case the present proposition was treated by this Board as still open to argument and to qualifications. Their Lordships did not think it necessary to go through the series of Indian decisions bearing on that point, but they would refer to some of the most important and of the latest date. It appeared to them that the subject was one of those in which from the earliest times there had been two conflicting principles of law, one favouring the perpetual integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions in the father's powers of mortgage and sale, on the payment of his debts out of the inheritance and on the testamentary power, would occur to everybody who was familiar with Indian litigations of the past half century or so. On each of these subjects there had been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles—viz., the use of property by the living generation or its living

heads. This their Lordships conceived was the kind of change referred to by Lord Kingsdown in the Bithoor case. The earliest case in which their lordships had found any exact comparison of the texts of the Mitakshara was decided by a division of the High Court of Calcutta in the year 1863. "*Mudhu Gopal v. Rani Buksh*" (6 W.R., p. 71). In that case the plaintiff's father had sold to the defendant property which was held to be self-acquired. The learned Judges carefully compared the texts of the Mitakshara. They treated those of sections IV. and V. as the governing ones. They conclude :—"We must hold that, according to the law as laid down in the Mitakshara, a father is not incompetent to sell immovable property acquired by himself." In 1872 the question was discussed before a full Bench in Calcutta (10 Beng. L.R., 192). A son disputed his father's disposition of property inherited by the father from a cousin, and not from the grandfather. Sir Richard Couch compared the texts and quoted cases which, as he said, exhibit the better opinion among commentators. His conclusion was this :—"It is only in respect of property not liable to obstruction that the wealth of the father or grandfather becomes the property of his sons or grandsons by virtue of birth." In that case the property, being inherited by the father from a cousin, was held to be obstructed as to inheritance. As regarded the North-West Provinces the question was carefully considered in 1877 by two experienced civilian Judges, "*Sital v. Madho*" (1 All., p. 394). Those learned Judges did not consider themselves bound by a previous decision of the High Court in 1869, which negatived the father's power to alienate, but without citing the authorities. In their elaborate judgment they made more than one suggestion for reconciling the conflicting texts. They said that the Courts had recognized the principle that the prohibition of certain acts might be implied, yet where it was not declared that there was absolutely no power to do them those acts, if done, were not necessarily void. And in the end they adopted Sir William Macnaghten's view "that, with respect to personal property, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility." (See "*Principles*," p. 3.) That was the same view as was expressed by Sir Francis Macnaghten and adopted by Sir T. Strange in the passage already quoted. Their Lordships fully assent to the reasoning contained in the judgment they had cited, and they found that in India there was a decided preponderance of judicial authority in favour of the power claimed for Jaswant in this case. It remained to mention a decision of the Board in 1873, which, though it fell under the Mithila law, appeared to their Lordships to bear closely on the present case. It was reported in 12 Bengal L.R., p. 430, "*Rajah Bishen v. Bour Misser*." The Mithila differed in some respects from that of the Mitakshara, but on the subject in question followed it very closely. The leading text-book was the *Vivada Chintamani*, and their Lordships quoted from the translation made in 1863. In page 76 and again in page 229 were passages giving a free hand to the owners of self-acquired property. In page 229 it was written :—"Such property as is acquired or recovered by the father without the aid of the ancestral estate shall be divided equally or unequally or not divided at all, at his pleasure. The father has full dominion over . . . that property which is gained by him through skill, valour, or the like, he may give it away at his pleasure," and so forth. In page 309 occurred the passage :—"It is declared in the work called *Prakasa* that immovable and bined property, even if it be self-acquired, cannot

be sold or given away without the consent of the sons. They who are born . . . even they who are not yet conceived, require paternal property for their maintenance, therefore it is improper to deprive them of it." The decision of the Judicial Committee was in accordance with the first set of texts. It was true that page 309 was not referred to in the judgment, but it could hardly be supposed that in a case fought up to the highest tribunal it was overlooked. For the foregoing reasons their Lordships had no hesitation in laying it down that the law of the Mitakshara was shown, after long conflicts of opinion due to the conflicting nature of the original texts, to be that which had been adopted from Sir William Macnaghten by the Courts of Calcutta and Allahabad. Such being the law it remained to apply it to this case. The plaintiff contended that the property in question was ancestral. As regarded the four villages the dispute turned on matters of fact, and the Courts below were agreed in finding them against the plaintiff. That dispute could not be reopened there. As regarded Bakewar they had differed, and the plaintiff asked their Lordships to say that the High Court was wrong in finding that that village was the self-acquired property of Jaswant. The question turned on transactions which took place in 1852. In 1836 Khaman, the father of Jaswant, executed a simple mortgage of Bakewar to Luchmandas. In 1839 he executed a second mortgage by way of conditional sale to the father of Kunjbehari. Disputes arose between the two mortgagees, who, under an award, were put into possession each of a moiety. In 1847 Kunjbehari bought out Luchman and was placed in sole possession. In 1852 one Hurbans Rai, a creditor of Jaswant, who had then succeeded to the property, got a decree against him. In the same year Kunjbehari applied for foreclosure under Regulation 17 of 1806. The year of grace expired, and the foreclosure became absolute. Hurbans endeavoured to execute his decree against Bakewar, but was opposed by Kunjbehari, who brought a suit against both Jaswant and Hurbans to assert his title. The First Court decided against him, apparently on the ground that his title was no better than that of Luchman, whose simple mortgage did not carry the right to foreclosure or to possession. The Zillah Judge thought differently, and held that the mortgage had been finally foreclosed. Hurbans appealed to the Sudder Dewani Adawlat, who upheld the Zillah Judge's decree, and granted Kunjbehari's claim to have the sale of the estate of Bakewar made absolute by expungement of the name of Jaswant and the entry of his own name. That final decree bore date February 14, 1856. Kunjbehari was then in possession, and he remained in possession, but he did not procure any mutation of name. The subsequent events were involved in some obscurity. It seemed that Kunjbehari got into trouble during the Mutiny, that he was charged with serious offences, and was in great danger of being hung, that Jaswant took up his cause, saved his life, and even gave him compensation to the amount of some thousands of rupees for injuries done to his estate. On Kunjbehari's part they found that in an irregular way, by endorsement on the decree of February, 1856, he purported to annul that decree in favour of Adhar Kunwar. The consideration stated was the sum of 4,526 rupees, apparently less than a year's revenue. That endorsement was dated June 22, 1858. The defendant alleged that soon afterwards Adhar Kunwar, also in an irregular way, made a verbal gift of the property to Jaswant. The certain thing was that about this time Jaswant regained possession and remained in possession until his death. How far his title depended on Adhar Kunwar's gift, how far on Kunjbehari's relinquishment of possession and practical reconveyance, and how far Kunjbehari's acceptance of the

small sum given for purchase money was influenced by Jaswant's services to him, or why he took so small a sum were questions which were not, and which need not be, cleared up. In 1868 Kunjbehari sued to establish his right to Bakewar. The defendants were Jaswant and Sheo Narain, to whom it was stated that Jaswant had sold the property. Kunjbehari alleged that the endorsement on the decree was a forgery, and gave a different account of his transactions with Adhar Kunwar, admitting, however, that he took the money from her, and that he, as he called it, annulled the decree. The subordinate Judge held that the arrangement of June 22, 1858, was a *bona fide* one, and that Jaswant got actual proprietary possession. On one of the issues he found that the foreclosure of the decree of February, 1856, and the other previous transactions between Kunjbehari and Jaswant were wholly fictitious and collusive. It was impossible to accept such a finding as of any value. Nobody disputed that Kunjbehari had a genuine mortgage from Khaman or that the estate and the liability devolved on Jaswant. And the subordinate Judge himself pointed out that the validity of the foreclosure was challenged by Hurbans who had a strong interest to upset it; but he added, "unfortunately these objections were not entertained by any Court." There was also another finding on a separate issue, of a most extraordinary character. The subordinate Judge found that because Kunjbehari did not effect a mutation of name, therefore his foreclosure decree became void and that he remained in possession as a mortgagee. It was mainly on account of those two findings, on which Mr. Ross dwelt at great length, that that voluminous, intricate, and confused judgment of the subordinate Judge of 1869 had been put in. Of course they had no legal force as between the heir and the grantee of Jaswant. Nor had they any result as between the parties to that suit, seeing that it was dismissed with costs. The decision of the District Judge in the case was apparently founded on the last-mentioned finding of the subordinate Judge of 1869, which he quoted as though it were conclusive. Their Lordships thought it clear that the point of time and the event to look at was the foreclosure of 1853. If that were a mere sham, the conclusion that the mortgage continued and that on its payment Jaswant only redeemed the estate he had inherited from Khaman might have some colour. But in the suit of 1853 the two appellate Courts held that the foreclosure was genuine and valid. That was held against the appeal of the execution creditor whose claim was defeated by it. It was not a decision between the present parties, but it was strong evidence, and their Lordships could not find any substantial evidence for disputing it. If the foreclosure took place the former title of Bakewar was broken and its ancestral character destroyed. The exact mode of its reacquisition by Adhar Kunwar and Jaswant was not material. For money or for services, it passed from Kunjbehari to Jaswant and so was acquired by him. For the above reasons their Lordships agreed with the High Court on this point. The only other point taken for the appellant was one of a very unusual character. It was alleged that the decree of the High Court was void, because one of the Judges, Mr. Burkitt, was not properly appointed. The point was not taken in the Court below, nor was the nature of it explained in the printed case of the appellant. Their Lordships understood that the appointment was questioned on the ground that it was not made immediately upon or within a reasonable time after the occurrence of the vacancy which it supplied. Their Lordships could not discover any ground for the objection. Under the High Court Act, the Lieutenant-Governor of the North-West Province had power to appoint an acting Judge upon the happening of a

vacancy among the Puisne Judges of the Court. No limit of time was mentioned within which the appointment should be made. That was left to the discretion of the Lieutenant-Governor and it was not competent to a Court of Law to invent a restriction not contemplated by the Legislature. The result was that the appeals failed on all points and their Lordships would humbly advise her Majesty to dismiss them. The appellant must pay the costs.

[Solicitors—Pyke and Parrott, for the appellant; Ranken, Ford, Ford, and Chester.]

Chan. Div. } 1898,
(Stirling, J.) } Feb. 18,
GREENWOOD V. THE LEATHER-SHOD WHEEL COMPANY
(LIMITED).*

Contempt of Court—Comments while action pending—Article in newspaper.

This was a motion on behalf of Mr. T. Harrison Lambert, who was a defendant in the above action, asking that the editor of a newspaper called the *Stock Exchange Gazette* might be committed to prison for contempt of Court. The action was brought against the company and five directors, of whom Mr. Lambert was one, claiming, as against the company, rescission of a contract by the plaintiff to take shares therein on the ground of fraudulent misrepresentation, and, as against the directors, claiming damages for such fraudulent misrepresentation. The action was one of a great number which had been instituted in consequence of a series of articles published in the *Stock Exchange Gazette* and containing criticisms on the Leather-Shod Wheel Company. These other actions, however, had been stayed pending the decision of the present action, which was taken as a test case. The statement of claim in this action was delivered on January 19 last. On January 29 there appeared in the *Stock Exchange Gazette* a leading article, to which attention was attracted by a notice on the outside of the paper. The article contained comments on the existence of the action and upon the steps which had been taken in it, and Mr. Lambert was mentioned by name and his conduct was commented on in somewhat strong terms. It was contended on behalf of the applicant that this article constituted a gross contempt of Court, inasmuch as it was calculated seriously to interfere with the course of justice and to prejudice and embarrass the defendant Lambert in his defence to the action. The respondent appeared by counsel, and tendered an apology to the Court, urging in mitigation that he was a young man and had had very little experience in the management of newspapers.

Mr. Upjohn, Q.C., and Mr. E. Ford appeared for the applicant, and Mr. Lightwood for the respondent.

MR. JUSTICE STIRLING said that this was one of a class of motions with which he always felt most reluctant to deal. It was a motion to commit to prison the editor of a newspaper for commenting upon the proceedings in a pending action, on the ground that such comments constituted an interference with the course of justice. No doubt the Court was vested with full powers of preventing and punishing such offences, but it could not be denied that applications were sometimes made on slight grounds, and comments which were only technical offences were brought before the Court with a view to the punishment of the offenders. His Lordship desired to subscribe to the views of the Court of Appeal as expressed in the case of "Hunt v. Clarke" (37 W.R., 724), and to adopt in the fullest

sense the language of Sir G. Jessel there cited, in which he said:—"It seems to me that this jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of the Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject. I say that a Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted." His Lordship then stated the facts giving rise to the motion, and said that the article complained of was a great deal more than a technical breach of the rule. An article of this character might interfere with the trial of the action both by deterring witnesses from giving evidence which they would otherwise have been willing and ready to give, and also by affecting the mind of the jury before whom it was possible that the case might hereafter come. The respondent now expressed his regret both by affidavit and through his counsel for having committed the contempt of Court. One thing in his favour was that he had no direct interest in the prosecution of the action; moreover, he had only been editor of the paper since the commencement of the present year. He also informed the Court that he was a young man and had had but little experience in the management of newspapers. At the suggestion of the Court he now offered to publish an apology in his paper and to undertake to abstain in future from commenting on the matter during the pendency of the action. Having regard to the seriousness of the offence, however, his Lordship could not entirely exonerate the respondent from all punishment, and, after serious consideration of the circumstances of the case, he came to the conclusion that the respondent must pay a fine of £20 and the costs of the application.

[Solicitors—Beyfus and Beyfus; Rowe and Maw.]

Chan. Div. } 1898,
(Romer, J.) } Feb. 18.

HOBSON V. TULLOCH.*

Landlord and Tenant—Lease—Covenants—"Not to use premises otherwise than as residence."

The parties to this action were owners of houses on the Colton estate, West Hampstead, the neighbourhood being a residential one. Each house was subject to a covenant not to use and occupy the same for the purpose of any trade or manufacture, or for any other purpose than a private residence. The defendant's house, which was called Whitefriars, was the largest house on the estate, containing 19 bed-rooms and seven reception-rooms. The defendant carried on a large girls' school in another house on another property some half-mile distant. The defendant proposed to live herself with her relations at Whitefriars, and also that the governesses should live there, and such pupils as might be sent to stay there with the object of attending her school. She did not propose in any sense of the word to carry on her school at Whitefriars, nor in any way to advertise Whitefriars as connected with her school. The action was a test action by residents in the neighbourhood, and the question was whether the proposed user of Whitefriars would be a breach of the covenant.

Mr. FARWELL, Q.C., and Mr. T. F. HOBSON, for the plaintiff, cited "German v. Chapman" (L.R., 7

Ch. D. 271); and "Rolls v. Miller" (L.R., 27 Ch. D. 71).

Mr. NEVILLE, Q.C., and Mr. GOLLAN, for the defendant, submitted that her proposed user was strictly residential, and to hold that it was not so because persons were brought there for the purposes of a business carried on elsewhere was too remote. The question was one of degree.

MR. JUSTICE ROMER said that the defendant's proposed user of the house was not a user of the house as a private residence within the ordinary acceptance of the term. That the house was not to be advertised as connected with the defendant's school was unimportant. What the defendant proposed to do was to carry on a business, or a species of business. He held that the proposed user would constitute a breach of the covenant.

[Solicitors—Edwards and Cohen; W. Haigh.]

Q.B. Div. } 1898.
(Wright, J.) } Feb. 18.

IN RE CRONMIRE—EX PARTE WAUD.*

Stock Exchange—Gaming and wagering contract
—Payment of differences—Deposit of money as
cover—Recovery of.

This was an appeal by Mr. A. E. Waud against the decision of the Official Receiver rejecting his proof against the estate of H. Cronmire on the ground that the claim arose on contracts which were gambling transactions. H. Cronmire had carried on a very large business as an outside stock and share dealer under the style of Gregory and Co. He died insolvent in April, 1897, and his estate was now being administered in bankruptcy. The other material facts and the arguments sufficiently appear in the judgment below.

Mr. Herbert Reed, Q.C., and Mr. Israel Davis appeared for Mr. Waud; Mr. Robson, Q.C., and Mr. Macaskie appeared for the trustee under the administration order.

MR. JUSTICE WRIGHT.—During a part of 1896 and in January, 1897, there had been transactions between Cronmire, carrying on business, not as brokers, but as outside dealers, under the name of Gregory and Co., and Mr. Waud. In form these transactions purported to be sales and purchases of stocks or shares, but in substance, as the jury have found, they were contracts merely for differences. On February 1, 1897, Cronmire rendered an account showing himself debtor to Waud for about £220. On February 8 Waud gave an order to buy for investment £200 Great Eastern stock, and on the same day Cronmire answered by telegraph—"Sold you 200 Eastons, 113½, investment"; and he sent to Waud a contract note of the same date stating that he had sold to Waud for the account, February 12, £200 Great Eastern stock for £228 12s. 6d., "to be taken up." No cover was given or asked for in respect of this stock. By the seventh of the conditions endorsed on the back of the contract note the vendor states that he is prepared to deliver the stock to which the contract refers, if demanded, but requires in that event cash on the first day of the account in payment of the stock. On the next day, February 9, Waud wrote as follows:—"With regard to the £200 Great Eastern stock, would you please take it off the market to-morrow and place it in the name of A. E. Waud, &c., and forward the transfer to me when ready for signature? As I have now only one stock open, there is ample balance in hand for payment of the Great Eastern stock, which please use for that purpose, &c." Cronmire made no

objection to this proposal, but acted on it by debiting Waud with the price of the stock and the stamp and fees and promising to send transfers, and from time to time Waud pressed for delivery and Cronmire continued to promise it until his death on April 16. The jury have found, and no doubt rightly, that this was a real transaction—*i.e.*, that both parties intended an actual purchase and sale of the £200 Great Eastern stock for delivery. After Cronmire's death Waud put in a proof in the administration for the balance appearing to be due to him on his general account with Cronmire, but he now asks to substitute a claim for damages for the non-delivery of the Great Eastern stock, and it is agreed that, subject to the question of cost, the proof is to be treated as amended in that sense. The objection raised by the trustee is that, as he contends, there was no consideration for Cronmire's promise to deliver the stock, because Cronmire was not to get anything for it except a discharge from or set-off of a claim for gambling differences, the payment of which Waud could not have enforced. And it seems to me that the trustee's contention ought to prevail if, as Mr. Waud in his affidavit says was the case, the bargain for the Great Eastern stock was at the time when it was made a bargain that the stock should be paid for in that way. In that view Mr. Waud's claim would in reality be a claim to enforce payment of gambling differences, not indeed in specie, but in the form of their equivalent in stock. But Mr. Waud ought not to be held to that view if it clearly appears that he, or rather the person who drew his affidavit, has mistaken the facts. I think that does appear. Cronmire's telegram and contract note of February 8, show a written and real agreement made on that day by which Waud became bound to take up and pay in cash on the first day of the account, and Cronmire became bound to deliver on such payment being made, and so the jury have found. There was, then, a contract free from any objection, though conditional on the money being provided by Waud. This condition could have been waived by Cronmire, and in that case he could have sued Waud for not accepting, as Waud on performing the condition could have sued him for not delivering, the stock. The next day, as appears by Waud's letter of the 9th, Waud for the first time proposed that, instead of cash passing, the payment should be made out of the balance due to him, and Cronmire assented. That relieved Waud of the necessity for performing the condition of payment in cash, but did not otherwise alter Cronmire's conditional contract to deliver, which was a good contract when it was made. If a contract is made for good consideration I cannot see that it can become invalidated merely because a party afterwards consents to accept in lieu of the good consideration, which he could have enforced, a different consideration which is of uncertain value or even of no value. A further claim is made by Mr. Waud for damages for non-delivery of stock known as Dover "A's" which were sold to him by Cronmire on April 3. The material facts are the same as in the first claim, except that, as appears by Cronmire's letter of April 5, this second transaction was from the first intended to be on the terms that payment should be made partly by setting off the gambling balance due to Waud. This intention, however, was not expressed in the contract. Moreover, a material part of the consideration—namely, £81 17s. 3d., was to be paid by Waud in cash, and there was, therefore, at any rate to this extent, consideration for Cronmire's promise, and the result appears to me to be the same, though for a different reason. A third claim is also made by Mr. Waud for the repayment of moneys amounting to about £60, which were advanced by him in separate sums at different times by way of specific "cover" on specific and separate gambling

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

orders. These sums have never been appropriated or required for covering losses. The return of them was never demanded until after the administration order, nor was any notice given revoking the authority to apply them as cover. But as regards the sums now in question, the events in respect of which they had respectively been deposited had resulted in Waud's favour, and there was no longer any reason for the retention of them by Cronmire. The trustee contends that these sums are irrecoverable as being within the meaning of the Gaming Act (8 and 9 Vict., c. 109, section 18) sums "which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Apart from the statute these moneys would have been recoverable as moneys of Waud in Cronmire's hands. They had been deposited to cover contingent debts which might become due from Waud in certain events, but those events had before Cronmire's death been determined in Waud's favour, and there was no ground for the further detention of them by Cronmire. It was the intention of both parties that when the dealings were closed the depositor should retain his ownership of what should remain unappropriated. Then does the statute prevent recovery? Apart from authority I should have thought that the moneys so deposited by way of security were not within the language of the statute "deposited to abide the events" on which the wagers were made. And this was the view of the Court of Appeal and of the House of Lords in the first case of "Strachan v. the Universal Stock Exchange" ([1896] A.C., 166) in relation to a deposit of shares as cover; but in the second case of the same name ([1896] 2 Q.B., 697) a deposit of money for a similar purpose was regarded in the Court of Appeal as made "to abide the event" within the meaning of the statute, and on that point I can see no distinction between that case and the present one, and I must, therefore, hold that the statute in that respect is applicable. Then, what is the effect of the statute in such a case? The decisions have not been uniform, and perhaps none is precisely in point. (His Lordship then reviewed the authorities at length, and continued.) These authorities seem to show that the statute is to be construed as interfering only with an action brought on the contract to enforce the contractual claim for winnings on the wager. In the present case the cover was not in any natural sense won by Waud, nor was the present application brought on the wagering contract or to enforce performance of it. On the old system of pleading no reference to the contract need have been made in the declaration. If, indeed, the depositor had sued for the joint deposit as winner of the wager, that would have been a claim to enforce the contract, and he could not, in reply to a plea of the statute, have assigned his real claim to be for recovery of his own deposit; but that does not show that he could not have sued to recover the deposit on particulars proper to the claim. In the present case, if this money had been deposited with a stakeholder, it is clearly settled by the cases above cited that it could have been recovered at any time before it had been paid over. The authority to pay over could at any time be revoked, and it is revoked by bringing an action. ("Strachan's Case, No. 1.") The same enactment applies to both cases equally so far as it applies at all; and, if it is no bar to recovery in the one case, it can hardly of itself be a bar in the other; and the obstacle to recovery, if there be one, must be found in the common law. There would have been such an obstacle by the common law if the events had been determined in Cronmire's favour, because the money being in his hands on the terms that it should become his on the event being so determined, and the

event being supposed to have been so determined, title and possession would have been conjoined in him, and there would have been the equivalent of a voluntary and unconditional payment, which is always a bar to recovery, even when payment has been made without any consideration. Nor, as has often been pointed out, is a wager such a "delict" as to admit the application of the rule, *Potior est conditio possidentis*, as applied in such cases as "Taylor v. Chester" (L.R., 4 Q.B., 318); "Kearley v. Thomson" (24 Q.B.D., 742); "Herman v. Jeuchner" (15 Q.B.D., 561). I should add that Lord Justice A. L. Smith in "Strachan's Case, No. 2," seems to have considered that the defendants there, under similar circumstances, were in the position of stakeholders. If that be so, there would be no doubt as to the claimant's right to recover in the present case. Then, if that was the law before "Strachan's Case, No. 2," has that case altered it? The actual decision was entirely consonant with the former cases, and it does not seem even to have required any reference to the statute, for in that case the event had been determined in the defendant's favour, and the money had been actually appropriated by him in accordance with the contract in settlement of the differences, and so there had been in effect a payment voluntarily and unconditionally made by the depositor. But, although the decision raises no difficulty, a *dictum* attributed to one of the Lords Justices raises a difficulty. Lord Esher, Master of the Rolls, is reported as having said that money so deposited by one party with the other can never be recovered unless the wager has been repudiated before the event of it has determined. This opinion seems not to be in accordance with what is laid down in "Varney v. Hickman" (5 C.B., 271), "Hampden v. Walsh" (1 Q.B.D., 189), and "Diggle v. Higgs" (2 Ex.D., 422) (which does not appear to have been cited), and is opposed to the opinion of Lord Justice A. L. Smith. In these circumstances it does not seem to me that the previous authorities are affected by Strachan's case. If this conclusion is well founded, it does not need the support of "Reggio v. Stevens" (4 The Times L.R., 326), on which reliance was placed by the counsel for the claimant. If it is not well founded, "Reggio v. Stevens" does not advance his case, for the cover was deposited, not, as here, in respect of each particular transaction, but generally, and that case decides no more than that a person who has deposited "cover" generally for future transactions can at any time decline to gamble further and recover the unexhausted deposit. As regards the contention that notice to Cronmire repudiating the wagering contract ought to have been given before these proceedings or before the administration order, I have said that this point appears to be concluded against the trustee by the case of Strachan, No. 1. And, even if that decision is not applicable, it seems to me on principle that an action is a sufficient assertion of the depositor's right to recover where the event has not been determined against him, or, at any rate, where, as here, it has been determined in his favour. Under the circumstances there will be no order as to costs.

[Solicitors—Atkinson and Dresser; H. H. Boorne.]

Q.B. Div. }
(Wright, J.) }

1898,
Feb. 21

HERMOUX V. HARBOLD.*

Bankruptcy—Proof—Fraudulent preference—
Mortgage—Transaction held not to be a fraudulent preference.

*Reported by R. BARBER, Esq., Barrister-at-Law.

This was an action by a creditor against the trustee of the estate of Sutton and Co., a firm of stockbrokers, claiming a declaration that he is entitled to prove against the joint estate of Sutton and Co. for the sum of £2,954 15s. 10d. By agreement dated March 7, 1890, James Sutton, W. N. Morrison, and A. R. W. Powles, members of the firm of Sutton and Co., bought from the plaintiff the lease of 22, Royal Exchange, for £2,500, to be paid for £1,250 by Morrison, £625 by Powles, and £625 by Sutton, and a bond was to be given to secure the payments in the proportions mentioned. On June 6, 1890, Morrison, Powles, and Sutton deposited the lease with the plaintiff, and by a memorandum of agreement of even date it was agreed as follows:—"That they the said J. Sutton, W. N. Morrison, and A. R. W. Powles, and each of them, will at his own cost and at the request of the said C. Hermoux, execute a legal mortgage of the said lease and premises, to be prepared by the solicitors of the said C. Hermoux, and to contain all such powers and provisions as their counsel should advise." On July 24, 1893, negotiations were commenced by and on behalf of Sutton and Co. for the purpose of administering their affairs under a deed of arrangement. On September 16, 1893, Sutton, Morrison, and Powles executed a legal mortgage of the lease to the plaintiff, in which they jointly and severally covenanted to pay the plaintiff £2,500. On November 16, 1893, a deed of arrangement was executed between Sutton, Morrison, and Powles and their creditors. It was contended by the defendant, the trustee, that the mortgage covenants were made by Sutton, Morrison, and Powles voluntarily, with a view to giving the plaintiff a preference over the other creditors, and were a fraud upon the creditors.

MR. JUSTICE WRIGHT said that according to the latest authority, "The Trustee of the Property of New France, and Garrard v. Hunting" ([1897] 2 Q.B., 19), he could not hold it to be a fraudulent preference, because the correspondence showed that the parties intended to carry out their obligations under the agreement of equitable deposit. It was clear by the operating words of the document of June 6, 1890, that a joint charge was given upon all the members of the firm, coupled with an undertaking that they would execute a legal mortgage. The fair interpretation was that there should be a joint liability.

Judgment in accordance with declaration prayed for.

MR. DICKENS, Q.C., and MR. RUFUS ISAACS were for the plaintiff; MR. ENGLISH HARRISON, Q.C., and MR. ATKIN for the defendant.

Prob., Divorce, and Adm. Div. (The Right Hon. the President, Sir Francis Jeune) } 1898.
Feb. 22.

THE VICTOR PRETOT.*

Contempt of Court—Salvage suit—Foreign ship
—Arrest by Admiralty Court—Moving ship
without sanction of the Court.

This was a motion brought by some of the salvors of the ship Victor Pretot to commit Captain Lewis, dockmaster at Southampton, and Mr. John Horn, the ship's broker, for contempt of Court. The Victor Pretot is a foreign ship under arrest by the Admiralty Court for salvage. She had been placed, with the permission of the Court, in the wet dock at Southampton, to enable her cargo to be discharged. Whilst the cargo was being discharged, the ship, which was in a waterlogged condition owing to damage to her hull, showed signs of capsizing. The dockmaster at once had the vessel

removed into a dry dock leading out of the wet dock and repaired, so that she would float in safety. After the repairs the ship was taken back into the wet dock and the rest of the cargo was discharged. The moving of the ship into dry dock without the sanction of the Court was the contempt of Court complained of.

MR. BADEN-POWELL, Q.C., and MR. A. E. NELSON appeared for the salvors of the Victor Pretot.

MR. ASPINALL, Q.C., on behalf of Mr. John Horn, and MR. BUTLER ASPINALL, for Captain Lewis, stated that their clients did not know they were acting contrary to the orders of the Court. What they had done had been absolutely necessary for the safety of the ship and the freeing of the dock from danger, and they therefore craved the indulgence of the Court.

THE PRESIDENT said that technically a contempt had been committed. It was admittedly necessary to put the ship promptly into dry dock, but the proper course before moving the ship would have been to have communicated at once to the collector of Customs, who was acting as agent for the marshal of this Court. As it was not, in his opinion, a serious contempt, he did not propose to punish Captain Lewis or Mr. Horn in any way.

[Solicitors—Lowless and Co., for Stocken and Stocken, for the salvors; T. Cooper and Co., for Mr. Horn; The Solicitors for the London and South-Western Railway Company, for Captain Lewis.]

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.J.J.) } Feb. 23.

KAYE V. CROYDON TRAMWAYS COMPANY.*

Company—Extraordinary meeting—Notice of—
Insufficiency—Companies Clauses Act, 1845,
sec. 71.

Order of Kekewich, J. (*ante*, p. 158), varied.

This was an appeal from a decision of Mr. Justice Kekewich, reported *ante*, p. 158. The action was brought by a shareholder in the above-named company on behalf of himself and other shareholders for an injunction to restrain the company and the directors from carrying out an agreement for the sale of the company's undertaking to the British Electric Traction Company. The agreement was dated November 25, 1897, and was made between the Tramways Company of the one part, and the Traction Company of the other part. After providing for the sale of the undertaking, the agreement continued as follows:—Clause 2. "In consideration of the said sale the Traction Company shall on the completion thereof pay to the Tramways Company the sum of £30,543. The Traction Company shall also pay the sum of £500 to each of the present directors other than Mr. W. J. Carruthers Wain, to whom the sum of £1,250 shall be paid, and £500 to the secretary of the Tramways Company as compensation for loss of office." Clause 6 provided as follows:—"This agreement and all the provisions hereof are conditional upon the same being adopted by the shareholders of the Tramways Company, and in case of non-adoption it shall be lawful for the Traction Company, by notice in writing to the Tramways Company, to determine this agreement." On November 26, 1897, notice was given by the Tramways Company of an extraordinary meeting of the shareholders of the company to be held on December 14 at 12 o'clock at noon "for the purpose of considering, and, if thought advisable, of approving, the terms of an agreement to be made between the Croydon Tramways

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

*Reported by H. E. HEMMING, Esq., Barrister-at-Law.

Company of the one part, and the British Electric Traction Company (Limited) of the other part, being an agreement for sale of the undertaking and assets of the Croydon Tramways Company to the British Electric Traction Company (Limited).'' This notice was followed by a circular dated December 1, and issued to the shareholders, which stated that the object of the agreement was to carry out a sale of the undertaking and assets of the company to the British Electric Traction Company (Limited) at a price sufficient to pay off the preference capital at par and return 60 per cent. to the holders of the ordinary stock, and the circular continued, ''The Traction Company in addition assume the responsibility for the debentures and other liabilities of the company, and as they are desirous of having the management in their own hands the directors and secretary have agreed to retire on being paid a lump sum as compensation for their loss of office. The circular then gave certain reasons for showing that the terms were fairly satisfactory, and enclosed a form of proxy. At the extraordinary general meeting a resolution confirming the agreement was passed by a large majority notwithstanding the opposition of the plaintiff. The plaintiff's case was, first, that the stipulation in favour of the officers of the company rendered the agreement *ultra vires*, and secondly, that neither the notice nor the circular sufficiently disclosed the real nature of the agreement, and the meeting was, therefore, not duly summoned. This question turned upon the construction of section 71 of the Companies Clauses Act, 1845, which was incorporated in the special Act of the Tramways Company. That section provided that every notice of an extraordinary meeting should specify the purpose for which the meeting was called. The case came on before Mr. Justice Kekewich on January 11, upon motion for injunction. His Lordship held that, having regard to the circumstances of the case, the notice was insufficient, and he also came to the conclusion that the company could not as against a dissentient shareholder pass a valid resolution sanctioning an agreement which gave to officers of the company large sums by way of compensation which would not bring any benefit to the company. He therefore granted the injunction. The Tramways Company appealed. After the appeal was opened on February 9 it was arranged that the plaintiff should bring in the Traction Company as defendants, and the case stood over till to-day to enable that to be done.

Mr. Cripps, Q.C., Mr. Warrington, Q.C., and Mr. Rowden were for the Tramways Company; Mr. Bramwell Davis, Q.C., and Mr. Bradford were for the plaintiff; and Mr. Buckley, Q.C., and Mr. Stewart Smith were for the Traction Company.

The MASTER of the ROLLS, after referring to the terms of the agreement and calling attention to the unusual character of the clause relating to the remuneration of the officers of the selling company, was not prepared to say that this agreement was *ultra vires*, or that the shareholders could not carry it out if they chose. The case of ''Southall v. British Mutual Life Assurance Society'' (6 Chan., 614) showed the contrary. But by the terms of the agreement there was no contract until it had been approved by the shareholders. That gave rise to the question whether the notice of November 26 was a sufficient compliance with section 71 of the Companies Clauses Act, 1845. Any one who read that notice would understand that the meeting was convened to sanction an agreement for the sale of the undertaking to the Traction Company and would assume as a matter of course that, whatever the purchase money was to be, it was to be paid to the vendors; but that was not true, because a very considerable portion of it was payable to the officers of the selling company. Then, could it be said that this notice specified the purpose

for which the meeting was called? In his Lordship's opinion the notice had been artfully framed to mislead the shareholders. It was playing with words to tell them that the meeting was convened for the purpose of approving the sale of the undertaking and to conceal from them that a large portion of the purchase money was not to be paid to the vendors. This was not a notice which disclosed the real purpose of the transaction. It followed that, though this contract was one which the parties could lawfully enter into, it was one which the selling company had not yet adopted so as to be binding on absent or dissentient members. The circular which followed the notice was sent out as much for the purpose of getting proxies as to give information, and it was not a full and fair disclosure to the shareholders of what was to be done. The real nature of the transaction had never been properly brought to the notice of the shareholders. The result was that the appeal succeeded to a certain extent and failed to a certain extent. The order of Mr. Justice Kekewich would be discharged, and an order substituted to restrain the company from carrying this agreement into effect until it had been duly sanctioned by a meeting of the company properly convened for the purpose.

LOBDS JUSTICES RIGBY and VAUGHAN WILLIAMS gave judgment to the like effect.

[Solicitors—Hugh Godfray; Walter Webb and Co.; Sydney Morse.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } Feb. 23.

SPOONER V. T. AND W. BROWNING.*

Principal and Agent—Authority of agent—Evidence of holding out—Stockbroker's clerk—Commission on business introduced—Authority of clerk to accept orders.

This was an appeal by the plaintiff from the judgment of Mr. Justice Hawkins at the trial of the action with a special jury. The appeal was argued on February 2, when the Court reserved judgment. The following statement of facts is taken from the judgment of Lord Justice A. L. Smith:—This is an action brought by the plaintiff, who is a farmer, against a firm of stockbrokers in substance to recover moneys paid by the plaintiff to a person named Dennis on account, as the plaintiff supposed, of the price of shares purchased by the defendants for him, which shares have not been delivered by the defendants to him. The case came to trial before Mr. Justice Hawkins and a special jury, when the learned Judge, doubting whether he should do so, left the following questions to the jury:—(1) Had Dennis express authority to enter into the contracts? Answer.—No. (2) Did the defendants hold him out or permit him to represent himself as possessed of such authority—that is, to enter into contracts on the defendants' behalf? Answer.—Yes. Mr. Justice Hawkins subsequently, after argument, entered judgment for the defendants, upon the ground that there was no evidence to support the second finding of the jury. The question is whether the learned Judge was right in so doing. The evidence, so far as material to the point under consideration, shows this—Dennis was a junior clerk of the defendants, who received a commission upon business introduced by him to them. Dennis was known to the plaintiff as a friend. Upon February 11, 1895, the plaintiff gave him an order to take to the defendants to be executed by them. It was an order to purchase for the plaintiff five Wolhuter shares. This order Dennis took to the defendants, who

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

executed it, and the plaintiff afterwards received from the defendants a bought note signed by them showing the purchase of these shares by them for him. This note was sent by the defendants to the plaintiff by Dennis. On the same day the plaintiff gave a similar order through Dennis for the purchase by the defendants for the plaintiff of ten Mainland Consolidated shares. This order Dennis took to the defendants, who executed it, and the plaintiff afterwards received through Dennis a bought note signed by the defendants showing the purchase of these shares by the defendants for the plaintiff. After the receipt of these notes from the defendants the plaintiff, upon February 25, 1895, drew his cheque in favour of the defendants for the price of these two lots of shares, amounting to £35 8s. 6d., which cheque he gave to Dennis to be handed by him to the defendants. This Dennis did, and these two transactions are duly entered in the defendants' ledger. Upon March 8, 1895, the plaintiff gave a third order to Dennis to be taken to the defendants for them to purchase for the plaintiff 100 Idaho shares. This order Dennis also took to the defendants, who executed it, and afterwards sent through Dennis to the plaintiff a bought note signed by them showing the shares purchased by them for him. Upon March 19, 1895, the plaintiff drew his cheque for the amount of these shares—viz., £17 16s. 2d.—in favour of Dennis to be handed by him to the defendants, which he did. This transaction was also entered in the defendants' books, and these matters thus became closed. After these three transactions and throughout the year 1895 the plaintiff gave Dennis, who still remained the defendants' clerk, orders for the purchase of other shares to be taken by him to the defendants for execution. Dennis took none of these orders to the defendants. What he did was this. He made out notes purporting to be signed by the defendants and handed them to the plaintiff. These were forgeries of Dennis. The plaintiff, upon receipt of these forged bought notes, drew cheques for the different amounts supposed by him to be due to the defendants and handed them to Dennis to be taken to the defendants. These cheques Dennis misapplied to his own use. The defendants knew nothing of these orders of the plaintiff or of what Dennis was doing till the beginning of the year 1896. These were the shares in respect of which the question in this action arose.

Mr. Crump, Q.C., and Mr. J. Eldon Bankes appeared for the plaintiff; Mr. J. Lawson Walton, Q.C., and Mr. A. G. McIntyre appeared for the defendants.

The COURT, having taken time to consider, delivered judgment to-day dismissing the appeal, Lord Justice Collins dissenting.

LORD JUSTICE A. L. SMITH read a judgment in which, after stating the facts as above set out, he said that it was not suggested that the plaintiff was guilty of any negligence in not finding out that the bought notes he received from Dennis from time to time did not bear the genuine signatures of the defendants, nor that the defendants were guilty of any negligence in not discovering Dennis's frauds. Both the plaintiff and the defendants were equally cheated by Dennis. The question was narrowed to this—Did the fact of a principal allowing an agent to obtain orders for him which he might or might not execute as he pleased, as the person giving the order well knew, afford any evidence either that he held out the agent as having authority to bind him by contracts or as representing that he, the principal, would execute the orders brought to him by the agent? It was clear that upon receipt of the first order the defendants would have been entitled to refuse to execute it, and they would have been under no obligation whatever to communicate to the plaintiff whether they would execute the order or

not. If they had not executed this order the above remark would have applied to the second or any subsequent order, assuming that they had not executed any of the orders. It was said, however, that because they executed the first and two subsequent orders their position became altered, and they thereby held out the agent as having authority as regards subsequent orders to bind them by contracts, or, at any rate, held him out as representing that they would execute the orders thereafter brought to them by him, unless they communicated to the plaintiff that they would not execute the order so brought. When did the legal obligation upon the principal to communicate to the customer that he would not execute an order first arise? After the first, second, or third, or later order? If it arose at all it seemed to him to arise after the first order executed, and this, in his Lordship's judgment, was not so any more than after a second or a third order executed. The defendants knew nothing of the orders given to Dennis after the first three, and yet it was said that by not communicating to the plaintiff that they would not execute orders of which they knew nothing they were liable to the customer. His Lordship could not agree with that. Nor did the fact that the defendants accepted a cheque drawn by the plaintiff in favour of Dennis and brought to them by Dennis show that the defendants held out Dennis as having authority to receive payment. That cheque was taken in payment of an order executed, but that did not show that they held out Dennis as having authority to receive payment for orders which they had never heard of and did not execute. It seemed to him that, although there was evidence fit to be left to the jury that the defendants held out Dennis as their agent to receive orders, which they might or might not execute, there was no evidence that he was held out by the defendants as their agent either to make contracts on their behalf or to bind them to accept orders when brought by Dennis to them, and that they were not estopped by their conduct from asserting against the plaintiff what was the truth—namely, that they had not executed for the plaintiff the bought notes forged by Dennis. For these reasons there was, in his opinion, no evidence to support the second finding of the jury, and the appeal must be dismissed.

LORD JUSTICE CHITTY read a judgment in agreement with the above.

LORD JUSTICE COLLINS read a judgment in which he expressed his dissent from the conclusion arrived at by the majority of the Court. His Lordship said that there was no principle of law involved in the case, and, in his opinion, there was evidence to go to the jury in support of their finding.

[Solicitors—Emanuel, Round, and Nathan, for the plaintiff; Debenham and Walker, for the defendants.]

Chan. Div.
(North, J.) }

1898.
Feb. 23.

IN RE PERKINS—POYSER V. REYFUS.*

Landlord and Tenant—Lease—Assignment—Covenant to indemnify assignor against liability for rent—Sub-assignment—Breach of covenant—Claim against executors of sub-assignee.

This was an originating summons to assert the right of Mr. Poyser, the original lessee of a house and stabling, No. 11, Hanover-terrace, Regent's-park, to an indemnity from the estate of the late Mr. G. F. Perkins, who at the time of his death was the holder of the lease, in respect of rent paid and other liabilities of Mr. Poyser

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

to the lessor, under peculiar circumstances. The lease was granted by a Mr. Coster in the year 1891 to Mr. Poyser for a term of nine years. In 1893 the lease was assigned to one Plaistow, the assignee expressly covenanting to indemnify the assignor against liability for rent and other obligations to the lessor. In 1895 Mr. Plaistow assigned to Mr. Perkins; Mr. Perkins covenanted to indemnify Mr. Plaistow against liabilities under the lease and the first assignment. In November, 1895, Mr. Perkins died; in the following month Mr. Plaistow became bankrupt. In June, 1897, the executors of Mr. Perkins assigned to a man of straw, thus getting rid of direct liability on the part of their testator's estate to the lessor. Mr. Poyser was called on to pay rent, and did pay rent to the lessor. Mr. Poyser carried in a large claim in the bankruptcy of Plaistow on the covenant for indemnity. A compromise was arrived at between the trustee in the bankruptcy of Plaistow and Poyser, under which the trustee, in consideration of a release of all claim by Poyser and the payment of £5, assigned to Poyser the benefit of the covenant by Perkins to indemnify Plaistow. It was now contended on the part of the claimant Poyser that he was entitled to be indemnified out of the estate of Perkins the full amount he could have got out of Plaistow, and Plaistow could have recovered over from Perkins had Plaistow been solvent. It was contended on the part of the executors that their testator's contract with Plaistow, being one of indemnity, they were only liable for the loss the bankrupt's estate had actually sustained, which, under the circumstances, was nothing.

Mr. Vernon Smith, Q.C., and Mr. Wace were for the claimant; Mr. Everitt, Q.C., and Mr. Edward Ford for the executors.

Mr. Justice North considered himself bound by the decisions, particularly the case of "*Ashdown v. Ingamells*" (5 Ex. D., 280), and held that the claimant was entitled to be repaid out of the testator's estate rent already paid, and to a declaration that he ought to be indemnified against future payments of rent and loss in respect of breach of covenants in the lease, including liability for dilapidations at the end of the term.

Chanc. Div. } 1898.
(Romer, J.) } Feb. 23.

IN RE LORD MONSON'S SETTLED ESTATES.*
Settled Land—Tenant for life—Other estates brought into settlement—Mortgages.

A tenant for life of settled lands brought into the settlement other estates of which he was tenant in fee, but which were mortgaged. These mortgages having been called in he obtained an order declaring that he had power to raise upon both sets of hereditaments the sums required to meet the mortgages.

This was a summons under the Settled Land Acts, which raised a general question on those Acts. It appeared that the applicant, Viscount Oxenbridge, was tenant for life of settled lands under the will (dated 1841) of the fifth Baron Monson and a conveyance to the uses of the will dated 1889, and that the applicant had by a deed made in 1892 brought into the settlement of 1841 other estates of which he was tenant in fee, but which were subject to considerable mortgages. These mortgages having been called in, the applicant asked for an order declaring that he had power to raise upon the hereditaments comprised in both settlements the sums required to meet the mortgages.

*Reported by E. B. SCHOMBURG, Esq., Barrister-at-Law.

Mr. Farwell, Q.C., and Mr. F. C. Wright appeared for the applicant; Mr. Neville, Q.C., and Mr. Ribton for trustees; and Mr. Onslow for remaindermen.

Mr. Justice Romer said that in his opinion it would be clearly beneficial to the settled estates as a whole that the application should be complied with. The legal point was whether, under the Settled Land Act, where estate A is first settled, if later on by a separate instrument the equity of redemption in estate B is settled in a similar although not identical way, and then owing to subsequent events estate B, subject to its mortgage, comes to be settled in identically the same way as estate A, and then a mortgage on estate B has to be paid off by means of a fresh mortgage, the fresh mortgage may not be charged upon both estates A and B, such a course being advantageous to all persons interested under the settlements. The cases of "*In re Mundy's Settled Estates*" ([1891], 1 Ch., 399) and "*In re Byng's Settled Estates*" ([1892] 2 Ch., 219) were decisions that two instruments could constitute one settlement under section 2, subsection 1 of the Act, and that if estate A had been subject to the mortgage the fresh mortgage might have been on estate B. He saw no reason why there should be any distinction in the present and converse case. The only ground suggested for making a distinction was that to allow that a second estate might be settled in the same way as a prior estate, so as to become one with it for all purposes under the Settled Land Act, might lead to acts of fraud. It was suggested that the mortgagor of estate B, who was tenant for life of the settled estate A, might settle the worthless equity of redemption of B and then free himself from his personal liability as mortgagor by getting estate A to pay the mortgage debt. But in reality such a case of fraud could not practically be carried out, for, apart from the difficulty of getting trustees appointed or to accept office on the settlement of a worthless property like B, before any mortgage of estate A could be made notice would have to be given to the trustees under section 45 of the Act, and they would at once put a stop to the attempted fraud by obtaining an injunction as in "*Hampden v. Earl of Buckinghamshire*" ([1893] 2 Ch., 531). The utility of the decision in "*In re Mundy's Settled Estates*" ought not to be interfered with by mere suggestions that fraud might possibly be attempted. Frauds might be attempted in many ways by tenants for life under the ordinary provisions of the Settled Land Act, but that consideration did not prevent the Act being passed or being useful. In ordinary cases when two estates were settled in the same way it was most useful to the beneficiaries that the two should be treated together for the purposes of the Settled Land Act, and it would impair the usefulness of the Act to limit it so as to exclude an application in the way contended for by the respondents to the summons. He held that what was proposed to be done could be lawfully done, and he therefore and for the reasons given made an order as prayed.

[Solicitors—Stileman, Neate, and Toynbee, for Toynbee, Larken, and Toynbee, Lincoln; Crawley, Arnold, and Co.]

Q.B. Div. } 1898.
(Kennedy, J.) } Feb. 23.

CRAWLEY V. WHITE.*
Gaming—Speculating in iron market—Paying differences—8 and 9 Vict., c. 109, sec. 18.

This case, in which two actions between the same parties had been consolidated, was tried by Mr. Justice Kennedy without a jury at the last autumn assizes at

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Leeds. In the first action the plaintiff claimed £251 10s. 5d. for goods sold, or, alternatively, for refusal to accept delivery of goods sold. In the second action the plaintiff's claim was against the defendant as acceptor of two bills of exchange for £184 10s. 9d. and for £184 10s. In both actions the substantial defence was that the plaintiff's claim arose out of certain gambling transactions in respect of differences in speculations in the rise and fall in the market price of pig iron, and that such transactions were contracts by way of gaming and wagering within 8 and 9 Vict., c. 109, s. 18. In the second action the defendant counter-claimed on a bill of exchange drawn by the plaintiff and accepted by the defendant, and endorsed by him to a bank. The defendant had paid the bank the amount of the bill, and now alleged that the bill was accepted by him in respect of the same gambling transactions, and that he was therefore entitled to recover the amount from the plaintiff. The case was adjourned to town for further argument, and judgment was reserved.

Mr. Tindal Atkinson, Q.C., and Mr. Bairstow appeared for the plaintiff; Mr. Boyd, Q.C., and Mr. H. F. Manisty appeared for the defendant.

MR. JUSTICE KENNEDY delivered judgment. In the course of his judgment his Lordship said that on January 13, 1897, the defendant entered into certain dealings with the plaintiff, the purport of which was that the defendant bought from the plaintiff storekeeper's warrants for 1,000 tons of hematite pig iron, payment to be by cash in Glasgow on March 12 or before in buyer's option on giving three days' notice against documents. These storekeeper's warrants were documents issued by the storekeeper, and in buying hematite it was sometimes described as storekeeper's warrants for so many tons. The price in this case was 52s. 3d. per ton. The defendant bought from the plaintiff on the same day another 1,000 tons at 52s. 3½d. per ton. In both cases on the sale note there was added, "Commission ¼ per cent.," but according to the plaintiff this was not, strictly speaking, commission, but represented his profit, and was added to what he calculated was the fair Glasgow price to a seller in order to prevent the defendant from thinking the price too high. On January 20 a similar transaction was entered into in respect of storekeeper's warrants for 2,000 tons. In March the three months elapsed in regard to the first two transactions and the plaintiff called upon the defendant to pay him the difference between the sale price and the then price on the Glasgow market, the price having fallen. The defendant made difficulties as to paying, and the matter was settled as to all three transactions by the defendant accepting three bills of exchange for the amount of the differences, two of which were the bills sued on by the plaintiff in the second action and the third bill was the subject of the defendant's counter-claim. It was also part of the same arrangement that the plaintiff should "continue," or "carry over," the transactions for two months, which was carried out by a formal repurchase from the defendant and the issue of a fresh sale note made out for the same warrants at current prices. Under this arrangement the date for completion would be May 18. The market continued to fall, and on May 18 the defendant failed to pay the differences and the plaintiff closed the transaction. In the first action the plaintiff claimed the amount of the differences. The main defence raised was that the transactions were really contracts by way of gaming and wagering within 8 and 9 Vict., c. 109, s. 18, and the question which his Lordship had to decide was whether as Lord Herschell put it in "The Universal Stock Exchange v. Strachan" ([1896] A.C., 173), these were real transactions of commerce or mere gambling for differences. After a careful consideration

of the evidence and of the above-mentioned authority, and also the cases of "Forget v. Ostigny" ([1895] A.C., 318) and "Thacker v. Hardy" (4 Q.B.D., 685), his Lordship felt himself compelled to come to the conclusion that the statutory defence set up by the defendant in both actions had been made out. The plaintiff, who said that he was an iron merchant, appeared to be so only in the sense that he bought and sold warrants for future dates. He sold to his clients, as he called them, and also speculated as a buyer on the Glasgow iron market, "carrying over," or "continuing," and paying or receiving differences. The defendant in these transactions was an oil merchant, and he also was dealing as a speculator. Transactions between the parties had been going on for seven years, covering 200,000 tons of iron. In every one of these transactions differences only had been paid; no demand for delivery of warrants or of iron was ever made. The plaintiff said that he always intended to deliver if delivery was asked for. His Lordship could not accept that statement. The well-understood intention was to pay and receive differences only, and neither of these contracts were intended to be executed by delivery according to the obligation expressed upon the face of them. Lord Halsbury in "Forget v. Ostigny," after pointing out that a contract could not be properly described as a gaming contract merely because it is entered into in furtherance of a speculation, said, at p. 323:—"The question whether a contract is intended to be executed by delivery, according to the obligations expressed upon the face of it, is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract." Counsel for the plaintiff sought to establish that the plaintiff had entered into certain contracts on the Glasgow Exchange which, although not made specifically for the purpose, would have enabled him to fulfil his contracts with the defendant, so that he stood to make nothing on the contracts beyond the ¼ per cent. commission or profit. If that could have been made good, it would have been an important point in the plaintiff's favour, for as Lord Justice Cotton said in "Thacker v. Hardy" (4 Q.B.D., 695):—"The essence of gaming and wagering is that one party is to win and another to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way, A will lose; but if it turns out the other way he will win." The result of the evidence was that the plaintiff failed to make good this point. It did not appear that the plaintiff had open contracts of purchase representing more than half the amount of iron which it would be requisite to deliver if the defendant called for delivery. These Glasgow transactions were in the nature of "hedging" contracts entered into with a view of preventing a heavy loss in the event of a sudden fall in prices, but this "hedging" did not establish the plaintiff in such a position that he did not stand either to win or lose by a fall. On these facts his Lordship held that the transactions between the plaintiff and the defendant were mere gambling, and therefore the plaintiff's claim in both actions failed. With regard to the defendant's counter-claim, it was said that the statute 4 and 5, Will. IV., c. 41, s. 2, entitled him to recover the amount which he had paid on the bill. That section, in his Lordship's opinion, did not apply to transactions such as these, and on the counter-claim the defendant's case failed.

HIS LORDSHIP granted a stay, if notice of appeal was given within seven days.

[Solicitors—Vincent and Vincent, for Ben. Day, Leeds, for the plaintiff; Turner and Co., for Jubb, Booth, and Helliwell, Halifax, for the defendant.]

Court of Appeal (Lindley, M.R., } 1898.
 Rigby and Vaughan Williams, L.J.J.) } Feb. 24.
 OPPERT v. THE BROWN HILL GREAT SOUTHERN
 (LIMITED)—THE SAME COMPANY v. COPELAND.*

Company—Meeting—Resolution declared unanimously passed—No objection taken—Subsequent attempt to restrain its being acted on—Injunction refused.

The first of these appeals was by the plaintiffs, Mr. E. D. Oppert and Mr. F. H. Kirby, against a decision of Mr. Justice North, dated January 25. The second appeal was by the defendant, Mr. J. F. Copeland, against a decision of the same learned Judge on the same date. The appeals were brought under the following circumstances:—

The plaintiffs, Messrs. Oppert and Kirby, moved before Mr. Justice North for an interlocutory injunction restraining the defendants other than the defendant company from acting or purporting to act as directors of the defendant company, and for an interlocutory injunction restraining the defendants from preventing the plaintiffs acting as directors of the defendant company and from excluding the plaintiffs from meetings of such directors. At the same time the company moved for an order directing the defendant, Mr. J. F. Copeland, who was the former secretary of the company, to deliver up to them, or as they might direct, all books, documents, and chattels of the company in his possession. It appeared that on January 3 last an extraordinary meeting of the company was held, upon a requisition of certain shareholders of the company, for the purpose of considering and, if thought fit, passing a resolution that four of the directors of the company (including the plaintiffs) should be removed from the board of directors, and of electing other directors in their stead. The plaintiffs contended that, on the chairman of the meeting putting the resolution to the shareholders present, three shareholders voted by show of hands against the resolution and only eight voted in favour of it, and that therefore the resolution was not carried by the requisite majority of three-fourths under section 51 of the Companies Act, 1862. The chairman announced that the resolution was unanimously passed, and at the time no protest was made nor was any poll demanded. The evidence was contradictory as to what voting actually occurred at the meeting, but Mr. Justice North came to the conclusion that Mr. Copeland had not voted against the resolution in such a manner that the chairman of the meeting could have seen him, and further that ten members had voted in favour of the resolution, so that even if Mr. Copeland had voted there would have been the required majority. His Lordship accordingly dismissed the plaintiffs' motion. On the motion made by the company against Mr. Copeland the learned Judge made an order as asked by the company.

In the first appeal Mr. Eve, Q.C., and Mr. Whinney were for the appellants. In the second appeal Mr. Martelli was for the appellant, Mr. Buckley, Q.C., and Mr. W. F. Hamilton were for the respondents in both appeals.

Their LORDSHIPS, without calling upon the respondents' counsel to argue, dismissed both appeals.

The MASTER of the ROLLS in giving judgment said, with reference to the first appeal, that the action was a curiosity in its way. It was a squabble about a resolution passed at a meeting held on January 3, 1898, for the purpose of removing some of the old directors of the company and appointing others. A resolution in favour of removing the directors was

declared unanimously passed by the chairman of the meeting. Oppert and another—one of whom was present at the meeting and the other not—brought an action against the new directors appointed by the resolution and the company for an injunction to restrain the directors appointed by the resolution from acting or purporting to act as directors of the company, and from preventing the plaintiffs acting as directors of the company and from excluding the plaintiffs from meetings of such directors. What was amiss? The meeting was held on a proper notice. The dispute now was as to the exact number of persons present and voting at the meeting. Oppert, who was not present, had three clerks who were. The chairman declared the result of the voting to be unanimous. Nobody challenged that ruling at the time; nobody then said that there had been any mistake. Neither of the three clerks of Oppert, nor Oppert's co-plaintiff, nor any one else, then objected. Copeland, the then secretary of the company, knew that it was not in Oppert's interests to demand a poll. Pausing there, was it to be tolerated that persons should allow a resolution to be declared as passed—not saying a word at the time, but letting the matter slide—and then bring an action to restrain its being acted on? If the Court did so hold it would be setting a precedent which would be extremely disastrous to companies. It would be intolerable if such a course were possible. Such a thing had never been heard of before, and without going into detail his Lordship thought that this was an experiment which he hoped would never be repeated. The appeal must therefore be dismissed with costs, and as a consequence the second appeal likewise.

LORDS JUSTICES RIGBY AND VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Ashurst, Morris, Crisp, and Co.; Armistage and Chapple; Beal and Payne.]

Court of Appeal (A. L. Smith, } 1898.
 Chitty, and Collins, L.J.J.) } Feb. 24.
 IN THE MATTER OF AN ELECTION FOR THE CITY OF
 YORK—FURNESS v. BERESFORD.*

Election Law—Parliament—Petition for a scrutiny—Particulars—Election Petition Rules, 1868, r. 7.

This was an appeal from an order made by Mr. Justice Lawrance at Chambers in the matter of a petition arising out of the recent Parliamentary election for the city of York, in which the candidates were Lord Charles Beresford, the respondent, and Sir Christopher Furness, the petitioner, and which resulted in Lord Charles Beresford being declared to be elected by a majority of 11 votes. The petition alleged that various classes of persons had voted at the election whose votes were void and ought to be struck off the poll—*e.g.*, persons who had personated other persons, aliens, persons who were guilty of corrupt or illegal practices, persons who were employed for payment as agents or clerks in connexion with the election, persons who voted at a wrong polling station, persons who voted more than once, and persons who were not on the register of voters; and the petition prayed that a recount might be had of the ballot papers, and that a scrutiny might be allowed of the votes given and tendered at the election, and that it might be determined that the respondent was not duly elected, and that the petitioner was duly elected and ought to have been returned. The order appealed from was made on a summons taken out by the respondent, and was an order that the petitioner should within four

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

days deliver to the respondent's agents particulars of the corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring in the sixth paragraph of the petition mentioned, and that the 11th paragraph of the petition be struck out, and that both parties should have leave to appeal. Paragraph 11 was as follows:—"And your petitioner further says that certain persons voted at the said election in respect of entries in the register of voters of the said city, in respect of which said entries the said persons were not entitled to vote, and that the votes of the said persons are void and ought to be struck off the poll." The respondent's objection to this paragraph was that it was ambiguous and embarrassing, as including classes of persons who were referred to in other paragraphs of the petition. The appeal was brought by the petitioner, and there was also a cross-appeal by the respondent asking that certain other paragraphs of the petition might be struck out.

MR. DICKENS, Q.C. (Mr. Willoughby Williams with him), for the petitioner, said that the petition in this case merely claimed a recount and scrutiny; it did not seek to avoid the election on the ground of corrupt and illegal practices or any similar ground. The petitioner claimed that he had a majority of lawful votes, and his case was that he was entitled to strike out the votes which had been given by persons not duly qualified to vote or not competent to vote, in order that he might show that he had such a majority. This case was governed by Rule 7 of the rules made under the Parliamentary Elections Act, 1868. Rule 6 was a rule applying to election petitions generally, and it provided for the giving of particulars by the petitioner or the respondent within four days of the making of an order for such particulars. Rule 7 applied specially to cases in which the petitioner alleged that he had a majority of lawful votes and claimed a scrutiny, and it provided that an order might be made that particulars of the votes objected to should be given by the petitioner six days before the trial of the petition. The learned Judge therefore was wrong in ordering these particulars to be given within four days. Paragraph 11 of the petition was not ambiguous, nor did it include cases covered by other paragraphs. It related to persons who were the occupiers of two qualifying tenements, and whose names therefore occurred twice on the register, and who had voted in respect of that tenement for which their names had been starred at the revision of the lists by the revising barrister.

MR. JELF, Q.C. (Mr. Lewis Coward with him), for the respondent, contended that some particularity of information must be given even in a case where the petition only asks for a scrutiny, and that paragraph 11 could not reasonably be read in the way suggested by the petitioner, and also argued the cross-appeal asking that other portions of the petition might be struck out.

MR. DICKENS, Q.C., replied.

THE COURT allowed the appeal and dismissed the cross-appeal.

LORD JUSTICE A. L. SMITH said that the petitioner sought by this petition to have himself declared duly elected as member for York, and he sought to have this declaration on a scrutiny only. He did not ask to have the election avoided for bribery, illegal practices, treating, or anything of that sort. His object was to have it ascertained by a scrutiny on which side the majority of the votes lay. Accordingly he set out a number of allegations to the effect that certain votes which had been given at the election were void on various grounds and ought to be struck off the poll. The petition was, in his opinion, good in form and in fact; it could not be said to be too general, taking into account the practice which had prevailed for many years with regard to election petitions. Rule 7

of the Parliamentary Election Petition Rules expressly applied to the case where a petition claimed a seat for an unsuccessful candidate, alleging that he had a majority of lawful votes. Rule 6 was a general rule, and in the case of "Munro v. Balfour" ([1893] 1 Q.B., 113) it was held that Rule 6 did not apply to cases to which Rule 7 applied. That decision governed this case, and in his opinion there was no jurisdiction here to make any order except an order that particulars of the votes objected to should be given six days before the day appointed for the trial of the petition. As to paragraph 11, he could not say, having regard to the Acts relating to registration, that it ought to be struck out. It seemed clearly to raise matters which were properly to be considered on the hearing of the petition. The same observation applied to those paragraphs which the respondent asked to have struck out.

LORD JUSTICE CHITTY said that the learned Judge had acted under Rule 6. He thought, however, that "Munro v. Balfour" had been rightly decided, and that where a petitioner claimed that he had a majority of lawful votes Rule 7 alone applied. Neither the petitioner nor the respondent had any right to get particulars from the other until six days before the hearing of the petition. On the other points raised he would only say that he agreed with Lord Justice A. L. Smith.

LORD JUSTICE COLLINS was also of the same opinion.

MR. JELF, Q.C., then appealed from an order made on a summons taken out by the petitioner, directing that all the ballot papers should be produced before Mr. Edwin C. Cooke at the Royal Courts of Justice, in order that they might be inspected and enumerated, and that Mr. Cooke should reserve for the consideration of the Judges appointed to try the petition such only of the ballot papers as might remain at the conclusion of the inspection and enumeration in dispute between the parties, and that the petitioner and the respondent should in all respects be bound by the result of the said inspection and enumeration.

THE COURT struck out the words as to the parties being bound by the result of the inspection and enumeration, and ordered that Mr. Cooke should report the result to the Election Petition Judges.

Chan. Div. }
(Kekewich, J.) }

1898.
Feb. 25.

IN RE MAYNARDS (LIMITED).*

Company—Filing of contract—Issue of fully paid-up shares—Companies Act, 1867, sec. 25—Sufficiency of contract filed—Consideration not fully stated.

A question which is of the greatest practical importance to shareholders in limited companies, in reference to the sufficiency of the contract to be filed pursuant to section 25 of the Companies Act, 1867 (30 and 31 Vict., c. 131), on the issue of fully paid-up shares, arose in this case. It appeared that by an agreement of March 14, 1896, the applicant, Mr. C. R. Maynard, agreed to sell certain businesses and leasehold tenements, which were fully described in the schedule to the agreement, to the above-mentioned company when incorporated in consideration of £40,000 to be paid partly in cash and partly in shares fully paid up. This agreement was duly confirmed by the company when incorporated and the company proceeded to issue to the applicant fully paid-up shares in accordance with it. The agreement, which was filed on the issue of these shares with the Registrar of Joint Stock Companies

* Reported by G. I. FORTER COOKE, Esq., Barrister-at-Law.

under section 25 of the Act of 1867, contained a recital of the previous agreement fully setting forth the terms of the purchase as regards the parties to it and the nature and extent of the consideration to be paid in cash and in fully paid-up shares, but the property which was the subject of the sale was described merely as "the business and property mentioned in the first part of the schedule" to the previous agreement and "the leasehold hereditaments short particulars of which are set out in the second part of" the same schedule, there being no further reference to the property nor copy of or reference to the schedule. In view of the recent decision of the Court of Appeal in "*In re Kharaskoma Exploring and Prospecting Syndicate*" ([1897] 2 Ch., 451) doubts were entertained as to the sufficiency of the registered contract by reason of its failure fully to state the consideration given for the shares, and application was accordingly made to the Court for the rectification of the register of shareholders with a view to the filing of a proper contract and the due reissue of the shares to the applicant as fully paid-up. In the case in the Court of Appeal the pecuniary consideration was not stated in any way in the registered contract but there was merely a reference to a preceding contract under which "for the considerations therein stated" the company had agreed to allot the shares. That case, therefore, did not conclude the point arising in the present case.

Mr. WARRINGTON, Q.C., and Mr. WHINNEY, for the applicant, submitted that the sufficiency of the contract was so doubtful that the register ought to be rectified.

Mr. VERNON, for the company, suggested that it was not necessary for the Court to decide whether the contract was or was not sufficient, but merely that its sufficiency was open to doubt.

Mr. KIRBY appeared for a member of a committee of shareholders.

MR. JUSTICE KEKEWICH, after observing that it had been suggested that he should be content to say that there was a doubt whether the contract was sufficient or not, but that in his opinion it was his duty to pronounce a decision upon the point, and after expressing his regret that the question had not been fully argued and that consequently his decision might not be an authority binding on any other Judge, continued as follows:—The question is whether this is a sufficient contract within section 25 of the Companies Act, 1867, the objection to it being that the consideration for the issue of these fully paid-up shares is not sufficiently stated. In the first place it may be said that it is not a contract at all, and in one sense it is not, for, though expressed to be a contract, it is in reality only a memorandum of the original contract or, as it is termed, a confirmatory contract. But to my mind it is far too late in the day to say that a confirmatory contract is not sufficient within the meaning of the Act. It may be said that, technically, when once you have made a binding contract you cannot make another. The original contract is the contract, and you cannot make another contract which is only an embodiment of the previous contract and say that that is the contract. But there is no doubt that a short confirmatory contract is sufficient for the purposes of this enactment. It has always been so regarded and to hold otherwise would be uselessly to endanger properties held under a confirmatory contract registered in the same way as this contract. I put that consideration aside; but whether you call it a confirmatory contract, in the same sense in which in the case of old charters there might be what is termed an "*inseximus*" charter, it must have all the elements of a contract. That I understand to be the foundation and substance of the decision of the Court of Appeal in the case of "*In re Kharaskoma Exploring and Prospecting Syndicate*"

(L.R. [1897], 2 Ch., 451). For the present purpose the Lord Justice Chitty puts the matter more directly and plainly than the other Lords Justices. At p. 468 he says:—"Now what is the object of the section? Publicity, to give information by registering the contract to any person who proposes to deal with the company either by way of becoming a shareholder or lending money, or the like. He is to go to the register to find what? To find the contract. He goes to the register in this case, but he does not find the contract. He finds part—half, as it were—of the contract." The Lord Justice does not mean that you may not register a confirmatory contract, or that you must register the whole contract, but that you must register the whole of that part of the contract which affects the transaction between the company and the shareholder. You must show all the elements of that contract. You have not got a contract if you omit the name of the vendor, or the name of the purchaser, or the amount of the consideration, or a fair description of the thing to be purchased. No doubt the cases as regards real property run very fine on each of those four points, and different Judges have taken different views, but it is clear that you must comply with those four requirements. You must indicate the vendor, the purchaser, the price to be given, and the thing to be purchased. In the present case you have the names of the vendor—i.e., the proprietor, who is to take the shares—and of the purchasers—i.e., the company who is to allot the shares—and the nature and amount of the price is fully stated. But have you got the thing which is to be purchased, the property in exchange for which the shares are to be allotted as fully paid up? Before I refer to the terms of the contract I will quote these further words of the Lord Justice Chitty. "This judgment of ours will not in any way affect the question with what degree of particularity the consideration must be stated in the contract. If the consideration is, for instance, a concession in South Africa, the person who reads the registered document will see that it is a concession in South Africa, and will form his own opinion about it." I do not suppose the Lord Justice meant to say that a reference to a concession in South Africa, without more, would be sufficient. "So, if it is furniture supplied to an hotel company he may be able to go at once and see what that furniture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill and stock-in-trade, the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration, and he sees it stated." The Lord Justice is there thinking of the furniture supplied to an hotel company, which is in an hotel which is named in the registered contract, and when he speaks of goodwill and stock-in-trade he means the goodwill and stock-in-trade of a particular business described in the contract. Apply that to this contract and the required result is something which you may fairly regard as incorporated into the contract as showing the substratum of the contract; what then do we find? The contract contains a recital that by an agreement dated March 14, 1896, the vendor has agreed to sell and the company when incorporated has agreed to purchase "(a) the businesses and property mentioned in the first part of the schedule thereto, and (b) the leasehold hereditaments and tenancies, short particulars of which are set out in the second part of the schedule thereto." So that in some schedule which he cannot look at the person who proposes to deal with the company is told he will find short particulars. He does not know whether there is one leasehold house or 50, whether they are let at a rack rent or a building rent—in fact, he knows nothing whatever about it, and cannot

find it out from the contract. It seems to me that it is idle to say that the terms of the contract are set out when one of the most important elements of the contract—namely, the property which is the subject matter of it—is described by reference to a schedule which you cannot see. It seems to me that though the Lord Justice Chitty says that the judgment of the Court of Appeal will not affect the question with what degree of particularity the consideration must be stated, yet that judgment shows that there must be some degree of particularity, and there is no particularity here. To say that the property is fully described in the document last mentioned is precisely the same thing for this purpose as if it were not mentioned at all. I have thought it my duty to express an opinion, and I have no doubt myself that this is a bad contract. The result is that, as there is no doubt about the intention of the parties, the register must be rectified. His Lordship then referred as to the form of the order to be made to “Chadwyck Healey on Companies,” 3rd edition, p. 384, where it is stated that in an unreported case of “*In re Eberhardt Company*” the Court of Appeal had held that the order ought simply to direct that the name of the applicant should be struck off the register of shareholders, and not to proceed to give directions that he should be put on the register in respect of shares fully paid up. That might be his right, but it was no part of the rectification to be ordered by the Court. His Lordship said he had always adopted that view from the time when his attention had been first called to the book referred to. The order accordingly was made for rectification of the register.

[Solicitors—E. C. Rawlings and Butts.]

Q.B. Div. (Wright)
and Darling, JJ.)

1898.
Feb. 25.

REG. V. THE GOVERNOR OF HER MAJESTY'S PRISON OF HOLLOWAY (EX PARTE BUDDENBORG).*

Criminal Law—Extradition—Criminal law of Netherlands—Postponement of execution of sentence—Treaty June 19, 1873.

This was the argument on a rule for a writ of *habeas corpus* to discharge from custody on an order of extradition to the Netherlands Hermann Rudolph Buddenborg, who had been convicted of an offence under the bankruptcy law of the Netherlands.

The Attorney-General (Sir Richard Webster, Q.C.), and Mr. Henry Sutton appeared for the Crown; Mr. R. Wallace, Q.C. (Mr. H. W. Rowsell with him) appeared in support of the rule.

The facts were these:—Buddenborg in October, 1893, was adjudicated a bankrupt at Haarlem, in Holland, according to the laws of the State, while he was absent in England. In November, 1893, Buddenborg was extradited in respect of a charge that he had committed certain offences against the bankruptcy laws of the said State. He was handed over to the Netherlands authorities. He then appealed against his adjudication in bankruptcy, and was detained in prison, awaiting trial for the offences for which he had been extradited, for ten months. As the appeal had not been heard at the expiration of that time—namely, in September, 1894—he was released. He remained in Holland until June, 1895, when he started business as a florist in England. In 1896 his appeal was dismissed. In September of that year, being still in England, he received a summons to attend his trial for the offences for which he had been extradited, and he thereupon

went over to Holland and was tried on September 27, 1896. He was convicted on part of the charges, and on October 8 he received a sentence of 14 months' imprisonment, from which the term of ten months which he had already served was to be deducted. He was thus ordered to serve 112 days' imprisonment. On application to the officer of justice that he might serve the said remainder of his term—namely, 112 days—at some other time, the request was granted, and Buddenborg returned to England and carried on his business in London as before. On February 2, 1898, he was arrested on a warrant as having been convicted of the commission of crimes against the bankruptcy laws of the Netherlands Government, being the crimes for which he had already been extradited in November, 1893, and convicted and punished. He submitted that the commitment was wrong, as he had previously been extradited on the same charge, also that the term of 112 days had expired, and that therefore he had already been tried, convicted, and suffered punishment. He also claimed that his release was an unconditional one. The extradition was claimed under the treaty with the Netherlands, which is dated June 19, 1873. Article IV. of the treaty is as follows:—“The extradition shall not take place if the person claimed on the part of the Government of the United Kingdom or the person claimed on the part of the Government of the Netherlands has already been tried and discharged or punished, or is still under trial in the Netherlands or in the United Kingdom respectively, for the crime for which his extradition is demanded. Article V.—The extradition shall not take place if, subsequently to the commission of the crime or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to.”

The ATTORNEY-GENERAL contended that there was no ground for interfering with the extradition order. No exemption had been acquired by Buddenborg under Article V. That article only meant that a country should not surrender a person if the surrendering country had already punished him for the very offence on which the claim for extradition was based. Here that had not been done.

Mr. WALLACE urged that extradition ought not to be allowed. The time had elapsed now under Article V. A sentence could not under English law be respited so as to begin at a future time. There was no real respite by the Court in this case. It was not the Court that had allowed Buddenborg to go away, but an “officer of justice,” which the learned counsel thought meant a sort of magnified policeman.

Mr. ROWSELL, following on the same side, referred to Wilkes's case (19 How. State Trials, 1,075) and “Reg. v. de Castro” (6 App. Cas., 229) as authorities to shew that a punishment to commence at a future specified day was illegal, and still more if it was to begin at an uncertain day. The case where a person was to suffer a previous sentence first was the only exception to this rule. Buddenborg had, in effect, been dismissed from custody. To be dismissed from custody was equivalent to being discharged. He had, therefore, undergone punishment, and could not be extradited.

The COURT discharged the rule.

Mr. JUSTICE WRIGHT said it was plain, from the letters and the affidavit, that in the Netherlands the execution of a sentence might be postponed at the request of a party. Here that had been done; whether as a respite or not he would not attempt to say. But, at any rate, it had been done at the request of the applicant, and he could not now be heard to say that he had served his sentence. On that ground, therefore, he failed. A second question was this. Was the

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

postponement of the execution of the sentence a bar to extradition? It was contended that lapse of time created a bar. It was true that that might have been made a term of the treaty between the contracting countries, but it was not in fact included in it. Under section 10 of the Extradition Act, 1870, all that was required was proof of conviction. When, under Article V., exemption from punishment had been "acquired by lapse of time, according to the laws of the State applied to," the extradition was not to be granted. Those words, however, were wholly inapplicable in this case. They referred to such limitations as were imposed by various statutes. With regard to Article IV., the meaning of it was that if a crime had been committed by a person, for which crime he could be punished in both countries, and he had, in fact, been punished for it in one, he could not be tried again for it in the other. The extradition would not be interfered with.

MR. JUSTICE DARLING concurred.

[Solicitors—The Solicitor to the Treasury, for the Crown; Crawshaw and Chatwin.]

Q.B. Div. (Wright and } 1898.
Darling, JJ.) } Feb. 25.

KNIGHT V. LANGPORT DRAINAGE BOARD.*

Rating—Commissioners of sewers—Proportionate rates—Validity.

Commissioners of sewers divided the rateable property in their district into three classes, and a differential rate was made in respect of each class.

Rate quashed.

This was a special case stated by the Quarter Sessions for Somerset on an appeal against a rate made by the Langport District Drainage Board. The quarter sessions quashed the rate. The question raised was whether commissioners of sewers are entitled to classify different lands in their district and to levy proportionate rates according to the benefit derived from the works.

Mr. Foote, Q.C., and Mr. C. S. Garland appeared in support of the rate, appealing against the decision of the quarter sessions; Mr. R. Wallace, Q.C., Mr. Howland Roberts, and Mr. Weatherley appeared against it.

The Langport District Board, in addition to special powers conferred on them by the Somersetshire Drainage Act, 1877, have, under section 140 of that Act, "all powers conferred on commissioners of sewers by Act of Parliament, law, or custom." The board had divided the rateable property in their district into three classes upon the principle of proportionate benefit received and danger avoided by virtue of the said Act; and a differential rate was levied in respect of each class. Thus, class one was rated at 1s. in the pound, class two at 8d., and class three at 6d. The question for the opinion of the Court was whether the quarter sessions were right in quashing a rate based on this principle.

Mr. FOOTE contended that the principle was a right and proper one. He said that under the statute 28 Henry VIII., section 2, commissioners of sewers might levy a rate by such ways and means as should appear to the commissioners convenient. This left them entire discretion, and there was absolutely no authority to the effect that the system followed in this case was illegal, and it certainly was most equitable. The commissioners had very carefully gone through the lands and made an

assessment according to the value of the benefit derived by each separate property. He cited "Bow v. Smith" (9 Mod., 94), "Soady v. Wilson" (3 A. and E., 248, 1835), "Reg. v. Commissioners of Sewers for the Tower Hamlets" (9 B. and C., 517), "The Metropolitan Board of Works v. the Vauxhall-bridge Company" ([1857] 7 E. and B., 964), "Reg. on the prosecution of the Imperial Gas Company v. Head" (3 B. and S., 419), "Pugh v. Metropolitan Board of Works" (34 L.J., M.C., 97).

Mr. WALLACE cited "Griffiths v. the London and Eversfield Drainage Board" ([1871] 41 L.J., Q.B., 25), "St. Katharine Dock Company v. Higgs" ([1845] 10 Q.B., 641).

The COURT affirmed the quarter sessions in quashing the rate.

MR. JUSTICE WRIGHT said it seemed to him that if the proposition for which Mr. Foote was contending had been well founded there would have been discovered some expressions in the cases on the subject in its favour long ago. None such were to be found. The system would involve great interference with private property and complicated inquiry, and the difficulty of working out appeals would be almost insuperable. There was no one authority which was clear in favour of the contention. The Vauxhall case was the only one that approached it, and the statement of the Court then on this point was extra-judicial, and at any rate it did not carry the case far enough. The effect was only that lands which were benefited could alone be rated. That case, moreover, dealt with a special Act, in which were words providing for "any reduction or allowance in respect of the sewers rate." Moreover, there were observations by the Judges in the late case of "Pugh v. Metropolitan Board of Works" (34 L.J., M.C., 97), which implied that the Court did not altogether approve of the extra-judicial opinion of the Court in the former case, though they did not in express terms decide against it. One other point might be mentioned. It was very doubtful whether the board would be entitled to divide the district under 3 and 4 Will. IV., c. 22, section 14, into special districts by the method of constituting into a district any property, say, 50ft. above the level of the marsh. This would render it necessary to take isolated properties here and there, and as under the Act the levy and expenditure of the rate was to be within the district, a district could not well be constituted in that manner.

MR. JUSTICE DARLING was of the same opinion, but thought that the opinion given by the Judges in the Vauxhall case was in favour of the view taken by the drainage board. It could not, however, be binding on this Court, as it was extra-judicial. The principle contended for had, therefore, never been acted on. It would occasion great complications if it were.

[Solicitors—H. O. Louch, for Louch and Poole, for the respondents at Quarter Sessions; Geare, Son, and Pease, for Hill and Son, Langport, for the appellant at Quarter Sessions.]

Q.B. Div. (Lord Russell of Kil- } 1898.
lowen, C.J., and a Special Jury) } Feb. 25.

THE BRITISH EMPIRE TYPESETTING MACHINE COMPANY (LIMITED) AND ANOTHER V. THE LINOTYPE COMPANY (LIMITED).*

Defamation—Libel—Trade libel—No allegation of special damage—Finding by jury that the libel was defamatory of the plaintiffs as well as their goods.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by E. HARBINGTON, Esq., Barrister-at-Law.

In this action the British Empire Typesetting Machine Company and the Empire Typesetting Machine Company, English and American companies respectively, sought to recover damages for libel from the Linotype Company, who carry on their business at 188, Fleet-street, E.C. The defendants denied that the words complained of were libellous, and maintained that they were true in substance and fact. They also said that there was no allegation of special damage.

Sir Robert Reid, Q.C., and Mr. Gregson Ellis were counsel for the plaintiffs; and Sir Edward Clarke, Q.C., Mr. J. Eldon Bankes, and Mr. Lewis Thomas appeared for the defendants.

SIR ROBERT REID, in opening the case, said that the two plaintiff companies were the owners of patent rights for the manufacture of certain typesetting machines and had them in use in this country, America, and various other parts of the world. The circumstances which gave rise to the libel in question were as follows. There was a newspaper in New York called the *Evening Sun*, and five machines of the Empire Typesetting Company were sent to be used in that office in the spring of 1896 for the purposes of trial. In the summer of 1896 some trouble arose through the action of a trade union there, and the union declared that the office of the *Evening Sun*, in consequence of the use of these machines, was a "machine" room, which meant that the persons employed there, who were under the rules of the union, were required to receive nine hours' pay for eight hours' work. A compromise with the union was attempted unsuccessfully, and it was, in consequence of the heavy tax thus imposed on the machines, found necessary to discontinue four out of five of them. Those being the facts, a rival company in this country, the Linotype Company, through an official, on June 9, 1896, sent to the editor of the *St. James's Gazette* a letter in these words:—"We shall be greatly obliged if you could make some use of the enclosed in your columns." The enclosed was the following article, which was complained of as a libel:—

"The Empire Typesetter in America.—The *Union Printer* and *American Craftsman*, the most wide-awake and spirited of American trade journals, has recently contained several references to the Empire composing machines, which were installed in the office of the New York *Evening Sun* with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in the month of February last, and the other four commencing operations on March 9 last. So short-lived, however, does this installation appear to have been, that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Company is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine." This announcement insinuated that the machines had been discontinued because they had proved to be failures and that was what was intended to be conveyed to persons interested in them. It was the statement of the truth so worded as to convey an entirely false character to what had really occurred. The American trade paper referred to in the libel, in its issue of March 21, 1896, contained a paragraph to the effect that the machines had given every satisfaction, and there was another paragraph in its issue of May 2 referring to the fact of the discontinuance of the four of the machines in consequence of the transformation of the *Evening Sun* office into a "machine" room. That paragraph was the only foundation for this libel, which counsel characterized as a shabby subterranean way of communicating with the Press in order to injure a rival in trade. The libel was also sent to the

editor of the *Printer's Register*, but both he and the editor of the *St. James's Gazette* behaved as gentlemen should behave, and did not insert the objectionable notice, but made inquiries on the matter from the British Empire Company. The plaintiffs then communicated with the defendants, and asked for an undertaking to withdraw the paragraph, and send a copy of such withdrawal to all persons to whom they had sent it. The reply received from the defendants was an assertion that the statements contained in the paragraph were true, and a refusal to withdraw anything that was stated in it. The defendants having taken up that position, the plaintiffs' only course was to take these proceedings.

Mr. Ernest Gunn, the former business manager of the *St. James's Gazette*, deposed to having received two copies of the paragraph in question, one addressed to the *St. James's Gazette* and one to *St. James's Budget*, and the editor of the *Printer's Register* said he had received the same paragraph, but it was not necessarily for publication.

Evidence taken on commission in America was read by SIR ROBERT REID. It was to the effect that the machines at the *Evening Sun* office were discontinued in consequence of the tax imposed on them owing to the transformation of the office into a machine room, under the rules of the trade union. The machines themselves had worked satisfactorily. The plaintiffs were unable to say what damage they had suffered by the paragraph complained of.

SIR EDWARD CLARKE submitted there was no case to go to the jury. The paragraph was not a libel at all, because it was not defamatory; if, however, it was a trade libel, no evidence had been given of special damage, of which proof was necessary. He cited "*White v. Mellin*" (Ap. Cas. [1895], 154). If a trader disparaged another trader's goods, the latter could not recover for libel, unless he showed special damage. The learned counsel also referred to "*Western Counties Manure Company v. Lawes Chemical Manure Company*" (L.R., 9 Ex., 218); "*Evans v. Harlow*" (5 Q.B., 624); and "*South Hetton Coal Company v. North-Eastern News Association*" (1894) 1 Q.B., 133).

THE LORD CHIEF JUSTICE.—Although I think that the mere vaunting of a man's goods, even if it implies disparagement of another man's, ought not to be actionable, yet I agree with Lord Herschell's opinion in "*White v. Mellin*" ([1895] A.C., 164) that where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action ought to lie. What I propose to do is, subject to what Sir Robert Reid may have to say, to ask the jury what this publication in effect is, and then I shall ask them, if necessary, to assess the damages.

SIR ROBERT REID argued that all the cases his friend had referred to had been decided on their merits. In "*White v. Mellin*" the words were not a libel at all, and there was only inferential disparagement of another trader's goods. Lord Herschell's judgment only referred to the classes of cases in which the excellence of one man's goods were vaunted to the disparagement of another's. If this case was a libel, there was no necessity for proving special damage. Counsel cited "*Ratcliffe v. Evans*" ([1892] 2 Q.B., 524).

THE LORD CHIEF JUSTICE.—I think the case must go to the jury. I do not think we quite know where we are till the jury have determined the nature of the libel.

SIR E. CLARKE pointed out that in "*Ratcliffe v. Evans*" general damage had been actually proved. He pointed out that it was for the Judge to rule whether the words were capable of a defamatory meaning.

THE LORD CHIEF JUSTICE.—Yes, I rule that they are capable of a defamatory meaning.

SIR ROBERT REID then addressed the jury. He said that it was only by the honourable conduct of the newspapers to which the paragraph had been sent that the libel was not published to the world, and so damage had been arrested. The defendants had stated that the paragraph complained of, whatever meaning it might be held to bear, was true. The libel conveyed an imputation on the plaintiffs in their business as vendors of a worthless machine. Was this libel merely a notice of the five particular machines, or was it in effect and substance an imputation on the business of the plaintiffs as carried on? If it merely referred to the five machines, the plaintiffs could not succeed, because damage had been arrested owing, as he had said before, to the honourable conduct of the newspapers in not publishing it. It was said that that circumstance entitled the defendants to judgment. There was another reason for being unable to prove damage, and that was that it was impossible to show how far this underhand back-biting process had gone. The question of special damage did not arise except where the words complained of were not in themselves a libel. What would a person of ordinary business intelligence understand by reading this paragraph? Counsel contended that the only meaning it could bear was that the plaintiffs were selling worthless articles, and therefore it was a libel on the plaintiffs in the conduct of their business. He asked the jury to measure their damages by the consideration of what ought to be given to mark their sense of disapproval of the conduct of the defendant company.

SIR EDWARD CLARKE said that the question to be asked of the jury was whether the notice in question was defamatory of the plaintiffs in the conduct of their business. There were two companies, who were plaintiffs, and there had been no reference whatever made to the English company, and he submitted that there was no evidence as to their having been affected in any way. The paragraph was obviously sent out as a trade advertisement, and dealt with a rival machine in words which the defendants believed to be absolutely true. The plaintiffs were trying to get a verdict and damages for libel, confessing that no damage had ever been sustained by them. The jury were asked to give a substantial sum to show their sense of disapproval of the defendants' conduct, but he thought that was an unreasonable request. The machines in question were offered as a gift to the *Evening Sun* newspaper for the purposes of making a trial of them. They were to serve as an advertisement for the plaintiffs. After the machines had been put there about ten days the paragraph referred to appeared in the American trade paper. The work of the machines was stopped, and the representatives of the Empire Company were informed that the machines could not be worked unless some arrangements could be come to with the trade union. This coming to the knowledge of the Linotype Company, the paragraph now complained of was sent to the *St. James's Gazette*. Everything in the paragraph was absolutely true. The defendants were quite entitled to say what they did. It was suggested that there was a defamatory imputation on the Empire Company. It was not defamatory to the company apart from their goods, nor depreciatory of the goods themselves.

THE LORD CHIEF JUSTICE, in the course of summing up, told the jury that all he had to decide was whether the words were capable of a defamatory meaning, and he had done so in this case, and it was for the jury to say whether in fact this was a libel. After dealing with the facts, his Lordship pointed out that the paragraph which appeared in the American trade paper on May 2

conveyed distinctly the cause of the discontinuance of the machines. The defendants had not suggested that they had any other or different information from what were now proved to be the facts. In that state of things the defendants did what he was sure the jury would think respectable and honourable men ought not to have done. Rivalry in trade was a good thing, but what the defendants in this case did he declined to think could have been sanctioned by any honourable men connected with the Linotype Company. They published this paragraph to the editors of two journals, who took a very proper view of the matter, and the paragraph did not appear in their journals. His Lordship read the paragraph and told the jury they would have to say what the language meant and would convey to the mind of an ordinary intelligent person. Would any one gather from that paragraph that the *Evening Sun* had no reason to complain of the machines, and that certain other circumstances had arisen which compelled their discontinuance. If the jury found the paragraph to be true in substance and in fact there would be an end of the case. Did the writer mean to convey that the company who were making these machines were making worthless machines, or, in other words, was it a libel on them in the conduct of their business? Or was it merely an imputation that these particular five machines were useless? As to damages the matter was reduced to a small compass. There was no evidence to go upon, as there was no publication to the world. In the case of libel there was no measure that could be called a legal measure at all, but the jury had to consider the conduct of the parties, to which the learned Judge directed the jury's attention in the case. His Lordship left the following questions to the jury:—(1) What was the meaning of the publication? (2) Was it merely a disparagement of the particular machines or was it defamatory of the plaintiffs in the conduct of their business in selling knowingly or unknowingly worthless machines? (3) Did the defendants publish the alleged defamatory matter maliciously intending to attack the plaintiffs in the conduct of their business? (4) What damages, if any?

The jury answered:—(1) The publication was a libel. (2) It was directed against the business of the company as vendors of these machines generally. (3) Yes. (4) £500 damages.

At the desire of **SIR E. CLARKE**, his LORDSHIP put an additional question to the jury. Did they think the libel meant to impute that the plaintiffs were knowingly selling useless machines?

The jury answered this question in the affirmative, and on these findings the learned JUDGE gave judgment for the plaintiffs for £500.

House of Lords (Lords Herschell, Watson, Shand, and James of Hereford) 1898. Feb. 28.

HUTTON V. ANNAN AND OTHERS.*

Trust—Trustee—Duties and liabilities—Law of Scotland—Unauthorized investment.

This was an appeal from the First Division of the Court of Session in Scotland inviting questions of the rights and liabilities of judicial factors. The decision of their Lordships is of interest and value to practitioners and others in England also, as the Judicial Trustees Act, 1836, is to a large extent an attempt to introduce the Scottish system into this country. By the English Act a judicial trustee may receive remuneration for his services, as do judicial factors in Scot-

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

land, and provision is made for the audit of accounts similar to that which exists in Scotland. In Scotland audit is made by the accountant of Court, and a judicial factor has to close his account once in every year. Act of Sederunt, 1730, and section 4 of the Judicial Factors Act, 1849. By the Judicial Trustees Rules, 1897, v. 14 (1), the Court fixes the time at which accounts are to be made up, and "the officer of the Court" who is to audit them is one of the Masters of the Chancery Division (Wheeler's Judicial Trustees Act, 1896, pp. 94, 107). One of the questions in the present appeal was whether any further responsibility was placed on the accountant of Court. The appellant, a chartered accountant of Glasgow, was, in January, 1885, appointed factor *loco tutoris* to the respondent Jessie Annan. In the following February he lent £1,750 in his name as [such factor to the Greenock Harbour Trust upon a bond, and the loan was duly entered with the accountant of Court. Shortly before Whit Sunday, 1887, the Harbour Trust was found to be insolvent, and the usual half-yearly interest was not paid. Under the Greenock Harbour Act, 1888, the appellant was obliged to accept certain debenture stock in place of the bond, the value of which is considerably less than the amount originally invested. The Lord Ordinary (Lord Kyllachy), whose interlocutors were affirmed by the First Division—Lord Adam, Lord Kinnear, and the Lord President—held that the loss must fall upon the appellant. The Lord Ordinary was not prepared to hold that the security was not of the class authorized by the Trusts (Scotland) Amendment Act, 1884, but thought that it was insufficient. By that Act trust moneys may be lent on real or heritable security; debentures or mortgages of railway companies and bonds, debentures, or mortgages secured on rates or taxes levied by municipal corporations. The First Division held both that the bond was not of the class authorized by the statute and that the security was insufficient. They further held that the accountant's audit was not equivalent to a discharge.

Mr. Balfour, Q.C. (of the Scottish Bar), and Mr. Haldane, Q.C., were for the appellant; the Lord Advocate (Mr. Graham Murray, Q.C.), Mr. Shaw, Q.C., and Mr. Orr Deasail (of the Scottish Bar), for the respondents, were not heard.

LORD HERSCHELL, in moving the dismissal of the appeal, expressed his concurrence with the Court below in the opinion that this bond was not "real or heritable security in Great Britain" within the meaning of section 3 of the Act of 1884, and said that it had been so held by the Judges of the Court of Sessions as far back as 1880 with respect to these very bonds. The only security assigned were the dues and rates of the Harbour Trust, and the only power possessed by the bondholder, in case the interest was not paid, was to obtain the appointment of a factor to receive the dues and rates. Further, this was not a loan secured "on bonds, debentures, or mortgages secured on rates or taxes levied . . . by a municipal corporation." The payments made by ships for the use of the docks were for services rendered and accommodation provided, and the Harbour Trustees were not a "municipal corporation." Some of them happened to be members of the corporation; but the Trust included persons who were not. In his view, therefore, the investment was one of a class for which there was no statutory authority. Then remained the question—apart from that of the class of investment—whether the actual circumstances were such as to justify the loan of trust money to the Greenock Harbour Trust. In his opinion, they were not. The margin was exceedingly small and the revenue of the Trust for some years had been steadily declining. There was, besides, a heavy expenditure in contemplation, and this, and other circumstances gave to the investment a

speculative character which made it improper for a judicial factor. He arrived at this decision with some regret as he was sure the appellant had no motive to serve except the interests of his ward.

LORD WATSON said that he was quite satisfied that the factor *loco tutoris* had acted in perfect good faith, but it would not be consistent with his judicial duty to accept that fact as any justification for the security in which the appellant had invested the funds. He did not think that, either under the Pupils' Protection Act or under any other statute or at common law, the accountant of the Court had any power to approve an improper investment. In his opinion the investment was not in any sense on land or a heritable security and that it belonged to a class which was not authorized. But it was also clear that its safety depended upon the success of an adventure which was a perfectly legitimate field for the ordinary investor, but not for either a tutor or factor *loco tutoris*.

LORD SHAND said that he had no doubt that the appellant had acted with good intentions, and he had given his evidence with great candour. This investment, it appeared, was very popular at Greenock itself, and even throughout Scotland. But the popularity of a security did not exonerate a judicial factor from the duty of prudent inquiry and cautious action.

LORD JAMES OF HEREFORD concurred, and the appeal was dismissed with costs.

Q.B. Div. }
(Bigham, J.)

1898.
Feb. 28.

ANDERSEN V. CRUNDALL AND CO.*

Ship—Charterparty—Construction—Damage to cargo—Liability for—Cargo, when at ship's risk.

This was an action brought to recover a balance of freight and dock dues due in respect of a cargo of timber carried by a vessel called the D. H. Morris from Pensacola to London. The claim was admitted, subject to a counterclaim for damage to the cargo. The plaintiff was the owner of the D. H. Morris. The defendants were the receivers of the cargo in question and the holders of the bill of lading given in respect of it. By a charterparty dated March 2, 1897, and made between the plaintiff and certain merchants, it was provided "that the D. H. Morris should proceed to Pensacola and there load a full and complete cargo of pitch pine timber; that the cargo should be delivered alongside the vessel at her ordered loading berth at shipper's risk and expense; that the cargo on delivery alongside should be received by the master and be secured by vessel's tackle and should be at vessel's risk, the dogs and chains on said cargo being also at vessel's risk; the ship to be responsible for any cargo lost from alongside through negligence and for salvage expenses on same." It also provided "that the shipper should for the sum of two dollars per load appoint and pay any stevedores to load the cargo, supply dogs and chains, and pay certain other charges; and that the master should sign shipper's bills of lading as presented." The vessel duly arrived at Pensacola and loaded her cargo. The logs were bound into rafts by dogs and chains and were then taken alongside the ship and loaded on board. A bill of lading for the cargo was signed by the master, and described the cargo as having been "shipped in good order and well conditioned on board the vessel," and provided that "freight and all other conditions should be as per charterparty." The vessel arrived in London and was ordered

*Reported by B. H. BALLOCH, Esq., Barrister-at-Law.

to the Surrey Commercial Docks, where the cargo was discharged by stevedores employed by the ship. The defendant's case was that a number of the logs had been injured by the use of dogs, either in discharging or in loading, and that in either case the plaintiff was responsible. The plaintiff's case was that the damage was not done in discharging and must have been done in loading, that the stevedore at the port of loading was the servant of the charterer, and that the shipowner was not responsible for damage done by him. He admitted that if the damage was done in discharging he was responsible.

Mr. Loebnis appeared for the plaintiff; Mr. English Harrison, Q.C., and Mr. D. C. Leck for the defendants. A number of witnesses were called on each side.

His LORDSHIP, in giving judgment, said that the defendants were entitled to succeed. The meaning of the charterparty was that the cargo was to be brought alongside the ship in the water and was then to be received by the ship, and that from that time forward the cargo was to be at the ship's risk, and that if anything happened to hurt the cargo from that time forward for which the ship could be to blame the ship must take the blame. The ship had to take the cargo on board and stow it, and, although by the terms of the charterparty the shipper was deputed to appoint and pay the stevedore, the work which the stevedore had to do was still the ship's work, and the ship remained liable for its proper performance, the cargo being at the ship's risk. The clause in question did nothing more than provide that the shipper should for a certain payment discharge certain duties which would otherwise fall on the ship; it did not take away from the ship any liabilities imposed by the other terms of the charterparty. Even if that view of the charterparty were unsound, the terms of the bill of lading threw upon the plaintiff the onus of proving that the damage complained of was done during the loading. So far was the plaintiff from having discharged that onus that he (the learned Judge) was inclined to think, upon the evidence, that the damage was done during the discharge. His judgment must be for the defendants.

Court of Appeal (Lindley, M.R.,¹ 1898.
Rigby and Vaughan Williams, L.J.J.) } March 1.
DOWLER V. KEELING.*

Patent—Validity—Specification—Insufficient description—Invention relating to improvements in hollow rivets and studs, and in the process of riveting.

This was an appeal by the plaintiff, Mr. Henry Dowler, from a judgment of Mr. Justice Kekewich, dated December 1 last, dismissing the plaintiff's action. By his statement of claim the plaintiff alleged that he was the patentee and registered legal owner of letters patent No. 5,312 of the year 1892 granted for an invention of "Improvements in hollow rivets and studs and in the process of riveting, which improvements are applicable to braces, straps, box buckles, brace fittings, and other light articles," and that the defendant, Mr. Samuel Henry Keeling (who trades as H. Hipkiss and Co.), had infringed such letters patent. The plaintiff accordingly claimed an injunction to restrain the infringement and the usual consequential relief. By his statement of defence the defendant denied the infringement. He alleged that the plaintiff's alleged invention was not new; that the plaintiff was not the first and true inventor thereof; that it was not useful nor the proper subject-matter of letters

patent; and, further, that the plaintiff did not sufficiently distinguish and point out in his specification which of the matters and things therein mentioned he claimed to have invented and which he did not claim to have invented or admitted to be old.

Mr. Thomas Terrell, Q.C., and Mr. Arthur J. Walter were for the appellant; Mr. Lewis Edmunds, Q.C., and Mr. N. Micklem were for the respondent.

At the conclusion of the arguments, lasting no less than six days or parts of days, their Lordships, on the 17th ult., reserved judgment, which was delivered dismissing the appeal, with costs.

The MASTER of the ROLLS read a judgment as follows:—In this case the plaintiff's invention relates to improvements in hollow rivets and studs and in the process of riveting. There are four claims in the specification, but three only have to be considered. Rivets and studs are both referred to, and the patent covers both. But the invention relates to hollow rivets and hollow studs only, and to such as are used for braces, straps, box buckles, brace fittings, and other light articles. Further, I cannot gather from the specification that the invention relates to studs which are not to be more or less riveted by pressure on the closed neck. The improved rivet or stud may be described as a hollow bottle-shaped thing, made of some compressible metal, closed at its top and having a flange at the bottom which may be either open or closed by a cap. The important features of this rivet or stud are—first, its neck or upper part, which is a cylindrical tube closed at the top but open below when it widens out into the shoulder; secondly, the shoulder connecting the neck with the lower part; thirdly, the lower part which widens out a little from the shoulder downwards until the flange is reached; fourthly, the flange at the bottom. One very important question is whether the patentee has in his first claim claimed this stud or rivet as a separate thing, or whether he has claimed it only in combination with a disc or plate, also described in the specification, and with which it is clearly intended to be used. Before deciding this question it is necessary to understand what this disc or plate is and how it and the stud or rivet are used. Two primary forms of disc or plate are described. The first is shown in figures 2 and 6. In this form the disc or plate is a circular piece of metal with a hole and short tube in the middle through which the neck of the rivet or stud is to be passed. In figure 2 this tube is expanded at the bottom; in figure 6 it is not. Both varieties of this form of disc or plate may be conveniently called washers, the projecting tube being their essential feature. The other primary form of disc or plate is a comparatively thick plate with a hole through which the neck of the rivet or stud is passed, but without any projecting tube at all. This form of disc or plate may be used either with an eyelet in the hole as shown in figures 15, 16, and 17, or without, as shown in figure 24. This form is referred to in the specification. Whichever of these forms of disc or plate is used, it is placed over the neck of the rivet or stud, so that the neck projects through the disc or plate. The closed top of the neck is then punched down and becomes "upset"—i.e., flattened and broadened by the blow. The punch at the same time forces the disc or plate on to, and in the first form into, the shoulder of the rivet or stud; and the disc or plate can be forced down tight on to any material between it and the bottom flange of the stud or rivet. The rivet or stud is usually passed through the material to be held by it until such material touches the flange at the bottom. But in figures 20, 21, and 22 the patentee shows another mode of using the rivet or stud. He, in fact, turns it upside down and passes the neck only through the material to which his rivet or stud has to be fastened. The flange

which I have spoken of as at the bottom thus becomes the top, it is like a button, and is fastened to the material to which it is applied by the pressure of the shoulder of the stud and the washer, which is pressed down by the upset head of the neck as before described. Such is, in my opinion, the short effect of what the plaintiff has described as his invention so far as figures 1-24 are concerned. The invention is so described in the body of the specification as to leave it quite open to the patentee to frame his claim in more ways than one. He might frame his claim so as to confine it to a combination of his rivet or stud with his discs or plates, or so as to cover that combination, but also to cover the rivet or stud as a distinct thing and independently of the particular combinations. He might also have claimed his tubed washers shown in figures 2 and 6 in a similar way. I will now turn to claim one, and see what the plaintiff has claimed. In the first part he appears to me to claim the rivet or stud shown in figure 1, and in the second part to claim it in combination with his discs or plates, or, to follow his own language more closely, to claim them in combination with it. I cannot, however, read claim one as a claim for a combination only. Nor, apart from the plaintiff's own evidence to which I will allude presently, does the specification indicate that a combination only was what he was aiming to describe as his invention. The pains he takes to describe his rivet or stud shows that he thought that he had invented a new thing. His peculiar form of tube washer described in figures 2 and 6 may be replaced by a thick plate having no peculiarity, and the patentee so worded his claim as to protect his rivet or stud whether used with his peculiar washer or not. No doubt now that it is seen to be desirable to fall back on the combination alone, the plaintiff's counsel strenuously contend that the claim is for a combination alone. But if the rivet or stud shown in figure 1 had been new and original, as the plaintiff thought it was, the claim could not, in my opinion, have been construed so as to claim it only in combination with the discs or plates described by the patentee. The claim is to the rivet or stud as a "subordinate part or integer," to use Lord Cairns's expression in "Clark v. Adie" (2 A.C., 320), and see "Cropper v. Smith" (28 Ch.D., 143). The case of the "British Dynamite Company v. Keebs" (13 R.P.C., 190), relied upon by the plaintiff, has little if any bearing on the present case. The real claim there was for dynamite, and the so-called second claim was only an unskilful description of the mode of firing it. To treat this specification as a claim to what is shown in figure 1, and what follows as the mode of using it, would not assist the plaintiff. The plaintiff in his evidence said that the rivet or stud described in figure 1 was new and original, the closed top without the shoulder was old, and the shoulder with an open top was old, but the combination of the two was new, and this combination was his invention which he wanted to protect. He did not know that the experiment had ever been made before. It is impossible to disregard this evidence, and it shows beyond all doubt that I am doing the plaintiff no injustice in construing his claim according to its ordinary grammatical meaning. The consequence is most unfortunate for him. The experiment is the exact thing described in figure 1, and although it was used by Player for a button as distinguished from a rivet, it is as a separate thing distinguishable from the plaintiff's rivet or stud shown in figure 1. Moreover, the defendant's studs were in all respects like the plaintiff's, except that their ends were open and not closed. The closing of the top can hardly be regarded as important if the rivet or stud is claimed as a separate thing. Great stress was laid on what is called the telescopic action of the plaintiff's

rivet or stud—i.e., the sinking of the neck into the lower part when the top is punched down. This is a mere incident of its shape. The patent is for the thing described, not for its telescopic action. Moreover, even if it were, the experiment made by the defendant in Court with blotting paper and an old open-ended stud such as the defendant used before the plaintiff's patent showed the same sort of collapsing or telescoping as is relied upon by the plaintiff. The controversy about the telescopic action is to my mind wholly immaterial. The conclusion at which I have arrived makes it unnecessary to refer to claims 2 and 3, which were said to have been anticipated by Boulton and by Dowler's earlier specification of 1878. I say nothing about the effect of the defendant having made studs like figure 1 in the course of making his open-ended studs before the date of the plaintiff's patent. The question thus raised is one of considerable difficulty, but it is unnecessary to decide it. For the reasons I have given I am of opinion that the plaintiff's patent as it stands covers too much and must be held invalid until amended. If judiciously amended it may be good. But in my opinion the patent is bad as it stands, and the appeal, therefore, must be dismissed with costs.

LORD JUSTICE RIGBY read a judgment to the like effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred in the reasons given by the other members of the Court for their decision, but expressed himself by no means satisfied that any amendment or any disclaimer, however judicious, would enable the plaintiff so to amend his specification as that it would be sufficient, either in point of novelty or subject-matter, to support the patent.

[Solicitors—Sharpe, Parker, Pritchards, and Barham, agents for Ryland, Martineau, and Co., Birmingham; Morgan, Price, and Mewburn, for J. Hargreave, Birmingham.]

Prob. Divorce, and Adm. Div. (The)
Eight Hon. the President, Sir Francis } 1898.
Jeune, and Gorell Barnes, J.) March 1.

THE HOLLINSIDE.*

Ship—Charterparty—Construction—Discharge of cargo—Quantity discharged—Discharge by consignee at ship's expense—Deduction from freight.

This was an appeal from the decision of the Judge of the County Court held at Newcastle. It appears that the respondents were the owners of the steamship Hollinside, and claimed to recover 18s. 10d. balance of freight on a cargo of coals. The appellants, who were the consignees, counterclaimed the cargo for the same amount. The coal was shipped under a charterparty which provided that the coal should be delivered "on being paid freight at the rate of 9s. per ton of 20cwt. or 1,015 kilos delivered, or on bill of lading quantity less 2 per cent., at receiver's option, to be declared in writing before bulk is broken." The charterparty also provided, "Consignee to effect the discharge of the cargo, steamer paying 1f. per ton of 20cwt. or 1,015 kilos." The bill of lading showed 1,184 tons of coal shipped on board at Sunderland. On arrival of the ship at Port de Bouc the appellants decided to accept the cargo at the bill of lading quantity less 2 per cent., and so save the expense and delay of having the cargo weighed. They, however, deducted from the freight £46 19s. 8d. for the steamer's portion of the costs of discharging the cargo, claiming

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

to be entitled to 1*l*. for every ton of coal discharged, and that, as there had been no weighing of the coal, the bill of lading quantity—viz., 1,184 tons—was conclusive. The respondents contended that, as the appellants had decided to take the coal delivered as 1,184 tons less 2 per cent. for the purpose of ascertaining the amount of freight, they had admitted that the amount they had to discharge was the same, and were therefore only entitled to be paid 1,184*l*. less 2 per cent.—viz., £46 0*s*. 10*d*.—as the steamer's share of the discharging expenses.

Mr. Joseph Walton, Q.C., and Mr. F. Laing for the appellants; Mr. H. Boyd, Q.C., and Mr. D. Stephens for the respondents.

The appeal was dismissed with costs.

The PRESIDENT said that it was obvious you must look to the whole of the charterparty, and when you did so you must come to the conclusion that, if the appellants had chosen to accept the bill of lading quantity less 2 per cent. as the quantity delivered, they were only entitled to be paid by the steamer for discharging the like amount.

MR. JUSTICE GORELL BARNES said he thought the charterparty should be read as a whole in a business-like way. The charterparty gave two methods of determining the quantity of coal delivered—the actual quantity delivered, or the bill of lading quantity less 2 per cent. For the purpose of determining the amount of freight the consignees had adopted the latter method. In his opinion the consignees could, therefore, not claim to be paid for having discharged a greater amount than they had admitted to have had delivered by the ship.

[Solicitors—Ince, Colt, and Ince; Stokes and Stokes, for Lietch, Dodd, Bramwell, and Bell.]

Chan. Div. }
(Wright, J.) }

1898.
March 2.

IN RE DRIFFIELD GAS LIGHT COMPANY.*

Company—Winding up—Distribution of surplus assets—Fully-paid and partly-paid up shares.

The Driffield Gas Light Company was constituted in 1835 under a deed of settlement and was registered under some or one of the old Joint Stock Companies Acts, and also under Part VII. of the Companies Act, 1862, as a company without limitation of liability. The deed of settlement provided (clause 1) "that the sums set opposite to the names of the parties hereto shall form the capital or joint stock of the company and that the aggregate amount thereof shall be £1,800" (with a provision for increase by issue of further shares); (clause 19) that losses should be made good by the proprietors "in proportion to their respective shares"; (clause 20) that profits should be divided amongst the proprietors "according to the amount of their respective shares"; and (clause 32) that upon a winding-up the residue after payment of debts should be "divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking." The capital was divided into shares of £10 each. Before the date of the winding-up the original capital had been increased, by the issue of new shares, to 1,200 shares of £10 each. Six hundred of them (including the original shares) were issued before 1893, and were fully paid up at or soon after the times of issue. The other 600 were created in 1893, with only £5 10*s*. paid up. The deeds creating some of the issues of shares subsequent to the original issue recited resolutions of the company authorizing their creation on the terms that the holders of the new shares should

be entitled to dividends on the amount from time to time called up thereon; but the deeds themselves provided that the new shares were to be in all respects subject to the provisions of the original deed. The undertaking of the company was sold in 1897 to a local authority, and the company was being wound up under a resolution of the shareholders. All the debts and costs of liquidation had been paid, and there remained a large surplus for distribution, the question being on what principle it should be distributed as between the holders of the fully-paid shares and the holders of partly-paid shares.

Mr. George R. Northcote was for the liquidator; and Mr. O. Leigh-Clare, Mr. Brinton, Mr. Hurrell, and Mr. Dunham were for the different classes of shareholders.

MR. JUSTICE WRIGHT delivered judgment, in which, after stating the facts and the question to be decided, he proceeded as follows:—In the case of the "Anglesea Colliery Company" [(1866] L.R., 2 Eq.; 1 Ch., 555) it was held that apart from the Companies Acts it is the clear right of a partner, when the partnership is wound up and the debts are paid, to have contribution in order to repay to him capital which has been advanced in excess of his proportion, and that the Companies Acts must be construed in accordance with this principle, so that a holder of fully-paid shares is to be regarded as a "contributory" entitled to have a call made on the partly-paid shares in order to equalize the capital account. In "*In re Scinde, &c., Corporation*" [(1867] L.R., 6 Ch., 53*n*) and "*Ex parte Maude*" [(1870] L.R., 6 Ch., 51) it was established that in a winding-up order under the Companies Acts where after payment of debts and costs a balance remains, but insufficient for a complete return of capital paid up, the capital account must be equalized by a call on the partly-paid shares, and the assets must then, in the absence of any different provision, be distributed according to the nominal amount of the shares; and it was held that an express provision for the payment of dividends according to the amounts paid up on the shares did not prevent this rule from being applicable in the partial return of capital in a winding-up. It was also decided that the holder of the fully-paid shares is not in the position of a shareholder who has paid calls in advance unless he has paid up on shares which have not been issued as fully paid, or fully called up. In "*Oakbank Oil Company v. Crum*" [(1882] 8 App. Cas., 65) where the company's articles of association provided that the shareholders should be entitled to dividend "in proportion to their shares," it was held that it was not competent to the company to declare a dividend in proportion to the amounts paid up on different classes of shares, and the practice of five years was disregarded. Lastly, in "*Birch v. Cropper*" [(1889] 14 App. Cas., 525) after payment of debts and costs of winding-up there was a balance more than sufficient to return all the capital paid up. The articles of association provided for payment of dividends in proportion to amounts paid up, but made no provision for distribution of surplus in a winding-up. The Court of Appeal held that the surplus should be distributed on the same principle as the dividends, but it was decided by the House of Lords that the article which governed dividends did not govern the distribution of the surplus, and that after equalization of the capital account the assets must be distributed according to the nominal amount of the shares. The effect of these decisions seems to be as follows:—The winding-up sections (section 109 and section 133) of the Companies Act, 1862, do not of themselves supply any rule for the mode of adjusting loss of capital or of distributing surplus, but only supply the necessary powers for giving effect to the rights and interests of

*Reported by F. EVANS, Esq., Barrister-at-Law.

the parties. Those rights in the case of a company constituted under the Companies Acts must, in the absence of any provision in the memorandum or articles of association, be ascertained, in the view of one of the noble and learned lords who took part in the decision of "*Birch v. Cropper*" (14 Ap. Cas., 525), by recourse to general principles of equity; in the view of another of them, by reference to the principles and provisions of the Companies Acts. But in either view the result is the same—namely, that the capital account must first be equalized, and then there remains no ground for appropriating the balance in any other way than according to the nominal amount of the shares in the capital; and a provision in the memorandum or articles of association regulating the distribution of dividends will not of itself govern the distribution of surplus in a winding-up. In the case of a company not constituted under the Companies Acts it would seem to follow that reference must be made to the deed or instrument under which it is constituted, and if that deed or instrument contains any provision with regard to surplus effect must be given to it, but a provision regulating the distribution of dividends ought not to be considered as of itself governing the distribution of surplus. If the capital of the company is limited by shares of equal or commensurable amount the same consequence ought to follow as if it were so limited under the Companies Acts, the holder of each share becoming, in the words of Lord Macnaghten in "*Birch v. Cropper*," "entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled as a necessary consequence to the same proportionate part in all the property of the company, including its uncalled capital." In opposition to this conclusion reliance is placed on two decisions, which happen to be the only reported decisions with reference to the distribution of surplus in the case of companies not constituted under the Companies Acts. The first is "*Somes v. Currie*" ([1855] 1 Kay and J., 605; 1 Jur., N.S., 954). There the charter of the company provided that "every person holding any share in the capital stock in the said company shall be entitled to the profits and advantages attending the said capital stock in proportion to the number of shares so held by him." Yet it was held by Vice-Chancellor Page Wood that upon the dissolution of the company the surplus must be distributed in proportion to the amounts paid up on the different classes of shares, and this without any previous equalization of the capital account. The ground of the decision seems to have been that on the particular facts of the case, and especially the fact that dividends had during three years been distributed according to the amounts paid up, the Vice-Chancellor held that there had in effect been a contract between the shareholders that "the profits and advantages" should be so distributed. It is pointed out by the Court of Appeal in "*Sheppard v. Scinde, &c., Railway Company*" ([1887] 36 W.R., 1) that "*Somes v. Currie*" cannot be considered as suggesting any general rule, and a disapproval of it, if so considered, is plainly implied. The other case is the one just mentioned of "*Sheppard v. Scinde, &c., Railway Company*." There it was held, both in the Court of Appeal and in the House of Lords, that the surplus was divisible according to the amounts paid up on the different classes of shares; but that decision, again, was expressly based on its own peculiar circumstances, and it is explained in "*Birch v. Cropper*" as depending entirely on very special facts, and not laying down any general principle, and not being an authority except where the circumstances are precisely similar. The very fact that "*Somes v. Currie*" and "*Sheppard v. Scinde, &c., Railway Company*" have been so plainly treated as defensible only on special grounds

shows that the general rule is not in accordance with them. I think, therefore, that in the present case effect must be given to the express provision of the deed of settlement in clause 32, and that after equalization of the capital account by a return of all the capital paid up the surplus remaining must, according to the language of that paragraph, be "divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking"—that is, in proportion to the nominal amounts of the shares. There was a contention that persons who took shares from the company at a premium should be allowed to share in the surplus in proportion to what they paid for the shares. This is plainly untenable.

[Solicitors—Oldman, Claburn, and Co., for Foster, Tonge, and Botterill, Great Driffield; Chester and Co.]

Chan. Div.
(Gorell Barnes, J.) }

1898.
March 2.

DAVIS V. OHRLY.*

Vendor and Purchaser—Concealment by purchaser
—Inducement—Relief—Deed of assignment set aside.

Plaintiff assigned to defendant for a nominal consideration his claim against an estate which subsequently paid 20s. in the £. The Court decided on the facts that he was induced to do so by the correspondence passing between the parties, and set aside the deed of assignment.

An interesting point arose in this case as to the duty of a solicitor to withhold or communicate facts within his knowledge of which the party with whom he is dealing is unaware. The case was before his Lordship on February 24, 26, and judgment was delivered to-day.

Mr. Farwell, Q.C., and Mr. Le Riche appeared for the plaintiff; Mr. Levett, Q.C., and Mr. Whimzey for the defendant.

The plaintiff, Mr. Montague Davis, alleged that the defendant, Henry Gerard Ohrly, had offered to buy from him a debt of £300 owing from a certain Mr. Alexander Dixon Frodsham to the firm of J. Davis and Sons, of which the plaintiff was the sole surviving partner. Mr. Frodsham was adjudicated a bankrupt on August 30, 1881, his statement of affairs filed in the bankruptcy proceedings showing no assets. On July 1, 1891, he died. Towards the close of that year Mr. Ohrly, who was a brother-in-law of Mr. Frodsham, advertised for Mr. Davis, who was then resident abroad. He there invited the firm of Messrs. Davis and Sons to communicate with his (the defendant's) solicitors, Messrs. Sheffield, Son, and Powell. In consequence of this advertisement Mr. William Jeffries Cox, who held a power of attorney to act for Mr. Davis, entered into negotiations with the solicitors. It was then alleged that they had represented that there were no assets of any kind and there was absolutely no estate whatever belonging to Mr. Frodsham out of which the plaintiff's debt could be satisfied, and that the defendant merely wished to buy the debt in order to clear off the petition for the sake of the family, and that under the circumstances he was only prepared to give the nominal figure of 1s. in the pound, and that if that was not accepted the plaintiff would get nothing. On August 9, 1893, the plaintiff assigned by indenture the debt of £300 and interest thereon together with the securities which he held for it for a sum of £15, and it had now come to the knowledge of the plaintiff that the Official Receiver, who represented the late Mr. Frodsham, was at that

*Reported by GWYNNE HALL, Esq., Barrister-at-Law.

time entitled to, and had now received, sufficient estate to pay 20s. in the pound. The plaintiff therefore claimed to have the indenture rescinded and the securities delivered up. In the course of the evidence it appeared that Mr. Cox, acting as agent of Mr. Davis, wrote to Messrs. Sheffield, Son, and Powell stating that Mr. Davis refused to consent to the acceptance of 1s. in the pound. Further correspondence took place between the parties which led Mr. Cox to say in a letter of March 14, 1892:—"No doubt what you have previously written is perfectly correct, and, therefore, I should advise Mr. Davis that £15 is better than nothing." The plaintiff was unable to say whether that statement referred to a letter received by him or on his behalf, or to the effect of conversations, but alleged that Messrs. Sheffield, Son, and Powell, by their reticence in not communicating to the plaintiff that there were assets, induced the plaintiff to sell the debt for a price which he would not have done had he known the true circumstances of the case. The defendant in his defence denied that Messrs. Sheffield, Son, and Powell had made the representations with his knowledge or privity, either express or apparent.

Mr. LEVETT, Q.C., urged that Messrs. Sheffield, Son, and Powell had acted in a perfectly proper manner. They were, he said, acting on behalf of the defendant, and were legitimately watching over the interests of their client. They did nothing to misrepresent the facts, and they were in no way bound to inform the plaintiff of the increase in value of the subject matter of the purchase. *Caveat emptor* was the maxim of the law.

Mr. FARWELL, Q.C., on behalf of the plaintiff, contended that since Mr. Cox had written saying that "£15 was better than nothing," it was obvious that he did not know the true facts, and that, therefore, the defendant's solicitors, who knew better, were not entitled to hold their tongues and say nothing. It was not the duty of solicitors to write letters which left false impressions.

MR. JUSTICE GORELL BARNES.—There is a case at p. 169 of Jacob's Reports, "*Turner v. Harvey*," which seems to me to have a very material bearing on all this.

Mr. LEVETT, Q.C.—I should submit that that case is very much in my favour. It is there said, at page 178, "The Court in many cases has been in the habit of saying that where parties deal for an estate they may put each other at arm's length; the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of his property. . . . If an estate is offered for sale and I treat for it knowing that there is a mine under it, and the party makes no inquiry, I am not bound to give him any information of it; he acts for himself and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor that principle will not be allowed to operate." Again, "*Walters v. Morgan*" (3 D. F. and J., 718) is an authority for saying that, since there is no fiduciary relation between a vendor and a purchaser, the purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or gesture intended to induce the vendor to believe in the existence of a non-existing fact which might influence the price of the subject to be sold would be sufficient ground for a Court of equity to refuse a decree of specific performance.

MR. JUSTICE GORELL BARNES.—The question is, has there been anything done in fact to mislead.

Mr. FARWELL, Q.C.—We say that their conduct misled us. Your Lordship remembers the case of "*Brownlie v. Campbell*" (5 App. Cas., 954). Lord Blackburn, in delivering his judgment, there said, "I should say wherever there is a duty to speak, when you have got anything to say and you keep it back in order that the other side, believing that you, having said nothing, have nothing to say, it is very much the same as falsehood and fraud."

MR. JUSTICE GORELL BARNES, in delivering judgment, after a careful review of the facts of the case, said that there had been a good deal of conflict in the evidence as to what had taken place at the interviews. He thought, however, that the parties had honestly endeavoured to speak the truth as to what had actually taken place at the conversations, which were now some years old. The position that the solicitors had taken up was that there was no antecedent obligation upon them to disclose what they had remained silent about, and they adhered to that position. With regard to the defendant himself, however, it appeared that in an action of "*Steane and Another v. Ohlry*" he had written a letter saying that the deceased had left no estate. That letter, however, did not appear to have been shown to Messrs. Sheffield, Son, and Powell, but if it had it would have ended the matter. The issue was of importance to the solicitors as the Court had to decide whether the position they had taken up was in fact maintained, or whether they had overstepped the line. The proposition of law which formed the basis of this case was to be found in "*Derry v. Peek*" (14 App. Cas., 337), and was elucidated by "*Redgrave v. Hurd*" (20 Ch. D., 13), "*Turner v. Harvey*" (Jacob's Reports, 169), and "*Coaks v. Boswell*" (11 App. Cas., 232), left no doubt as to what the law on the subject was. He had come to the conclusion that the plaintiff's contention was right, that it was the letters that had induced him to act as he had, and sell his debt, being under the impression that there was nothing more to be got out of the estate, and the deed of assignment would, therefore, be set aside.

[Solicitors—Joseph and Hyam; Sheffield, Son, and Powell.]

Q.B. Div. (Wright and }
Graham, JJ.) }

1898.
March 2.

IN THE MATTER OF AN ELECTION OF COUNTY COUNCILLORS FOR THE CENTRAL HACKNEY DIVISION OF THE ADMINISTRATIVE COUNTY OF LONDON—WESTACOTT V. STEWART.*

Election Law—County Council—Death of candidate after nomination—*Mandamus* to returning officer to countermand notice of the poll—Ballot Act, 1872, sec. 1.

Section 1 of the Ballot Act, 1872, is applicable to elections for the County Council "as far as circumstances admit."

This was an application to postpone an election in consequence of the death of a candidate, and it raised questions of law of considerable practical importance.

The application was made by Mr. Dickens, Q.C. (Mr. S. Day with him), on behalf of Mr. Thomas Bentley Westacott, who had brought an action for an injunction to restrain the returning officer from holding the election of county councillors for this division on Thursday, March 3. They also applied, in the alterna-

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

tive, for a *mandamus* to compel him to countermand the notice of poll for that day.

Mr. Macmorran, Q.C., and Mr. H. Avory appeared for the returning officer, desiring the decision of the Court as to the course to be taken.

Mr. Westacott's affidavit stated that he was one of the candidates for election to the office of County Councillor for the Central Hackney Division of the Administrative County of London. In addition to himself there were three other candidates nominated—namely, Henry Sylvester Samuel, James Stuart, and Thomas McKinnon Wood. Such nomination took place on Wednesday, February 23, and the poll was fixed to take place on March 3. Mr. Samuel died on Saturday, February 26, 1898. Notice of the said death had been given to the returning officer, and proof thereof had been given to his satisfaction, and the certificate of death had been left with him. A demand had been made by Mr. Westacott to the said returning officer requiring him to countermand the notice of poll which had been given for March 3. He had, however, refused to do so. Mr. Westacott had issued a writ claiming an injunction. The matter came before Mr. Justice Grantham in Chambers, and he had desired that it should be brought into Court. A Divisional Court had therefore been formed and the application now mainly relied on, and ultimately held to be the right form, was for a peremptory prerogative writ of *mandamus* commanding the returning officer of the Administrative County of London "forthwith to countermand the notice of the poll given at the said election for March 3, 1898, and to proceed with the said election in accordance with law." The sections on which the question turned, and which afford a typical instance of the modern system of legislation by reference, are as follows. The Local Government Act, 1888 (51 and 52 Vict., c. 41), section 2 (1):—"The county council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner . . . as the council of a borough divided into wards." Section 75:—"For the purpose of the provisions of this Act with respect to county councils, and to the chairmen, members, committees, and officers of such councils, and otherwise for the purpose of carrying this Act into effect, the following portions of the Municipal Corporations Act, 1882—namely, part 2, part 3, &c.—shall, so far as the same are consistent with the provisions of this Act, apply . . . with such modifications as are necessary to make them applicable." Part 3 of the Municipal Corporations Act, 1882 (45 and 46 Vict., c. 50), contains section 58, of which subsection (1) is as follows:—"If an election of councillors is contested the poll shall, as far as circumstances admit, be conducted as the poll at a contested Parliamentary election is by the Ballot Act, 1872, directed to be conducted." The Ballot Act, 1872 (35 and 36 Vict., c. 33, section 1):—"If after the adjournment of an election by the returning officer for the purpose of taking a poll one of the candidates nominated shall die before the poll has commenced the returning officer shall, upon being satisfied of the fact of such death, countermand notice of the poll, and all the proceedings with reference to the election shall be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death, provided that no fresh nomination shall be necessary in the case of a candidate who stood nominated at the time of the countermand of the poll."

Mr. DICKENS contended that the combined effect of these sections was that the returning officer should act as he would act in a contested Parliamentary election if one of the candidates died after nomination, for

section 1 of the Ballot Act, 1872, was obviously incorporated in the Municipal Corporations Act, 1882.

Mr. MACMORRAN, Q.C., said he raised no objection as to the form of the application. He urged that section 1 of the Ballot Act, 1872, was not made applicable to a municipal election or to county council elections by the Municipal Corporations Act. The procedure of a Parliamentary election was quite different. Thus the date of an election of county councillors was fixed by the county council, while at a Parliamentary election the returning officer fixed the date. He could not fix the date even if he were to countermand the poll at the present election. There would be serious difficulties in his way. Further, would it not be necessary, if any part was postponed, to put off the whole election of County Councillors for the County of London? If not, the result might be that the voters who would vote at the election for this division would be a different body to those who would vote at it if it were not postponed. Voters who had voted in other divisions might claim to vote at this as well if it were postponed, which they could not do if the elections for the whole county took place on one day. Section 1 of the Ballot Act, 1872, dealt with the nomination of candidates, as the marginal note said. It was section 2 that dealt with the poll. The two matters were distinct. The provisions of the Ballot Act in this respect did not fit in with the provisions for municipal elections. The Ballot Act applied to elections for Parliament, when representatives of the two great political parties in the State would be candidates, and not to local elections, when there might be 20 candidates.

Mr. DICKENS, in reply, emphasized the words of section 58 of the Municipal Corporations Act, "as far as circumstances admit," and contended that that permitted the Court to modify the provisions so as to meet the case. If section 1 of the Ballot Act, 1872, did not apply, there was no provision applicable to the case. As to fixing the date of the election, application could be made to the Court, under section 70 of the Municipal Corporations Act, and they had power to fix a day.

The COURT granted the *mandamus* to postpone the election.

Mr. JUSTICE GRANTHAM said,—"I am of opinion that the best view of this case is that section 58 of the Municipal Corporations Act, 1882, must be taken as incorporating the last paragraph of section 1 of the Ballot Act, 1872. It certainly relates to the taking of the poll. It was said that there was a difference between the Acts, because one applied to high politics and the other to local politics. That argument, however, had no weight with me. The argument that the provisions of the Ballot Act were not as they stood compatible with a municipal election carried more weight; but that is met by the words of section 58 of the Municipal Corporations Act making the Ballot Act applicable "as far as circumstances admit" as to the form of proceeding. The motion for a *mandamus* to the returning officer to countermand the poll is the proper form of motion.

Mr. JUSTICE WRIGHT concurred. The writ for an injunction was not the proper form in this case. The other candidate had no right to obtain an injunction, but the *mandamus* should be granted. The Court had two alternatives. The one to let the election take its course, in which case the validity of it could be questioned on petition; but that would be a very inconvenient method for all parties, and expensive; or it could grant the *mandamus*. He thought the *mandamus* should go, and be a peremptory *mandamus* to the returning officer.

[Solicitors—Grover, Humphreys, and Son, for the applicant; W. A. Blaxland, for the Returning Officer.]

Court of Appeal (A. L. Smith, J.
Chitty, and Collins, L.JJ.)

1898.
March 3.

IN RE HUMPHREYS, EX PARTE LLOYD-GEORGE AND
WILLIAM GEORGE.*

Solicitor—Costs—Power of Court to charge property recovered with payment of costs—Solicitors Act, 1860, sec. 28—Criminal proceedings—Bankruptcy proceedings—Rule 125 of Bankruptcy Rules.

The power given to the Court by sec. 28 of the Solicitors Act, 1860, to charge property recovered with the payment of costs does not apply to criminal proceedings.

Decision of Divisional Court (*ante*, p. 68) affirmed.

This was an appeal by Messrs. Lloyd-George and William George, a firm of solicitors, from the decision of the Divisional Court (Mr. Justice Wright and Mr. Justice Kennedy) reversing an order of the County Court Judge of Carnarvonshire. The case is reported *ante*, p. 68. The facts are sufficiently stated in the judgment.

Mr. W. S. Robson, Q.C., and Mr. S. T. Evans appeared for the appellants; Mr. H. Reed, Q.C., and Mr. Carrington appeared for the trustee.

The COURT, having taken time to consider, delivered judgment, dismissing the appeal.

LORD JUSTICE CHITTY read the judgment of the Court as follows:—This is an appeal from the order of the Divisional Court discharging an order dated November 10, 1896, made by the County Court of Carnarvonshire sitting in bankruptcy. The applicants are a firm of solicitors who obtained the order in the County Court. It was made on their petition for a charging order under the provisions of section 28 of the Solicitors Act, 1860. The order declared that the sum of £813 mentioned in the petition had been recovered and preserved for the bankrupt's estate through the instrumentality of proceedings instituted by the petitioners on behalf of the trustee in bankruptcy, and ordered that the costs, charges, and expenses of the petitioners of and incidental to the recovery and preservation of the £813, including the costs and expenses of the petitioners in procuring the arrest of the bankrupt and the costs and expenses of the proceedings taken before the justices preliminary to and consequent on such arrest, and of the petition and the parties properly appearing thereon, should be taxed and paid out of the £813 recovered and preserved as aforesaid. The bankrupt, a horse dealer, had absconded to Australia, taking with him the sum of £813, the proceeds of the sale of his horses, and the property of his creditors under the bankruptcy. Two criminal charges were made against him. The first was for forgery, and in this matter the appellants acted as solicitors for his father. Although they introduced charges against the trustee in their cash account for proceedings on this charge, the appellants do not now seek to have these charges paid out of the bankrupt's estate. The other criminal charge was for offences against the Debtors Act, 1869. In respect of this charge the County Court Judge, on an application made by the appellants on behalf of the trustee, whose solicitors they then were, directed the trustee to prosecute the bankrupt by order made in April, 1895. To this order section 166 of the Bankruptcy Act, 1883, applied, and thereupon it became the duty of the Director of Public Prosecutions to institute and carry on the prosecution. The object of the enactment appears to be to save the bankrupt's estate from the costs of the prosecution. The bankrupt was arrested in Australia on

the criminal charges and brought to this country; he was afterwards discharged by the justices on the charge of forgery, and was tried and acquitted on the charge under the Debtors Act, 1869. At the time of his arrest he had on him the sum of £813, which was taken from him by the police authorities. The balance of this sum, amounting to upwards of £700, was remitted to the appellants by virtue of a power of attorney prepared by them on behalf of the trustee in bankruptcy. The appellants have retained in their own hands the money thus received. They delivered to the trustee a cash account, in which they sought to deduct large sums in respect of the costs of the prosecutions and other matters, some of which it is admitted they are not entitled to claim. The account showed a balance of £323 4s., payable to the trustee. Although they had been requested to deliver a bill of costs to the trustee in September, 1896, they had not done so before the charging order was made. In fact they have not now delivered their bill of costs. It was contended on behalf of the appellants that they were entitled to retain the money on two grounds—first, by virtue of the charging order, and, secondly, by virtue of a lien they claimed as solicitors. As to the charging order, I think it ought not to have been made. Section 28 of the Solicitors Act, 1860, is to the effect that in every case in which a solicitor is employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or a Judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such solicitor entitled to a charge upon the property recovered or preserved. "Property recovered or preserved" means property recovered or preserved in any suit, matter, or proceeding in any Court of justice. Obviously the proceeding must be in a civil Court of justice. The enactment does not extend to criminal proceedings. In a criminal proceeding, instituted as it is for the punishment of the offender, no property is recovered or preserved. The only possible exception which occurs to us is an order made after conviction by the Judge for restitution of the property to the owner under the provisions of the Acts relating to larceny and other similar offences (24 and 25 Vict., c. 96, s. 100; 35 and 36 Vict., c. 93, s. 30). If that be an exception—a point on which it is not necessary to express any opinion—the only costs for which a solicitor could obtain a charging order would be the costs of obtaining the order for restitution. In the case before us the money received by the appellants was not recovered or preserved in any civil proceeding in a Court of justice. It was received merely by virtue of the power of attorney. It was contended that it was recovered in the proceedings in the bankruptcy. The answer is, it was not. The only colour for the argument was the order directing the prosecution. This point is covered by what we have said as to criminal proceedings, coupled with the fact that the money was not recovered by virtue of that order, although the order may have led indirectly to the recovery. To these reasons against the charging order we may add the following. The jurisdiction under section 28 of the Act of 1860 is discretionary. We entirely agree with the opinion expressed by Lord Justice Bowen in "*Greer v. Young*" (24 Ch. D., 545, at p. 557), where he said that "the Act gives a discretionary power to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court in the exercise of its discretion to make the charge." Without going so far as to say that the Bankruptcy Court ought never to make a charging order in favour of the solicitor to the trustee upon the funds which belong to the creditors, we think that the cases in which the discretionary power ought

so to be exercised must be rare. In the circumstances of this case we think that the discretion was wrongly exercised. There is great force in the observations made by Mr. Justice Wright on Rule 125 of the Bankruptcy Rules regulating the priority of costs and charges payable out of the estate. Still there may be occasions on which it would be right to make the order, seeing that the ordinary right of the solicitor to be paid for his services out of the estate is only through the right of the trustee to obtain the costs out of the estate, a right which the trustee may have lost by reason of his being a defaulter or by his misconduct in which the solicitor is not implicated (see "*Ex parte Harper*," 26 Ch. D., 685). For these reasons we think that the Divisional Court were right in reversing the charging order. The point as to the solicitor's lien, apart from the Act, does not appear to have been raised in the Divisional Court. It may be disposed of in a few words. The petition was not founded on lien; it was simply for a charging order. The solicitor to the trustee, whether in bankruptcy or in the case of an ordinary trust, has no lien on the trust estate. The trust estate in bankruptcy does not belong to the trustee; in equity it is the property of the creditors. The right of the solicitor to be paid out of the bankrupt's estate is only through the right of his client, the trustee. He has no independent right (see "*Ex parte Harper*"). No doubt a solicitor employed by the trustee with respect to the trust estate is not uncommonly called or calls himself solicitor to the estate, but this is a misnomer. The law on this subject is well stated by Mr. Justice North in "*Stanier v. Evans*" (34 Ch. D., 476, 477). Unfortunately for themselves the appellants have pursued a mistaken course. It was their duty to pay the money to the trustee and to deliver a bill of costs, and to have taken steps for the taxation of the bill at the proper time. At the conclusion of the argument their counsel stated that they would now follow this course. Nothing which has fallen from us will in any manner prejudice them on the taxation. The respondent submits that on the delivery of the bill it should be taxed, and all proper costs and charges should be allowed. There is no undertaking on either side. The appeal must be dismissed with costs.

[Solicitors—Lloyd-George, Roberts, and Co., for the applicants; Saffery, Huntley, and Son, for Breese, Jones, and Casson, Criccieth.]

Court of Appeal (A. L. Smith, }
Rigby, and Collins, L.JJ.)

1898.
March 3.

DUNN V. APPLETON.*

Practice—Costs—Action remitted to County Court—Costs of O. 14 application.

In remitting an action to the County Court the Master has no jurisdiction to make an order as to the costs of an unsuccessful application previously made under O. 14.

This was an appeal by the defendant from an order of Mr. Justice Day at Chambers. The case was argued some time ago, when judgment was reserved. The facts are sufficiently stated in the judgment.

Mr. C. B. Marriott appeared for the defendant; Mr. Montague Shearman appeared for the plaintiff.

The Court, having taken time to consider, delivered judgment allowing the appeal.

LORD JUSTICE COLLINS read the judgment of the Court, in which he said that the action was to recover £22 10s. alleged to be due under a contract. On November 5 an order was made under Order 14 giving

the defendant leave to defend on his bringing £20 10s. into Court, which he did. On November 19 the Master made an order at the instance of the plaintiff remitting the action to the County Court, and directing that the costs of the Order 14 application should be costs in the cause in the County Court. On appeal against this latter part of the order Mr. Justice Day affirmed the Master, and the defendant now appealed to this Court. The appellant contended that, the action being one which might have been brought in the County Court, there was no jurisdiction to make the order, the conditions under which alone Order 14 costs could be recovered in such actions—viz., either under Order 14, r. 9 (a), or under section 116 of the County Courts Act, 1888, not being performed. In their opinion the case was concluded by "*Harris v. Judge*" ([1892] 2 Q.B., 565), followed by "*White v. Cohen*" ([1893] 1 Q.B., 580), both decisions of the Court of Appeal. It was unnecessary to repeat the train of reasoning by which the Court came to the conclusion that section 116 of the Act of 1888 cut down the effect of section C5, and applied to all actions, whether remitted or not, which might have been brought in the County Court. The result of these decisions was that, in the case of a remitted action, if the plaintiff recovered more than £20 and less than £50 in contract—and the plaintiff here could not do more—he should not be entitled to more costs than he would have been entitled to if he had brought the action in the County Court, for he could not bring himself within the proviso in section 116 as to Order 14, nor could he get the benefit of a certificate or order in Chambers under the same section. "The clause in section 116 relating to the certificate or order allowing costs," said Lord Justice Lindley in delivering the judgment of the Court in "*White v. Cohen*," "can only come into operation where the action is tried in the High Court." Therefore, even if the order in question could be construed as such an order allowing costs, it could not help the plaintiff. Neither did he come within the proviso in the section as to Order 14, for he did not get judgment under that order. Neither was it an order made at the hearing under Order 14, r. 9 (a), even if such an order could have been made at the hearing, purporting as it did to make Order 14 costs costs in a County Court action. The appeal must be allowed with costs here and below.

[Solicitors—David Davis, for the plaintiff; Norris and Son, for H. Simpson, Leicester, for the defendants.]

Q.B.Div. (Wright and }
Darling, JJ.)

1898.
March 3.

REG. V. COCKSHOTT AND OTHERS, JUSTICES—EX PARTE RICKERBY.*

Criminal Law—Summary Jurisdiction Act, 1879, sec. 17 (1) and (2)—Election to be tried by jury. Conviction under Betting Act, 1853, quashed on ground that the justices had not, before going into the charge, informed defendant that, if he desired it, he had a right to be tried by a jury

Mr. Danckwerts in this case showed cause against a rule nisi obtained to quash a conviction under the Betting Act, 1853 (16 and 17 Viet., c. 119), section 3, by the justices of the borough of Stockport. Mr. J. R. Randolph appeared in support of the rule.

The short facts were that on November 6, 1897, Joshua Rickerby, a hairdresser, was convicted of being a person using a certain office at 7, Market-passage, Southport, for the purpose of betting on horse races

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

with persons resorting there. It did not appear that the justices, before going into the charge, informed Rickerby that he had a right to be tried by a jury. It did not so appear in the conviction, and was not so in fact. On November 6 the town clerk, as the case was about to begin, stood up to read out the statutory notice that the defendant might elect to be tried by a jury, but, seeing that a consultation was going on as to whether the defendant should plead guilty, he desisted, and the case was continued without the notice being read at all. After some evidence had been given on oath the defendant, by the advice of his solicitors, pleaded guilty. The justices fined him £50. Affidavits were now put in on behalf of Mr. Rickerby to the effect that he would have elected to have been tried by a jury if he had known that he had the right to do so. His solicitors also swore that they did not know that he had that right. The rule was granted on these facts.

MR. DANCKWERTS submitted that there was no reason for disturbing the conviction. The defendant had pleaded guilty. The statement as to his right to trial by jury had not to be read to him till he had pleaded not guilty. Here it was seen at once that he would plead guilty. Moreover, a man could waive any such objection. "*Turner v. Postmaster-General*" (5 Best and Smith, 756).

MR. RANDOLPH contended that the conviction was invalid because the statutory caution had not been given. Without that the Court had not jurisdiction to deal with the matter.

The COURT made the rule absolute.

MR. JUSTICE WRIGHT said the case was important. The defendant was brought up before the justices on a charge under the Betting Act, a conviction for which might render him liable to imprisonment for six months with hard labour. The offence therefore was brought within section 17 (1) of the Summary Jurisdiction Act, 1879 (42 and 43 Vic., c. 49), as being an offence "in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault." That section provided that a person "may on appearing before the Court and before the charge is gone into, but not afterwards, claim to be tried by a jury," and thereupon the Court shall deal with it as if it were an indictable offence. The second subsection provided, "A Court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect:—'You are charged with an offence in respect of the commission of which you are entitled, if you desire it, to be tried by a jury. Do you desire to be tried by a jury?' " In the present case the defendant came into Court, and the proceedings were about to begin when it appeared that the defendant intended very shortly to plead guilty. For certain reasons he did not desire to plead guilty at once. He therefore pleaded not guilty, and when the facts that were wanted by him had come out he withdrew his plea. The town clerk had known his duty and was prepared to read out the statutory caution, but seeing that the matter was about to be arranged he desisted. The first point raised was that the conviction must state the fact of the caution having been given; but that was not persisted in, and was a bad point, section 27 of the Summary Jurisdiction Act only applying to indictable offences tried summarily. It was then pointed out that the person charged must make his election "before the charge is gone into, but not afterwards." This power of selecting a tribunal was of no use to him unless he knew that he had it. That

showed that it was necessary that the information should be given to him before the one opportunity on which he could make use of it had passed away. The Court had no right to fritter away the protection given to prisoners. The option was to be put to each prisoner before he was asked whether he pleaded guilty. There could be no waiver of a right by a person entirely ignorant that he possessed such a right. The affidavits were to the effect that neither the defendant nor his solicitors knew of the right to trial by jury. Moreover, it was not at all clear that there could be a waiver, even if they had known.

MR. JUSTICE DARLING concurred. To accept the contention that the caution should be given after the plea had been taken would do away with the protection given by section 17 (2) of the Summary Jurisdiction Act, 1879. The exact time when the claim to have his trial by jury should be made by a prisoner was noteworthy. It was on appearing before the Court and before the charge is gone into. The knowledge of his right might make all the difference in a plea by a prisoner. It must not be assumed in the case as a presumption of law that the prisoner or even the solicitors for him knew the law, for the statute made in effect an exception to the presumption by providing in terms that the information must be supplied. The conviction must be quashed.

[Solicitors—Rowcliffes, Rawle, and Co.; Pritchard, Englefield, and Co., for Brighouse, Brighouse, and Co., in support of rule.]

Q.B. Div. (Wright and }
Darling, JJ.) }

1898.
March 3.

JONES V. WALTERS.*

Local Government—Bye-law—Validity—Prohibition against frequenting and using "any street or place" for betting.

This was a case stated by magistrates of the county of Stafford, and raised the question whether a certain bye-law made by the county council of Staffordshire against frequenting any public place for the purpose of betting was invalid or not.

MR. MULHOLLAND, Q.C., and Mr. Alfred Young appeared for the appellant, a bookmaker, who had been convicted for breach of this bye-law; Mr. Greene, Q.C., appeared for the respondents, but was not called on.

The bye-law, No. 7 of the bye-laws of 1896, was as follows:—"No person shall frequent any street or public place and use the same for the purpose of betting or wagering, or agreeing to bet or wager with any person, either on behalf of himself or any other person."

MR. MULHOLLAND said the bye-law was illegal. The words ought to have been added that the betting should be to the annoyance of other persons. At any rate, its terms were too wide. The prohibition was not even confined to public highways. It would apply to a place where people might go, as, for instance, a place like Epsom Downs. The bye-law created a new offence. It was as if a bye-law were made to prevent a man sneezing or smoking. Betting was just as legal as sneezing or smoking. He cited "*Burnett v. Berry*" ([1896] 1 Q.B., 641); "*Strickland v. Hayes*" ([1896] 1 Q.B., 290); "*Johnson v. Mayor of Croydon*" (16 Q.B.D., 708); "*Mantle v. Jordan*" ([1897] 1 Q.B., 248).

The COURT upheld the bye-law.

MR. JUSTICE WRIGHT said that it did not appear to

have been contended that there was any real difference between the bye-law in the present case and that in "Burnett v. Berry" ([1896] 1 Q.B., 641). That was a case which the Court must follow, unless there was any very strong reason to the contrary. But the learned Judge did not disagree with it. It was contended that something amounting to actual annoyance of the public was necessary to justify a bye-law of this description. That was not so, however. The bye-laws were to be bye-laws for good government of the locality. They certainly included a bye-law for the prevention of the practice of frequenting streets or public places for the purpose of making bets there.

MR. JUSTICE DARLING concurred. The bye-law was perfectly good. The county council had power to make bye-laws for "good rule and government." To make a bye-law for preventing persons frequenting streets for the purposes of betting was certainly a rule for the good government of the locality. Frequenting the highways and stopping people to make bets with them was clearly a subject for a bye-law. It was contrary to the primary use of a highway—namely, for people to pass and repass thereon.

[Solicitors—M. F. Blakiston, for the respondents; Turton, for the appellant.]

Q.B. Div. }
(Bigham, J.) }

1898.
March 3.

LONDON BANKING CORPORATION (LIMITED) V. HORSNAIL, HAYWARD, AND COOPER.*

Bill of Exchange—Action by endorsee against acceptor—Alleged payment by endorser—Payment, what amounts to—Bills of Exchange Act, 1882, sec. 59 (2) (b).

This was an action to recover £1,700, the balance due on a three months' bill of exchange, dated June 25, 1897, drawn by the defendant Horsnail, accepted by the defendant Hayward, and endorsed by the defendant Cooper, amongst others. The bill was ultimately endorsed to the plaintiffs. The action had been discontinued against Horsnail, he being an infant, and judgment had been recovered against Cooper. The defendant Hayward raised the defence that Cooper had paid the plaintiffs the balance due on the bill.

Mr. Bosanquet, Q.C., and Mr. E. A. Nepean were for the plaintiffs; Mr. Bray, Q.C., and Mr. R. G. Glenn for the defendant Hayward; and Mr. J. Roskill appeared for the trustee in bankruptcy of Cooper.

It appeared from the evidence and the statements of counsel that the bill was drawn in connexion with building operations upon which Hayward was engaged in September, 1897; and that Cooper, who was at that time a solicitor, had endorsed it, in order that it might be more readily discounted. The bill became due on September 28, 1897. Cooper, shortly before it became due, paid the plaintiffs, who were then the holders of the bill for value, a sum of £300; and further paid them a bonus of £20 to induce them to hold the bill over from September 28 to October 1. On September 30 Cooper went to Hayward's office, hoping to find that Hayward had provided money to meet the bill; but not receiving the money from Hayward, he drew his own cheque on the London and County Bank (Croydon branch), where he had an account, for £1,700, and handed the cheque to the plaintiffs. At the same time he wrote a letter to his bankers advising them that he had drawn the cheque, and expressing a hope that Hayward would provide funds to meet it. The cheque was

taken by a clerk of the plaintiffs to the London and County Bank on the morning of October 1. The cheque was a crossed one, and the cashier to whom it was presented prepared a form of "banker's payment," after consulting the manager. The form was as follows:—"Per Croydon branch, London and County Banking Company (Limited). Pay ourselves the sum of £ —, for —, manager." The date, amount, and the name of the payee were filled in, and the form was signed by the cashier and countersigned for the manager. The document was then handed to the plaintiffs' clerk, who looked at it and turned to leave. At that moment another clerk came out of the manager's room and said:—"Stop that payment." The cashier thereupon said to the plaintiffs' clerk:—"I fancy there is a mistake. Let me see it," and the clerk returned the document to him. The "banker's payment" and the cheque were then taken to the manager. The reason for the demand of the return of the "banker's payment" was the fact that the bank authorities had just heard (as was the fact) that Cooper, on October 1, had shot at his wife and attempted to commit suicide. Cooper on the same day was arrested, and was subsequently sentenced to a term of penal servitude, which he is now undergoing. The handing over of the "banker's payment" to the plaintiffs' clerk was the payment set up by the defendant.

Mr. Benham, the cashier at the Croydon branch of the London and County Bank, who was called on behalf of the defendant, stated that when a cheque was presented by one bank on another, and no particular mode of payment was specified, it was customary to pay by means of a "banker's payment."

In cross-examination he said that it was the custom of the bank to advise the head office of "banker's payments" issued during the day. The payee bank had to sign the "banker's payment," and it was then taken to the clearing-house. If the head office was not advised he did not think the money would be paid. He had never known of a "banker's payment" being cancelled after it had once been issued. The head office had not been advised on this occasion.

Mr. Nalder, the manager of the City office of the Metropolitan Bank of England and Wales, said that if no advice were given of the issuing of a "banker's payment" the signature of a branch bank would not be repudiated; but that the branch banks in fact always advised.

Mr. Dunsford, of the chief cashier's department in the Union Bank, said that, so far as the Union Bank was concerned, branch banks did not advise as to "banker's payments"; and Mr. Drake, a cashier at Lloyds Bank, gave evidence similar to that of Mr. Nalder.

Evidence was also given by the solicitor to Cooper's trustee in bankruptcy, and by Cooper himself, who explained the circumstances leading to the making of the bill and the drawing of the cheque for £1,700.

MR. BOSANQUET, Q.C., submitted that, the action being against the acceptor of the bill and payment, if any, having been made by the endorser, the bill was not discharged, and the acceptor was still liable. The plaintiffs might recover as trustees for Cooper—Bills of Exchange Act, 1882, section 59, subsection (2) (b).

MR. BRAY, Q.C., argued that the onus was on the plaintiffs to prove that they were holding the bill for Cooper. The Bills of Exchange Act showed that the endorser was the only person who could sue if the bill had been paid. The bill had in fact been paid when the "banker's payment" was handed to the clerk of the plaintiffs, and the defendant was under no liability to the plaintiffs. He relied on "Pollard v. Bank of England" (L.R., 6 Q.B., 623). "Chambers v.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Miller" (13 C.B., N.S., 125), "Williams v. James" (2 Ex., 798).

MR. JUSTICE BIGHAM, in giving judgment, said that the plaintiffs' clerk on presenting Cooper's cheque at the London and County Bank might have insisted upon receiving £1,700 in cash. He had not insisted upon a cash payment, but, being authorized no doubt to do so, had taken instead a "banker's payment." What took place at the Croydon branch of the bank amounted, in his Lordship's view, to a payment of the cheque. Apparently, after this payment had been made, the manager of the bank discovered something—probably the fact that Cooper had been arrested—which made him think it would be unwise to pay the cheque; and he accordingly directed his clerk to ask for the return of the "banker's payment" on the ground that there had been a mistake. In reality there had been no mistake at all, but the bank wished to prevent payment. The paper was thereupon handed back to the cashier by the plaintiffs' clerk. The consequence was that, though there had been a payment of the cheque in law, there had been none in fact, for the plaintiffs had never converted it into cash. His Lordship found, as a fact, that Cooper by October 15 knew that his cheque had been treated as a non-paid cheque, and, in his opinion, from that time forward the plaintiffs remained, with the assent of Cooper, holders for value of the bill. Being holders for value, and the acceptor not having paid, the plaintiffs were entitled to sue the defendant. He did not think that the defendant had made out that the amount of the bill had been paid, and gave judgment for the plaintiffs, with costs.

[Solicitors—T. Edwardes, for the plaintiff; David Gunnell, for the defendant Hayward; G. A. King, for the trustee in bankruptcy of Cooper.]

Q.B. Div. (Lord Russell of Kil-) 1898.
lowen, C.J., Wright, J.) } March 4.

THE QUEEN V. DOUGLAS AND OTHERS.*

Justices—Disqualification—Clerk to magistrates
—*Ex officio* justice—Local Government Act,
1894, sec. 22.

A clerk to magistrates became *ex officio* a justice of peace by virtue of being chairman of the district council; held that he thereby vacated the office of magistrates' clerk.

In this case, which came before the Court on February 12, a rule *nisi* for a *certiorari* had been obtained to bring up a conviction by the justices of the division of Ringwood, in the county of Southampton, to be quashed on the ground that Mr. Alderman Druitt, who was clerk to the magistrates, and who, being mayor of Christchurch and chairman of the district council, was by virtue of the Local Government Act, 1894, section 22, an *ex officio* justice of the peace for the division of Ringwood, in which Christchurch is situate, had formed one of the seven magistrates who adjudicated on the case. Another alleged ground for quashing the conviction, which was for assault upon a woman, was that the respondent, Alderman Druitt, was a practising solicitor. Though holding the office of clerk to the magistrates and receiving the salary, Mr. Druitt had not acted in that capacity since May, 1896, the duties being performed by his son with the acquiescence of the justices. The respondent had on several occasions tendered his resignation to the Bench, but they had not accepted it or appointed

a successor until after the commencement of the present proceedings.

MR. A. T. LAWRENCE, Q.C. (Mr. Clavell Salter with him), showed cause against the rule. The Local Government Act, 1894, made the respondent an *ex officio* justice, unless he was disqualified by some Act of Parliament. Even if the office of magistrates' clerk was inconsistent with being a justice, this did not amount to a statutory disqualification. Even if the offices were incompatible the conviction was not necessarily bad. If holding the office of magistrates' clerk was a disqualification, it was waived at the hearing, for on both occasions when the applicant was before the Bench he was represented by solicitors who knew the facts.

MR. JUSTICE WRIGHT said that if the two offices were incompatible, one of them was vacated, as that was the legal meaning of the word.

MR. LAWRENCE said that in "Rex v. Pattison" (4 B. and Ad., 9) it was held that the acceptance of the one office did not vacate the other. He did not say that the two offices ought to be exercised together, but there must be a real interest to make the conviction bad. On the question of waiver he cited "Reg. v. Burton" ([1897] 2 Q.B., 468).

MR. E. BOWEN ROWLANDS (Mr. F. H. M. Corbet with him) argued *contra*. On the occasion in question the respondent was acting through his son in advising the magistrates, and was also sitting on the bench as a judicial officer. These offices were incompatible, because it was essential that the justices forming the Court should be unpaid, whereas Mr. Druitt was taking money for the clerkship. It was not consonant with the policy of the law that a man should fill both positions. Having cited "Worth and Others v. Newton" (23 L.J., Ex., 338), the learned counsel said that the question of waiver could only arise where the magistrate was interested, but in this case he had no jurisdiction and had no right to be on the bench at all.

The LORD CHIEF JUSTICE, after hearing the arguments, intimated that the case was of such importance that the Court would reserve judgment. He was glad that Mr. Druitt had put an end to what was undoubtedly a scandal, although there was no suggestion of any personal imputation upon him. In giving judgment to-day he said that this was a case which illustrated the jealousy with which the law looked upon what was required in the administration of justice by magistrates. Two objections were made to the conviction. The first was that Mr. Alderman Druitt, one of the magistrates who took part in it, was a practising solicitor, and the second that he was clerk to the magistrates. As regards the first objection there was no real foundation for it. The gentleman had ceased to practise so far back as 1892, in which year he made over his business to certain of his relations. It was true that until 1896 he had taken out a solicitor's certificate, but he had only done this because he thought it was proper to do so, having regard to the fact that he was joint registrar of one of the County Courts. With regard to the second objection it appeared that Mr. Druitt had held the position of clerk to the magistrates for a considerable time, and, in the sense that he received the salary, he continued to hold it until a date subsequent to the conviction. He had tendered his resignation, but the magistrates had done a highly improper thing. Though Mr. Druitt had become mayor of Christchurch, and *ex officio* a member of the Bench, they permitted him to retain his office of clerk to the magistrates and to draw the salary. It was not suggested that there was any intention in the nature of jobbery; nevertheless the course pursued was reprehensible, and the fact was that Mr. Druitt continued to be clerk to the magis-

*Reported by C. E. WILBRAHAM, Esq., Barrister-at-Law.

trates, acting by his son. The question was whether he was thereby incapacitated from holding the position of a magistrate. The two positions were incompatible with one another. What was the position of a clerk to magistrates accepting the position of mayor and chairman of a district council? He could not be compelled to remain in his office of clerk. He had a right to free himself of that office, and the magistrates could not prevent him. What was the effect of a person holding two offices incompatible with one another? The principle to be applied was to be found in "Reg. v. the Mayor, &c., of Bangor" (18 Q.B.D.; 349). In that case it was held that a person elected to the office of councillor in a borough who was also at the time of his election an alderman of the borough by accepting the former office vacated the latter. The late Master of the Rolls, Lord Esher, in the course of his judgment said:—"It has been said that the offices are incompatible, and that two incompatible offices cannot be held by the same person at the same time. The latter proposition is true with respect to the offices of alderman and councillor, not on the ground that they are offices of profit, but on the ground that they are so incompatible that the Legislature cannot have intended they should be held by the same person at the same time. What is the consequence of this doctrine? A long series of authorities has upheld the proposition that when two offices are incompatible, and the suggested ineligibility of the candidates for one of them only arises from the fact that it is incompatible with the office he already holds, he is not thereby prevented from being elected to the second office, whether it be superior in rank or power to the other or not. The cases have decided that if a person holding one office be elected to another and accepts that election he thereby vacates the office he held, and thus the difficulty with respect to the impossibility of holding two incompatible offices is got rid of." The principle in that case applied to the present one. By accepting the office of mayor Mr. Druitt vacated his office of clerk to the magistrates. Though his subsequent acceptance of the salary was an irregularity, yet that did not prevent him from acting as a magistrate. The rule for a *certiorari* would therefore be discharged, but without costs.

[Solicitors—Lovell, Son, and Pittfield, for J. and W. H. Druitt, Bournemouth, showing cause; Routh, Staacy, and Castle, for Burt and Haviland, Christchurch, *contra*.]

Q.B. Div. (Wright)
and Darling, J.J.)

1898.
March 4.

DENABY AND CADEBY CO. V. FENTON.*

Contract—Agreement—Construction—"Fatal accident in mine," meaning of.

This was a case stated by justices at Doncaster, and raised a question as to the meaning of the words "fatal accident in the mine" in an agreement between colliery owners and the miners.

Mr. Cripps, Q.C., and Mr. E. Lewis Thomas appeared for the appellants; Mr. Atherley-Jones, Q.C., and Mr. Compton-Smith for the respondents.

The facts were these:—A summons was taken out by the appellants, the Denaby and Cadeby Main Collieries Company, under the Employers and Workmen Act, 1875 (38 and 39 Vic., c. 90), claiming 5s. damages by reason of the respondent, a miner, absenting himself from service on September 7, 1897. On that day a boy was injured in the Cadeby Main

Colliery, and the respondent assisted to extricate him from under the "corves," or trucks, and stated that the boy then gave no signs of life. He was taken out alive, and taken on an ambulance to a hospital about a mile and a-half from the colliery, and died two hours after his arrival there, but was in an unconscious state and dying from the moment the corves ran over him. There had been a question between the appellants and their workmen in May last as to whether men were entitled to leave the mine in case an accident happened when a workman was injured in the mine, but did not die therein. The appellants did not recognize the custom as extending to any case but that of a person dying in the mine. Eventually it was agreed between the appellants and their workmen that in case of a fatal accident in the mine the workmen might in certain cases leave the mine. The circumstances of the case were such that if the boy had died in the mine the respondent would have been entitled to leave and to cease work during the time he did so leave and cease it. He left the mine under the *bona fide* belief that a fatal accident had occurred. The justices held that the accident was not a fatal accident in the mine, and that therefore the respondent was not entitled to leave the mine and cease work, but that as he had an honest belief that the boy was dead he was justified in leaving, for which reason the Justices held that he was not liable in damages, and dismissed the summons.

Mr. CRIPPS, on behalf of the appellants, contended that the justices were wrong. If the agreement between the parties had been broken a *bona fide* but mistaken belief as to a matter of fact was no answer to the breach. The Justices should therefore have given damages.

Mr. ATHERLEY-JONES submitted that there was within the meaning of the parties a fatal accident in the mine. It was not like a miner dying weeks after the injury. The boy here was *in articulo mortis* while in the mine. The contract must be reasonably interpreted. If the men reasonably believed the boy was dead, it would be reasonable that they should quit.

The COURT upheld the decision of the justices, but not on the grounds given by them.

MR. JUSTICE WRIGHT said the Court, speaking generally, could only deal with the issues left in a case stated, but this was not without exception; for if the Court could see from the contract set out that there was a point not taken by the magistrates, the Court could deal with it. In the opinion of the Court, what happened was in effect a "fatal accident in the mine," and therefore the respondent was within his right in leaving off work. He would advise the masters and workmen to come to an agreement to define more clearly the circumstances which would justify men in leaving the mine. He might suggest that some such words as these might be inserted,—"If the person injured is apparently dead, or in a dying state, it would then be a question of fact for the justices in each case to say whether there were sufficient grounds to justify the miners in leaving the mine."

MR. JUSTICE DARLING said the decision must be upheld. This accident was a "fatal accident in a mine" within the words of the agreement as set out in the case. If the words had been "an accident fatal in a mine" there might have been a difference. The boy here was dying the moment after he was run over. He was *in articulo mortis*.

[Solicitors—Hickin, Smith, and Capel-Cure for Edward Lodge, Wakefield, for the respondent; Stevens, Bawtree, and Stevens for H. H. Hickmott, Rotherham, for the appellants.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Q.B. Div. (Wright and } 1898.
Darling, J.J.) } March 4.
REG. V. SHARMAN AND OTHERS, JUSTICES—EX PARTE DENTON.*

Licensing Acts—Licence—Application for—Objections—Justices—Practice.

Justices have a discretion as to hearing objections to a licence from persons who decline to make their statements on oath.

This was a motion for a *certiorari* to quash the grant of a licence, and also for a *mandamus* to the justices of the Wellingborough division of the county of Northampton, and the question was raised whether an objector to the grant of a new licence, who wished to state facts, might be compelled to make his statement on oath.

Mr. Lawson Walton, Q.C., and Mr. Pollard appeared for the persons to whom the licence had been granted; Mr. Candy, Q.C., and Mr. W. Ryland Adkins appeared for the justices; Mr. Asquith, Q.C., and Mr. G. Blaiklock for Mr. Denton, the person who had objected to the licence being granted, and [was not allowed to make unsworn statements before the justices.

The general annual licensing meeting of the Wellingborough division of the county of Northampton was held on Monday, August 23, when an application was made by William Douglas Knight for a provisional full licence for a proposed hotel near the railway station at Rushden.

Several witnesses were called and sworn on behalf of the applicant, and were examined and cross-examined.

A memorial in favour of the grant was also put in and considered. A number of witnesses against the grant were called, sworn, examined, and cross-examined, and a memorial or petition was put in on behalf of certain opponents. Among the signatures thereto was that of Mr. George Denton, the applicant for the *certiorari*. Upon the closing of the case, Mr. Denton, who was a resident in the district and a large employer of labour, rose and stated that he had certain facts to lay before the justices in opposition to the granting of the licence. It was objected that he ought not to act as an advocate, and that if he desired to make statements of fact he ought to do so upon oath and submit to cross-examination as all other witnesses had done. The justices were of opinion that Mr. Denton ought to take the oath like any other witness when he claimed to make statements of fact. At the meeting of the committee for confirming the licence Mr. Denton acted in a similar manner, and was refused permission to make statements of fact not on oath. The licence was confirmed.

Mr. LAWSON WALTON urged that the rule for a *certiorari* ought not to be made absolute. He cited "The Royal Aquarium v. Parkinson" ([1892] 1 Q.B., 431), "R. v. the London County Council—Re the Empire Theatre" (71 L.T., 638), "R. v. the Court of the Company of Watermen, &c." ([1897] 1 Q.B., 659), "R. v. Justices of Surrey" (52 J.P., 423). He stated that Mr. Denton had claimed the right to express his views to the justices and to state facts on the strength of the case of "Boulter v. Justices of Kent" ([1897] A.C., 556), which decided that a licensing meeting of justices was not a Court of summary jurisdiction. Mr. Lawson Walton submitted that the justices had a discretion, and that if they refused to hear Mr. Denton except on the same terms as other witnesses they were perfectly justified in doing so.

Mr. ASQUITH, on behalf of Mr. Denton, said it was immaterial for his client whether a *mandamus* or *certiorari* was granted. He would not, therefore, con-

tend very strenuously that a *certiorari* was the right remedy. Mr. Denton claimed a right as a resident parishioner to express his views. The case of "Boulter v. Justices of Kent" had nothing to do with the matter. He hoped that the Court would decide whether a *certiorari* was the proper remedy before dealing with the *mandamus*.

The COURT then held that a *certiorari* was not the right remedy.

MR. JUSTICE WRIGHT said it was not a case for a *certiorari*. The grant of the licence was not a judicial order, and there had been no want of jurisdiction. In fact, almost all the possible objections were applicable to it.

Mr. CANDY and Mr. ADKINS then showed cause on behalf of the magistrates against the *mandamus*.

Mr. ASQUITH, dealing with the question as to whether the applicant had shown a legal right to the *mandamus*, said that residents had a *locus standi* at licensing meetings. The justices ought to have accepted the statements of Mr. Denton, though they might allow less weight to them if he would not swear to their truth.

The COURT refused to make the rule absolute.

MR. JUSTICE WRIGHT said that as to the substantial question the matter was left to the discretion of the justices, and they should not be too strict in its exercise. Within reasonable limits the local public should be allowed to express their views. But there was nothing to hinder their discretion. As to the *mandamus* there was no substance in the application. Under certain circumstances members of the local public might have the right to intervene at these licensing meetings; but in this case little, if any, ground was shown why Mr. Denton should do so, and, moreover, he never gave any reason why he should not be sworn. The learned judge did not see that the grant of a *mandamus* would serve any useful purpose. No miscarriage of justice had been shown. The opponents of the licence had been fully heard; a petition against it, of which Mr. Denton was a signatory, had been put in and considered. The rule must, therefore, be discharged.

MR. JUSTICE DARLING concurred. The justices had discretion to refuse to hear persons who would not take an oath, as all the others had done. The case illustrated the saying that a little knowledge was a dangerous thing. It would have been just as well if Mr. Denton had never read "Boulter v. the Justices of Kent."

[Solicitors—W. Hirst Simpson, for the Licensing Justices; Metcalfe and Birkett, for Becke and Green, Northampton, for the applicant; Arthur Block, for James Jackson, for Mr. Denton.]

Q.B. Div. } 1898.
(Biggam, J.) } March 4.

THE OWNERS OF WOOL CARGO LATELY LADEN ON BOARD THE STEAMSHIP WAIKATO V. THE NEW ZEALAND SHIPPING COMPANY (LIMITED).*

Ship—Bill of lading—Damage to goods—Defective condition of vessel—Exceptions limiting liability—Construction.

This was an action brought to recover damages for breach of contract by bills of lading given in respect of certain parcels of wool shipped at ports in Queensland for London on board the defendants' steamship *Waikato*. The wool in question was stowed in portions of the vessel which had been fitted up with insulation, in the usual manner, for the carriage of frozen meat. On arrival in London the wool was found to be damaged. The plaintiffs alleged, *inter alia*, that the vessel was not in a proper condition to carry the wool by reason of

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

the insulation of her holds, whereby the heated air in the holds was unable to escape, and that by reason thereof the wool had been damaged. The defendants contended that under the terms of the bills of lading they were protected. The bills of lading contained the following clause:—"The act of God, . . . loss or damage arising from accidents to or defects, latent on beginning voyage or otherwise, or to (sic) hull, tackle, boilers, or machinery, or their appurtenances, . . . steam, heat, or fire on board, . . . any act, neglect, or default whatsoever of pilots, master, or crew, or other servants of the company, the dangers and accidents of the seas, rivers, and canal, and of navigation, of whatsoever nature and kind, are excepted." By an order made in Chambers it was directed that certain questions be tried before the trial of the action—namely, (1) whether, having regard to the bills of lading, there was an implied term that the parts of the Waikato in which the wool was stowed should be, when the said wool was shipped, in a proper condition to carry the said wool safely on the voyage; (2) whether the fact alleged—namely, that they were insulated for use as refrigerating chambers, whereby the heated air in the holds could not escape, by reason of which the damage complained of was alleged to have occurred—was not a defect within the meaning of the clause in the bill of lading. These questions now came before his Lordship for decision.

The Right Hon. H. H. Asquith, Q.C., and Mr. T. E. Scrutton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. F. Laing for the defendants.

HIS LORDSHIP, in giving judgment, said that the common law obligation of the shipowner was to provide for the cargo-owner at the beginning of the voyage a ship fit to carry the particular cargo. If the shipowner desired to get out of that responsibility he must do so by using very plain and distinct words. The bill of lading, as a rule, was given to the cargo-owner after the cargo had been shipped, and he was supposed to assent to the terms which were introduced into the bill of lading if he did not raise an objection to them, and, as his opportunity of objecting was not of much practical use to him, the shipowner ought to express his meaning in the plainest possible way. Now it was said in this case that the shipowner had told the cargo-owner, by this clause, that his goods were to be carried upon the terms that the ship was not responsible, although she started on her voyage in an obviously unfit state to carry the cargo. That was a most unlikely contract for the shipowner to suggest or the cargo-owner to agree to, and unless the words of the bill of lading constrained him he (the learned Judge) would hesitate to come to the conclusion that such a contract had been entered into. (The learned Judge then read the words of the bill of lading set out above, and continued.) The "defects" which the shipowner excepted were those which were latent at the beginning of the voyage. The clause was really an attempt to introduce into the bill of lading one of the provisions of the Harter Act.* The defendants contended that the meaning of the clause was that they were not to be responsible for defects which were prominent and open to the observation of themselves and their servants. They relied on the words "or otherwise." In the opinion of the learned Judge those words would not convey such a meaning to any one reading the bill of lading. If the shipowner wanted to make such a contract he must use plain and simple words, and show the cargo-owner clearly that he would have to insure himself against risks which as a rule he had not to insure against. There must be judgment for the plaintiffs upon the preliminary questions with costs.

* [Act of Congress of the U.S.A. of 13 February, 1893 (a. 105). See [1895] 2 Q.B., 408.—ED. *The Times L.R.*]

Judicial Committee of the Privy Council
(Lord Halsbury, L.C., Lords Watson,
Hobhouse, Macnaghten, Morris, Shand,
Davey, and Sir R. Couch) 1898.
March 5.

ECCELS AND OTHERS V. MILLS AND OTHERS.*

Landlord and Tenant—Lease—Covenant by lessor
—Breach—Covenant not running with the reversion—Liability of lessor's general estate.

This was an appeal from a judgment of the Court of Appeal of New Zealand of June 29, 1895, dismissing the appeal of the appellants against so much of the judgment of the Supreme Court of New Zealand in the action as related to certain lands in Otago known as the Meadowbank Estate. The arguments were heard in February, 1897.

Mr. Cozens-Hardy, Q.C., and Mr. Butcher, Q.C., were counsel for the appellants; Mr. Warrington, Q.C., Mr. Russell Roberts, and Mr. C. H. Sargant for the respondents.

LORD MACNAGHTEN, in giving their Lordships' judgment, said the question in the case was whether a sum of money recovered more than 20 years ago by the lessee of a New Zealand farm from the executors of his lessor as compensation for the non-fulfilment of a certain covenant in the lease ought not to have been charged against the specific devisees of the farm instead of being paid as it was out of the lessor's general estate. The claim, though it arose so long ago, was not barred by statute, or by laches, or by any rule of equity. The liability was not dealt with directly by any provision in the lessor's will. The answer to the question must therefore depend on the true meaning and nature of the covenant. Was the covenant one that ran with the reversion? If so, was that circumstance of itself enough to throw the liability on the reversion in exoneration of the general estate? If the covenant did not run with the reversion did the reversioner necessarily escape all liability? Or must the inquiry be carried further? Might not the liability depend on other considerations than the rights and remedies of lessees under the statute of 32 Henry VIII., and the question whether the agreement was or was not under seal? Might it not perhaps be that as between the objects of the testator's bounty the liability depended on the consideration whether the covenant was properly incident to the relation of landlord and tenant, or was it in its nature preliminary and introductory to the commencement of that relation—whether it was, so to speak, a condition of the letting or a condition of the lease? Those questions were all debated more or less fully at the Bar. They were certainly none of them free from difficulty, and there did not appear to be any authority applicable to the peculiar circumstances of the case. By deed dated September 2, 1868, the lessor, John Jones, of Dunedin, in the province of Otago, demised to Francis Dillon Bell a farm of some 4,000 acres in that province known as Meadowbank. The term was 14 years from September 1, 1868. The rent was to be £1,000 a year. The lease contained a covenant by the lessor for himself, his heirs, executors, administrators, and assigns in the following words:—"The lessor, his heirs, or assigns will, at his or their own expense, on or before September 1, 1869, completely finish laying down in good English grass and in accordance with the rules of good husbandry the 1,000 acres which the lessor has already commenced laying down in English grass." If there were nothing more in the lease bearing on the construction of that covenant and nothing else to be considered there would undoubtedly

* Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

be implied in and by reason of the covenant to finish the operation in question, an agreement on the part of the lessor to lay down in English grass and according to the rules of good husbandry so much and such parts of the 1,000 acres referred to as had not been laid down in that manner already. There would also be implied on the part of the lessee an authority or licence for the lessor to enter upon the land and cultivate it for that purpose. And if such an agreement and such a provision were implied in the lease it would be difficult to contend that the burden of the covenant did not run with the reversion, so as to give the lessee a right of action and a remedy against the persons who might be assignees of the reversion at the time fixed for the complete fulfilment of the covenant. The covenant, however, did not stand alone. It was accompanied and apparently controlled by the following declaration, which was inserted at the end of the lease:—"It is hereby declared that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto." The effect of that declaration, if it meant what it said, was to qualify the preceding covenant by shutting out every possible implication which the terms of the covenant would seem to suggest or require. The result, therefore, was that by the covenant so qualified the lessor warranted that he would on or before September 1, 1869, completely finish laying down the 1,000 acres in good English grass, according to the rules of good husbandry, but that he did not bind himself further in any shape or way. He did not agree to break up the land or to lay it down, or to do anything on the land in fulfilment of the apparent intention of the covenant. He had reserved no power of entry, nor was he given any authority to enter for that purpose. Still, if the operation was not found finished on the prescribed day, he must be answerable in damages. That was the bargain between the parties. They stood to be bound by the strict letter of their contract. They chose to draw the line there. They would not go one step further. Whatever there might be beyond the mere letter of the contract depending on inference or implication that was deliberately excluded—a singular provision no doubt, whether it proceeded from mutual distrust or sprang from the fancy of the draftsman, or was adopted as a means of avoiding some difficulty of the moment. But the declaration was not open to any ambiguity. The language was as plain and as positive as language could be. And, after all, perhaps the explanation was not so very far to seek if Mr. Bell's letter of July 2, 1869, which was in evidence, might be taken as an accurate description of the surrounding circumstances and the position of the parties when the lease was executed. The treaty for the lease was a very protracted affair. The great matter to be arranged was the laying down of the 1,000 acres in English grass. Mr. Bell counted upon that improvement to make the rent. At Mr. Jones's request he laid down about 250 acres. Mr. Jones set about doing the rest of the work himself. He ploughed the ground and he sowed it. Then he wanted Mr. Bell to accept the land as he was laying it down. Mr. Bell refused. The quality of the seed was not what it should have been; the best seed in the world would come to nothing on a single ploughing; the work would have to be done all over again. Everybody said so—friends and neighbours as well as the incoming tenant. Heedless of warning and deaf to advice, Mr. Jones went on in his own way. When he had once ploughed and once sown the specified number of acres, though no grass was to be seen, he maintained that he had done all that was required. Mr. Bell would not yield. Mr. Jones was firm, or perhaps obstinate. Fortunately they both appealed to the future. Time would tell who was right and who was

wrong. So when it came to the point of granting the lease "a year was given," as Mr. Bell says, "to prove" whether the work had been properly done or not. Mr. Jones was content to pay the penalty if the fates were against him. But apparently, as a point of honour, he would not set his hand to anything implying an agreement to do more than he had done without expressly negating any such implication. Whether that explanation be satisfactory or not, everybody must admit that, in construing a contract, the Court was bound to give effect to every part of it. If a stipulation was found in the bond it mattered little how it got there. It was not to be rejected because it might be unusual or ignored because 20 years afterwards the Court could not guess why it was ever introduced. Mr. Jones did not live to see the end of his experiment. He died on March 16, 1869. By his will, which was made on December 20, 1868, he divided his property among his children. Some of their shares he settled, including the share in which Meadowbank was comprised. He appointed executors, and made them also trustees of the settled shares. The appellants, who claimed under a voluntary conveyance, represented the inheritance in Meadowbank. The principal respondents were the persons interested in the testator's residuary estate. At the end of the first year of his tenancy Mr. Bell claimed compensation for breach of the covenant in question. The claim was originally made against the testator's executors as trustees of Meadowbank. The matter was referred to arbitration. By an award dated March 2, 1871, the arbitrators found that the covenant had been broken and assessed the damages at £2,296, directing that the parties contesting the claim should pay that sum to Mr. Bell as executors of Mr. Jones. The money, with interest and costs, was ultimately paid to Mr. Bell out of the testator's personal estate not specifically bequeathed. The payment was directed to be borne by the testator's executors in deference to an opinion of Sir Roundell Palmer and Mr. (afterwards Mr. Justice) Archibald, who advised that the covenant did not run with the reversion, and that the damages would be payable out of the testator's general estate. The learned counsel, of course, gave no reasons with their opinion, but it could hardly be doubted that they proceeded on the principle that effect ought to be given to every term of the contract. The propriety of the payment was not questioned at the time or for many years afterwards. Lately, however, difficulties arose in regard to some items in the trustees' accounts and two suits were instituted for partial administration of the testator's estate. In the course of the second suit the question now at issue came to be discussed. At the suggestion of the Judge the pleadings were amended. All parties interested were brought before the Court, and the suit was turned into a suit for general administration. Mr. Justice Williams was of opinion that Mr. Bell's claim ought to have been satisfied by the specific devisees and that the testator's general estate ought to be recouped by a charge on Meadowbank. A decree to that effect was accordingly pronounced with consequential directions. On appeal the Court unanimously affirmed the decree. Their Lordships were unable to concur in the view taken by Mr. Justice Williams and the Court of Appeal in New Zealand. They thought that the covenant in question must be construed as qualified and controlled by the declaration which followed it. On that construction the covenant did not run with the reversion, and, inasmuch as in their opinion the covenant was not incident to the relation of landlord and tenant, they thought that the liability for the breach of the covenant properly fell to be borne by the testator's general estate. The view taken by their Lordships of the nature and meaning of the covenant rendered it unnecessary to determine upon

whom as between the different objects of the testator's bounty the liability would have fallen primarily if the covenant had been unqualified and uncontrolled by any other provision in the lease. But inasmuch as Mr. Justice Williams proceeded on the assumption that the covenant was unqualified and on the admission of counsel that the covenant ran with the reversion, and as his judgment in its entirety was approved by the Court of Appeal, it would hardly be right for that Board to pass the question by in silence. The reasoning of Mr. Justice Williams seemed to be this:—The covenant runs with the reversion. It is, therefore, not merely an obligation imposed by statute on the reversioner, but a burden or charge upon the reversion itself. A person who takes a benefit under a will must take the benefit with any burden that happens to be attached to it. Then there are plenty of cases where legatees of leaseholds have tried in vain to shift the burdens incident to their leasehold interest and throw them on the testator's general estate; those cases are in point; there the burden was incident to the lease here it is incident to the reversion. The leaseholder bears the burden incident to his holding; the reversioner must in like manner bear the burden incidental to his estate. That reasoning did not appear to their Lordships altogether satisfactory. It did not, perhaps, keep sufficiently distinct the two principal questions which, on the assumption that the covenant ran with the reversion, would present themselves for consideration—the question whether the covenant was a burden or charge on the reversion itself and the question whether the covenant was in its nature incident to the relation of landlord and tenant. In regard to both their Lordships had some difficulty in accepting the view of the learned Judge. Granted that the covenant ran with the reversion it did not follow that the liability under the covenant was a burden upon the reversion. At common law no covenant ran with the reversion. By the statute of Henry VIII. all lessees have “like action and remedy against all persons . . . having any gift or grant . . . of the reversion of the said lands and hereditaments so letten . . . for any condition or covenant expressed in the indentures of their leases” as they might have had against their lessors. They could not have any greater right or any more extended remedy. In the lifetime of the lessor the covenant was not a burden on the land in the hands of the lessor. After his death, how could it be a burden on the land in the hands of the specific devisees? The appellants did not dispute that if the covenant ran with the reversion the specific devisees of Meadowbank came under liability to Mr. Bell. Whatever liability the statute threw on the specific devisees as assignees of the reversion that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable and residuary legatees took nothing until the testator's liabilities were satisfied. If the liability for the breach of the covenant was not a charge on the inheritance as Mr. Justice Williams seemed to have thought it was, why should the specific devisees bear it rather than the testator's estate merely because for the protection of tenants the statute gave the lessee an additional remedy against the lessor's assignees? The inquiry must go deeper. It would seem that the nature of the obligation in each particular case must determine the question. If it was in its nature incident to the relation of landlord and tenant it would only be fair that the burden should be borne by the devisee as between him and the testator's estate, falling on him as landlord whether the agreement bore a seal or not. That seemed to have been the principle of “*Mansel v. Norton*” (22 Ch. Div., 769), where it would be observed there was no covenant to run with the reversion, though by some

slip in the report the Master of the Rolls was made to say that there was. The lease was not under seal, and therefore the statute had no application. The agreement there was that the lessor should buy the tenant's property at the end of the term, and it was held that as between the specific devisee and the testator's estate that obligation—incident as it plainly was to the relation of landlord and tenant—fell on the devisee. On the other hand, if the covenant was not in its nature incident to the relation of landlord and tenant—if the thing to be done was something preparatory to the complete establishment of that relation—it would seem to be fair and in accordance with the probable wishes of the testator that the burden of the covenant unperformed by him in his lifetime should be borne by his estate rather than by the specific devisees. In the present case the object of the covenant was to insure the premises being put into a condition fit for the occupation of the tenant under the lease. Such a covenant was intended to be performed forthwith—not to remain attendant on the lease during its currency. In its nature it seemed to be very different from a covenant by the landlord to keep buildings on the demised land in repair or to pay for unexhausted improvements at the end of the lease. The cases cited at the Bar where the question was between a specific legatee of leaseholds and the testator's estate were of little or no assistance in determining the question now under consideration. The only one cited in which the covenant could possibly be regarded as otherwise than incident to the relation of landlord and tenant (if indeed any covenant in a lease on the part of the lessee could be regarded as otherwise than incident to that relation) was the case of “*Marshall v. Holloway*” before Vice-Chancellor Shadwell (5 Sim., 196). There the lessee covenanted to make certain improvements in existing buildings and to erect certain new buildings on the demised land within a comparatively short period. The lessee died before the period expired without having completely performed his covenant. It was held that the devisee of the leasehold ought to be exonerated by the general personal estate from the cost of completing the unfinished work. That case if it could be accepted as an authority would appear to go far beyond the position which the appellants sought to establish. The report, however, was so confused that it was not easy to say upon which, if any, of the various grounds touched upon in the judgment his Honour desired to rest his decision. It was certainly not surprising to find that subsequent Judges had differed on the point. Vice-Chancellor Turner felt considerably embarrassed by “*Marshall v. Holloway*” in a case before him (“*Fitzwilliams v. Kelly*,” 10 Hare, 266) where the covenant was meant to be in attendance during the whole term of the lease and to have a recurring operation—a case in that respect apparently as different from “*Marshall v. Holloway*” as well could be. He thought Vice-Chancellor Shadwell must have relied on a provision in the will as to the payment of the testator's debts. Sir John Romilly, Master of the Rolls, however, considered that the principle in “*Marshall v. Holloway*” and the principle in “*Fitzwilliams v. Kelly*” were one and the same—the principle being that the obligation of completing the testator's interest in the subject-matter of the bequest fell on the testator's general estate (see “*Armstrong v. Burnet*,” 20 Beav., 424, 431, 437). The Master of the Rolls seemed to have thought that the fulfilment of the repairing and building covenant in “*Marshall v. Holloway*” was required to complete the testator's interest as lessee, or, in other words, that the fulfilment of that covenant might be regarded as antecedent and preparatory to the complete establishment of the relation of tenant and landlord. Whatever might be the true explanation of “*Marshall v. Holloway*,” their Lordships agreed with

Mr. Justice Williams in thinking that it would not be satisfactory to rely on a case about which there was so much obscurity, though they could not see that " Marshall v. Holloway " was virtually overruled, or, indeed, affected by the decision of the Court of Appeal in " Hawkins v. Hawkins " (13 Ch. Div., 470) which seemed to have been a very plain case, and was one in which their Lordships entirely agreed. Their Lordships would humbly advise her Majesty that the decision under appeal should be reversed and that the suit should be dismissed with costs in the Courts below so far as it sought to throw the liability for the breach of the covenant in question on the specific devisees of Meadowbank. The respondents, who represented the residuary legatees, would pay the costs of the appeal, including the costs of the respondents, the trustees.

[Solicitors—Pollock and Co., for the appellants; Blyth, Dutton, Hartley, and Blyth, and Paines, Blyth, and Huxtable, for the respondents.]

Q.B. Div. (Crown Cases Reserved)
(Lord Russell of Killowen, C.J.,
Grantham, Wright, Bigham, and
Darling, JJ.) } 1898.
March 5.

THE QUEEN V. CLEMENS.*

Criminal Law—Malicious injury to property—
24 and 25 Vict., c. 97, sec. 51—Direction to
jury.

This was a case reserved for the opinion of the Court for Crown Cases Reserved by the Quarter Sessions for Cornwall.

Mr. Bucknill, Q.C., and Mr. W. T. Lawrance appeared for the prosecution; Mr. Duke for the defence.

The defendant, Henry Clemens, sen., and 19 others were indicted under section 51 of the Malicious Damage Act, 1861, for that they on August 31, in the parish of Newquay, Cornwall, unlawfully and maliciously did damage certain personal property—namely, a wooden structure, or office, of the Headland Hotel Company (Limited), to an amount exceeding £5. The facts were as follows:—In August, 1897, the Headland Hotel Company having obtained a lease from Mr. Treffry, the owner of the soil of some land at Newquay, forming portion of the Little Fistral Meadow, had begun to excavate for the foundations of an hotel, and had erected thereon a wooden building of the value of £14 for an office. On August 31 a number of persons, including the defendants, assembled at Newquay, and, headed by a brass band, proceeded to the meadow, fastened a rope to the wooden building, pulled it over, and broke it up. They then tied the rope to the two sides of the building, dragged them to the edge of the cliff, and threw them into the sea, which is distant 120 yards from the spot where the wooden building had been erected. They then returned, tied the rope to the remaining two sides, dragged them to the cliff, and likewise threw them into the sea. For the defence, evidence was given that, until about 60 years ago, the land was part of a large extent of unenclosed land called Towan Common, and the inhabitants of Newquay (which was then a village called Towan Blistra) were accustomed to dry and mend nets on Towan Common, take sand therefrom, cut the rushes growing thereon for fuel and for litter for cattle, and go upon the said land for purposes of recreation. About 60 years ago Mr. Lomax, the then owner of the soil, enclosed great part of the land, including Little Fistral Meadow. At the time of the enclosure the inhabitants of Newquay protested and had a meeting with Mr. Lomax, who agreed to put a stile in the eastern hedge of the Little

Fistral Meadow, for the purpose of giving to the inhabitants access to the land within the enclosure. The inhabitants and visitors have been accustomed to use the stile and to wander at pleasure over the enclosure. It was contended by the defendants that they were not guilty of the alleged offence, on the ground that the acts done by them had been done in good faith in assertion of rights over the said land which they believed to be possessed by the inhabitants of Newquay. The chairman directed the jury that it was for them to decide whether the defendants acted *bona fide* in the belief that they were within their rights; and, secondly, whether they did excessive damage; and that if, in the exercise of what they believed to be their rights to remove an obstruction, the defendants did more damage than was necessary the jury should find them guilty. The jury returned a general verdict of guilty, and in answer to questions stated that the defendants, acting in the *bona fide* belief that they were entitled to remove the building, did more damage than was necessary. A fine of 40s. was imposed on each defendant, and a case reserved by the chairman for this Court.

Mr. DUKE said his submission was that the direction of the chairman was wrong as to the rights claimed. They were a right of access to the land for purposes of recreation in the inhabitants of New Quay, and a right to have the land kept free of buildings which would interfere with the drying of nets. If the *bona fide* belief in the right to take sand existed that would exonerate the defendants even if the right itself did not exist.

MR. JUSTICE GRANTHAM asked whether it was part of their recreation to throw the office into the sea.

Mr. DUKE said there was no adjoining place where they could have put the materials except highways and private property, where they would be a trespass. He admitted, however, that there was evidence on which the jury might have been entitled to convict, but submitted that they were not properly directed. What they should have been told was that the excess of damage beyond what was absolutely necessary might be evidence of malice and illegality, but that they ought not to have been told that it was proof of it. It was not found here that the defendants did more than they knew they had a right to do. He cited "Perry v. FitzHowe" ([1846] 8 Q.B., 757).

The COURT, without calling on counsel for the prosecution, upheld the conviction.

The LORD CHIEF JUSTICE said the statement of the case was not altogether satisfactory, but the fault lay, not with the chairman of quarter sessions, but with the way the case was presented to the quarter sessions on behalf of the defendants. His Lordship then read the statement on the case as to the rights said to have been exercised more than 60 years ago. Some of them, he said, were profits *à prendre*—namely, rights to enter on the land of another and take therefrom a profit. These would not be general rights for a whole community, but only rights in respect of certain property. The right alleged of drying their nets on the ground might apply to the inhabitants of the place, as also might the claim of right of access for purposes of recreation. The case did not expressly state what rights were relied on by the defendants. The chairman thought there might be some evidence of right of access for purposes of recreation. But no details were given. It must, however, be assumed that the defendants went on the land in the assertion of some right. His Lordship then read the statement in the case as to the destruction of the wooden office, and then continued,—It was not denied that there was in this state of things ample evidence that the defendants had unlawfully and maliciously damaged personal property to an amount exceeding £5, but it was contended that the jury had

arrived at a verdict of guilty on a wrong direction of the chairman. The summing-up, however, was in substance a proper summing-up, though the precise language thereof might not be the same as he himself would have used. As appeared from the note of the summing-up affixed to the case, the chairman said to the jury, "You have not got to decide whether a right exists or does not exist, but whether defendants, in acting as they did, acted in the *bona-fide* belief that they were acting within their rights—rights that were known to the law and a right that can be legally a right in removing this building. In the next place you will have to determine whether or not, assuming they acted *bona fide* in what they did, and that they removed an obstruction which they were justified in removing, whether they did excessive damage in so doing." And later on, in his summing-up, he directed the jury—(1) first of all to decide whether or not in removing this building the defendants thought they were acting in the protection of a right, such right being a right known to the law, and if so (2) whether, in removing it, they did damage which was greater than they were bound to do in removing the obstruction. The jury answered the first question,—We believe that the defendants acted in the belief that it was according to right in the first place. The chairman then said,—Do you think they are guilty because they did more than was necessary to be done in asserting that right? The Foreman.—Yes, by destroying it and throwing it over the cliff. The Lord Chief Justice thought that on the whole the charge of the chairman did convey the points it was necessary for the jury to consider. The conviction must, therefore, be affirmed.

The other learned JUDGES concurred.

[Solicitors—Graham and Graham, for the prosecution; Carthew and Wheeler for the defendant.]

Court of Appeal (Lindley, M.R., 1898.
Rigby and Vaughan Williams, L.JJ.) } March 7.

RE CHARLES CLARKE.*

Lunacy—Execution creditor—Receiver in lunacy—Jurisdiction of the Court over lunatics' property.

The Court has not jurisdiction to compel the creditors of a lunatic to come to it for payment, or to restrain them from pursuing their legal remedies against property of his not actually under the protection of some one appointed by the Court to take care of it.

This was an original application to the Court sitting in lunacy, the case being that of a person of unsound mind not so found by inquisition. It appeared that a judgment creditor of Charles Clarke issued a *fi. fa.* on January 8, 1898, under which the judgment debtor's goods were seized on January 17, 1898. After the judgment had been obtained—viz., on December 31, 1897, a summons in lunacy was taken out in order to obtain the appointment of a receiver under section 116 of the Lunacy Regulation Act, 1890. Notice of the pendency of this summons was given to the judgment creditor before he issued the *fi. fa.* After the seizure under the *fi. fa.*—viz., on January 18, 1898—an interim receiver was appointed and notice was given to the sheriff to withdraw which, however, the execution creditor told him not to do. On January 21, 1898, an order appointing a receiver was made, and notice of this order was given to the sheriff and he was again asked to withdraw, but the execution creditor directed him not to do so, and he remained in possession. On

January 28, 1898, the sheriff issued a summons in lunacy asking for directions how to act, and this summons was adjourned into Court and came on to be heard on February 16, 1898.

Mr. Manisty was for the applicant; Mr. S. O. Buckmaster and Mr. Ivor Bowen were for the receiver, the wife of the lunatic; Mr. Edward Ford was for the execution creditor.

At the conclusion of the arguments their Lordships reserved judgment.

The MASTER of the ROLLS, in reading the judgment of the Court, stated the facts as above set forth, and continued as follows:—On that occasion (February 16, 1898), it being obviously for the benefit of every one that the sheriff should be got rid of, and no one objecting, the Court ordered the sheriff to sell the goods and to pay the proceeds, less his expenses, into Court in the matter of lunacy. But this order was made without prejudice to any question between the lunatic or the receiver in lunacy on the one hand and the execution creditor on the other, and the Court took time to consider their respective rights and the right of the Crown as the protector of lunatics and their property. These rights have now to be determined. Unless the right of the Crown and the jurisdiction of the Judge in lunacy can be regarded as arising when the summons was taken out—viz., on December 31, 1897—so as to place the lunatic and his property under the protection of the Crown on and after that date, it seems plain that the proceeds of sale ought to be paid to the execution creditor and not to the receiver in lunacy. It is very true that the property in goods seized under a *fi. fa.* remains in the execution debtor until sale (*Giles v. Grover*, 1 Cl. and Fin., 72). But it is no less true that after seizure and before sale the execution creditor is as regards those goods in the position of a secured creditor. See "*Ex parte Williams*" (L. R., 7 Ch., 314) and "*Slater v. Pinder*" (L. R., 7 Ex., 95). He had a legal right as against the execution debtor—i.e., owner of the goods—to have the goods sold and to be paid out of the proceeds of their sale. Further, in this case it cannot be said that the goods were ever in the possession of the receiver. Even if an order appointing a receiver related back, which it never does, the receiver has never in fact been in possession of the goods. This circumstance distinguishes this case from "*In re Winkle*" ([1894] 2 Ch., 519), where the receiver had possession and the sheriff had not, he having gone out of possession under an order of a Judge at Chambers. The judgment of the Court proceeded entirely on this ground, and "*In re Winkle*" is no authority for saying that the Court in lunacy can deprive execution creditors of their rights over property not under the control of the Court when seized under legal process. The cases of "*In re Plenderleith*" ([1893] 3 Ch., 332) and "*In re Farnham*" ([1895] 2 Ch., 799, and [1896] 1 Ch., 836) show that whilst on the one hand the Court will not allow property in its custody and belonging to a lunatic to be applied otherwise than for his benefit, and will not pay his creditors out of it without first providing for him, yet, on the other hand, the Court in lunacy has no jurisdiction to interfere with the rights of creditors to seize and sell by legal process property of the lunatic which at the time of seizure is not in the custody of the Court. It was, however, suggested that as soon as the summons in lunacy was issued the jurisdiction of the Crown exercisable by the Judge or Court in lunacy became exercisable over the lunatic's property, and that his property ought to be regarded as under the protection of the Crown from that time. In a sense this is true, for as soon as the summons was issued the Judge in lunacy had jurisdiction to make orders for the protection of the lunatic's property; but until some order is made showing that

*Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.

the Crown has actually taken the property of the lunatic under its protection it has never yet been held to be withdrawn from legal process by a creditor of the lunatic. The Court in *lunacy* has gone far even before any inquisition to protect an alleged lunatic and his property. It has punished persons entrapping an alleged lunatic into a marriage (see "*Smart v. Taylor*," 9 Mod., 98), it has restrained an alleged lunatic from execution instruments disposing of his property ("*Ridgeway v. Darwin*," 8 Ves., 65), and it has in quite recent times protected the property of an alleged lunatic against seizure by his creditors by appointing an interim receiver ("*In re Pountain*, 37 Ch.D., 609.) The statute *De Prerogativa Regis*, which has always been regarded as defining the power of the Crown in lunacy matters, has been very widely construed—*e.g.*, it has been held to extend to a lunatic's personal property, although land and tenements alone are mentioned. But it is quite clear from Lord Eldon's observations in "*Ex parte Hastings*" (14 Ves., 182) and "*Ex parte Hall*" (Jac., 160) that the Court in lunacy could not protect a lunatic from arrest under a *ca. sa.*, and could not prevent a judgment creditor from issuing execution against his property if the creditor could reach it by ordinary writs of execution without interfering with the possession of an officer of the Court in lunacy, and this doctrine is as well settled now as it was then, as is shown by "*Brockwell v. Bullock*" (22 Q.B.D., 567) and "*In re Farnham*" ([1896] 1 Ch., 836). If, indeed, the creditor has done anything to give the Court in lunacy jurisdiction over him it is another matter (see "*Ex parte Weaver*," 2 Myl. and Cr., 441, and other cases of that kind noticed by L. J. Fry in "*Brockwell v. Bullock*"). We have looked to see whether the fact that the Judge in lunacy can now sell a lunatic's real property for the payment of his debts enables the Court to compel creditors to come to that Court for payment, and to restrain them from pursuing their legal remedies against property not actually under the protection of some one appointed to take care of it. The power to sell the real property of a lunatic for payment of his debts was first given in 1830 by 11 Geo. IV., and 1 Will. IV., c. 65 (see sections 28 and 30), and this power has been continued under later statutes ever since. But it has always been held both before and since 1830 that the Court in lunacy cannot compel a creditor to come in and prove his debt in lunacy by restraining him from issuing execution if he can do so without interfering with the officers of the Court. "*Brockwell v. Bullock*" and the cases cited in it show this to be the law now, as it always was. We can find no trace of the exercise by the Court in lunacy of any such jurisdiction as we are referring to. We find a long course of decisions inconsistent with the possession of any such jurisdiction; and we are not prepared now for the first time to assert it. It would, we think, be wrong to creditors to do so, and not necessary for the protection of infants or lunatics, for an order for a receiver or an injunction can in an urgent case be obtained very summarily, and such an order affords all the protection which is really necessary. It was contended that under section 117 of the Lunacy Act the Court could sell the goods seized, they being the property of the lunatic. But the Court could only sell the lunatic's interest in those goods; it could only sell them subject to the security of the execution creditor; and this would not benefit the lunatic in the present case. No doubt the Court could have directed the receiver to redeem the execution creditor's security by paying the judgment debt and the sheriff's charges, and then to sell the goods; but the Court was not asked to do this, nor did it appear that the receiver had money in her hands which she could have applied for such a purpose. As soon, therefore,

as the money is paid into Court it ought to be paid out to the execution creditor if the amount does not exceed his debt and costs. An order to that effect will be made by the Master. The execution creditor is also entitled sooner or later to be paid the unpaid balance of his judgment debt and his costs of those proceedings out of the lunatic's property applicable to such payment; but the creditor must apply for such payment to the Master, who will give the receiver proper directions on the subject. The receiver must also apply to the Master for payment of her costs.

[Solicitors—Cunliffes and Davenport, agents for Cousins and Co., Cardiff; Carthew and Wheeler, agents for Jas. Morgan, Cardiff; Fielder and Sumner, agents for William Jones, Cardiff.]

Prob., Divorce, and Adm. Div. }
(Gorell Barnes, J.) }

1893.
March 8.

THE WARSAW.*

Ship—Collision—Compulsory pilotage—River Tyne—Merchant Shipping Act, 1894, sec. 604(1)—Tyne Pilotage Order Confirmation Act, 1865, sec. 16.

In this case the plaintiffs were the owners of the steam-tug *Warrior*, and claimed damages from the defendants, the owners of the steamship *Warsaw*, for colliding with their tug, which was lying moored alongside another steamer at the Felling buoys in the river Tyne. The defendants alleged that the collision was solely caused by the negligence of the pilot of the *Warsaw*, who was employed by compulsion of law. On March 4 the Court, with the assistance of the Trinity Masters, found that the collision was solely occasioned by the fault of the pilot, and reserved judgment on the question of compulsory pilotage.

Mr. Aspinall, Q.C., and Mr. Butler Aspinall appeared for the plaintiffs; Mr. Boyd, Q.C., and Mr. F. Laing for the defendants.

MR. JUSTICE GORELL BARNES, in delivering a considered judgment, said,—The *Warsaw* was at the time on a voyage from Leith to Newcastle with a general cargo and 51 passengers, and was proceeding up the river Tyne in charge of a pilot duly licensed by the Tyne Pilotage Commissioners. I have already decided that the collision was solely occasioned by the fault of the pilot, and the question now arises whether or not the employment of the pilot was compulsory by law. The question depends upon statute law. The first subsection of section 604 of the Merchant Shipping Act, 1894, makes it compulsory for every master of a ship carrying passengers between any places in the British Islands to employ a qualified pilot whilst navigating within the limits of any district for which pilots are licensed under this or any other Act, and imposes a penalty of £100 on the master for failing to do so. Subject to a contention raised by the plaintiffs' counsel, this subsection is applicable to and determines this case in favour of the defendants. The plaintiffs' counsel, however, contended that, notwithstanding the said section, the vessel was exempted from compulsory pilotage by virtue of the 16th section of the order confirmed by the Tyne Pilotage Order Confirmation Act, 1865. That section is as follows:—"Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." The 22nd section of the same

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

order provides that "nothing in this order shall exempt the commissioners or the pilotage district aforesaid from the provisions of any general Act of Parliament now in force or hereafter to be passed relating to pilotage or pilotage dues or to merchant shipping." I am of opinion that, in the absence of any previous decision binding the Court to decide otherwise, the 604th section of the Act of 1894 expressly imposed upon the master of the Warsaw the duty to employ a qualified pilot, and that the order and Act of 1865 do not free him from this duty. It was, however, urged for the plaintiffs that the present case is governed by the decision in the case of the Johann Sverdrup, reported in 11 P.D., p. 49, and 12 P.D., p. 43. In that case the question was as to the effect of the Act of 1865 upon a previous Act regulating pilotage in the Tyne. That was an Act passed in 1801, which compelled foreign vessels coming into or leaving the Tyne to employ pilots licensed by the Trinity House of Newcastle-upon-Tyne. The Act of 1865 transferred the old jurisdiction of the said Trinity House to the Tyne Pilotage Commissioners, by whom the pilot in charge of the Johann Sverdrup was licensed. It was held that the Act of 1865 superseded the pilotage provisions of the Act of 1801, and that no obligation to employ a pilot was imposed by the said 16th section upon any vessel, whether British or foreign. It will be seen that no question was raised or considered as to the effect of the 354th section of the Merchant Shipping Act, 1854, for which the 604th section of the Act of 1894 is now substituted. The order of 1865 was made under the powers conferred by the Merchant Shipping Acts Amendment Act, 1862, section 39 (replaced by certain sections of the Act of 1894), and confirmed by the Act of 1865, and, although it superseded the local Act of 1801 and substituted new regulations for those contained in that Act, there is nothing in it inconsistent with the 354th section of the Act of 1854 or the 604th section of the Act of 1894. The said 16th section does not even expressly exempt vessels from employing pilots. It merely provides that nothing in the order shall extend to oblige the owner or master of any vessel to employ a pilot or pay pilotage dues, and it is followed by the said 22nd section. The case of the Temora (Lush, 17) was cited by the defendants. That case was not decided on the exact point now in dispute, and, although it is favourable to the defendants, it is not necessary to rely on it, because I am of opinion, for the reasons above set forth, that the 604th section expressly makes the pilotage compulsory upon vessels circumstanced as the Warsaw was, and that the Act of 1865 does not prevent its application. Therefore, although the plaintiffs have unfortunately suffered loss through the collision in question, as the collision was solely occasioned by the fault of the pilot, and there was no fault on the part of the defendants or their servants, the defendants are not responsible for the loss, and my judgment must be in their favour with costs.

[Solicitors—H. O. Coote and Ball, for Adamson and Adamson, North Shields; Stokes and Stokes, for Lietch, Dodd, Bramwell and Bell.]

Judicial Committee of the Privy Council
(Lord Halsbury, L.C., Lords Herschell, Macnaghten, and Morris, and Sir R. Couch) 1898.
March 9.

THE MOLSON'S BANK V. COOPER AND SMITH AND OTHERS.*
Bankruptcy—Proof—Loan—Realization of securities.

The appellants lent money on securities to a firm which subsequently failed. Having realized

the securities they nevertheless sought to recover judgment for the whole indebtedness, so that they might obtain a larger dividend in the bankruptcy.

Held, that they could not do so.

This was an appeal from a judgment of the Supreme Court of Canada of December 9, 1896.

Mr. Shepley, Q.C. (of the Canadian Bar), and Mr. Hume Williams appeared for the appellants.

The respondents, Messrs. Cooper and Smith, were boot and shoe manufacturers at Toronto, and they had an account with the Molson's Bank. Having applied to the bank for a line of credit, they received from the manager, Mr. Pipen, on June 13, 1891, a letter stating that the board had granted them a line of credit to the amount of \$150,000, to be secured by collections deposited, at a rate of interest of 6 per cent., with one-quarter commission on all cheques and collections outside the city of Toronto. To that letter there was a postscript stating that its meaning was not that the advances should be fully covered by collections, but as near as the respondents could. The respondents stopped payment in August, 1893. In the interval the bank had made large cash advances to the firm in the way of discount of their promissory notes. The respondents from time to time handed the bank large numbers of their customers' notes and bills as collateral security for the advances so made. At the time of the firm's failure the bank held their promissory notes to the amount in all of \$145,000, all of which they had discounted for the firm. The bank held as collateral security under the letter of June 13, 1891, customers' notes, which they proceeded to realize, and in respect of which, when the action was brought, they had actually received \$83,000. The suit was brought for the recovery of the whole indebtedness, \$145,000, and the defence set up was payment or satisfaction in whole or in part by the money received by the bank on the collateral notes. Mr. Justice Rose, who tried the action without a jury, gave judgment for the bank for the full amount of the notes sued upon, holding that they were not obliged to credit the money in their hands against the notes, but were entitled to retain the fund so realized as a reserve fund, carrying the amount to the credit of a suspense account. The Divisional Court, on appeal, set aside that judgment, deciding that the bank were bound to apply the money in reduction of the respondents' debt, and that it ought to be applied *pro tanto* in payment of the notes sued upon. The bank appealed to the Court of Appeal, which restored the original judgment of Mr. Justice Rose. The Supreme Court, on further appeal, unanimously decided against the bank, the Chief Justice, who gave their judgment, stating that the bank were bound from time to time, as it was received, to apply the proceeds of the collateral paper in reduction of the principal paper. The result was that, instead of being permitted to rank against the estate for the whole of the indebtedness, the bank was only permitted to rank for about \$60,000, being the difference between the principal paper and the proceeds of the collaterals. From the judgment of the Supreme Court special leave to appeal was sought and obtained. The object of the bank in not applying the money received by them was that they might prove for their whole debt unreduced by any payments, and so obtain a larger dividend of the money levied under the executions and remaining in the sheriff's hands to be applied on the executions *pro rata* under the Creditors Relief Act.

The LORD CHANCELLOR, in giving their Lordships' judgment, said they were of opinion that the appeal ought to be dismissed with costs. It appeared that

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

the bank had received at the time the action arose and had realized, in pursuance of the letter of June 13, 1891, sums amounting to \$83,000. They brought the action to recover the entire amount said to be due—some \$145,000. The suit raised the question, Were they entitled to treat the sum they had received and realized of the so-called securities as not having been received at all, or were they entitled to recover in respect of the entire amount of their indebtedness? No such right as they alleged could possibly exist. The bargain was intelligible enough—namely, that an overdraft should be allowed, and that cheques, bills, and securities should be deposited to secure repayment. The intention of the parties was made still more clear by the postscript to the letter:—"The meaning of the above is not that the advances shall be fully secured by collections, but as near as you can." It was admitted that \$83,000 had been received and realized by the bank on those collateral securities. As the bank received the money, or turned the securities into money when they received them, it was impossible to say that the indebtedness between them and their debtors was otherwise than diminished to the extent of the money which the bank put into their pockets. For these reasons their Lordships would humbly advise her Majesty that the appeal should be dismissed with costs down to the time of lodging the appeal.

[Solicitors—Poole and Robinson, for the appellants.]

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.JJ.) March 9.

THE SOUTH HETTON COAL COMPANY (LIMITED) V. THE HASWELL, SHOTTON, AND EASINGTON COAL AND COKE COMPANY (LIMITED).*

Practice—Pleading—Statement of claim—No cause of action disclosed—Striking out—O. 25, r. 4.

Decision of North, J. (*ante*, p. 176), affirmed.

This was an appeal by the plaintiff company against a decision of Mr. Justice North directing the statement of claim to be struck out on the ground that it disclosed no reasonable cause of action. (See *ante*, p. 176.) The action was for specific performance of an alleged contract by the defendant company, in voluntary liquidation, by the agency of their liquidator, Mr. Holmes, for the sale of certain coal measures known as the Easington and Undersea royalties, which belonged to the defendant company, who also held a lease of coal measures known as the Pespool royalty. Besides the liquidating company, their liquidator and Mr. Barwick, a rival purchaser, were made defendants. It appeared from the statement of claim that Mr. Holmes was negotiating with both the South Hetton Company, through their solicitors, Messrs. Dees and Thompson, and Mr. Barwick for the sale of the Easington and Undersea royalties. On September 20, 1887, he made a proposal in writing to each party that they should send in sealed tenders, which he undertook should be opened on October 7 in the presence of the chairman and directors of his company. His invitation closed with the following words:—"And the highest net money tender I receive (all other things being equal and satisfactory), that tender I will at once accept." Mr. Barwick sent in a tender in the following terms:—"I hereby offer you the sum of £31,000 for the company's interest in the Easington and Undersea royalties, and, in addition, I agree to indemnify you and the company against all claims and liabilities under the Pespool lease, taking an assignment of the same as from May, 1896, and repaying the £1,000

already paid by the Messrs. Lamb." Messrs. Dees and Thompson sent in a tender on behalf of their principals as follows:—"Referring to previous negotiations, we on behalf of the South Hetton Company offer for these royalties such a sum as will exceed by £200 the amount to-day offered for them by the other proposing purchaser, coupled with a transfer of the Pespool lease, if the other offer be upon that footing." Mr. Holmes accepted the tender of Mr. Barwick as the one he ought to act upon, and the plaintiffs brought this action on the footing that they had made the highest net money tender. They claimed specific performance of their alleged contract, an injunction to restrain the carrying out of a sale of the royalties to Mr. Barwick, and damages. Mr. Justice North on the construction of the letters set out in the statement of claim, came to the conclusion that if the plaintiff's tender could be considered "the highest net money tender," it did not fulfil the condition "all other things being equal and satisfactory." In his Lordship's opinion this was an ingenious attempt on the part of the plaintiffs to get behind the offer of their rival bidder, and the statement of claim showed no just cause of action. It would therefore be struck out and the action dismissed with costs. The plaintiff company appealed.

Mr. Swinfen Eady, Q.C., and Mr. O. Leigh Clare were for the plaintiff company; Mr. Cozens-Hardy, Q.C., Mr. Vernon Smith, Q.C., and Mr. Micklem were for the defendant company and the liquidator; and Mr. Younger was for Mr. Barwick.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the question to be determined was whether the plaintiffs' offer fairly answered the description of what the liquidator bound himself to accept, or, in other words, was it the highest net money tender? Whether it was a tender at all depended not upon the construction of the plaintiffs' letter but upon what other people tendered. That was not what was meant by the liquidator. The plaintiffs' offer was illusory. It did not answer the description of the highest money tender either in the business sense or in the legal sense of the words. To hold that the plaintiffs' offer answered that description would be to encourage trickery and chicanery. It would be opening the door to the grossest fraud not only towards purchasers but towards vendors also. Further than that, the liquidators agreed to accept the highest money tender only on condition of all other things being equal and satisfactory. His Lordship agreed with the learned Judge below that this condition had not been fulfilled. Giving the plaintiffs the full benefit of all the previous correspondence, this letter was ambiguous as to the terms upon which the Pespool property was to be assigned. The liquidator was perfectly justified in not considering this a satisfactory tender. Both points were absolutely fatal to the plaintiffs' claim. There was no contract at all. The appeal should be dismissed with costs.

LORD JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

[Solicitors—Crossman, Prichard, Crossman, and Block, for Dees and Thompson, Newcastle-on-Tyne; Botterell and Roche; E. Flux and Leadbitter.]

Chan. Div. } 1898.
(Wright, J.) } March 9.
IN RE COOLGARDIE CONSOLIDATED GOLD MINES

(LIMITED).*

Company—Shares—Issue of shares as fully paid
—Companies Act, 1867, sec. 25—Filing of contract—Liability.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

*Reported by F. EVANS, Esq., Barrister-at-Law.

This was an application to exclude the names of shareholders from the list of contributories on the ground that the shares were to be deemed to be fully paid up, as having been issued in pursuance of a contract filed with the registrar of joint stock companies under section 25 of the Companies Act, 1867. The agreement was made in 1895, and was for the sale by the Yilgarn Exploring Company (Limited) to the Coolgardie Company of certain mining claims. The purchase money was to be £75,000, and, as to £30,000 of this sum, the contract provided that the directors of the purchasing company might discharge it either wholly in cash or partly in cash and partly in fully-paid-up shares, or wholly in fully-paid-up shares, and "for that purpose the shares from 30,008 to 60,007 shall be set aside for issue to the vendors or as they shall appoint, in case the directors shall so decide to pay in shares, and such shares shall be issued solely as fully-paid-up shares without any liability whatsoever accruing thereon." The directors did decide to discharge the purchase money in fully-paid shares, and before the shares were issued to the applicants the contract was filed at Somerset House. But nothing showing that this option had been exercised was filed until after the shares had been issued.

Mr. John Chester and Mr. Marten supported the application; and Mr. Jenkins, Q.C., and Mr. Ward Coldridge opposed it on behalf of the liquidator.

MR. JUSTICE WRIGHT said that he must be guided by the plain language of section 25 of the Companies Act, 1867, although there might be great hardship to the applicants. That injustice, if it was such, had followed from the language of the Act in other cases. The doctrine of estoppel did not arise here. The case turned on the words in the section, "unless the same shall have been otherwise determined" by the contract. It was otherwise determined when the option was exercised, but not before that was done, and when the document was filed it was not a contract to issue shares. It only became such a contract when the option was exercised. To decide otherwise would open wide the door to frauds and uncertainties, which the section was passed to avoid. His Lordship must decide this point against the applicants, but there were other points which he would allow them to argue on another day.

[Solicitors—Bonner, Thompson, Burnie, and Co.; P. J. Gordon and Son.]

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.JJ.) }

1898.
March 10.

IBBOTSON V. IBBOTSON BROTHERS AND CO. (LIMITED).*

Company—Shares—Shares issued as fully paid—
Filing of contract—Companies Act, 1867, sec. 25.
Decision of Wright, J. (13 *The Times* L.R.,
p. 589), affirmed.

This was an appeal by the defendants from the judgment of Mr. Justice Wright at the trial of the action (reported in 13 *The Times* Law Reports, 589). The plaintiff claimed £8,000, being the balance of the purchase-money due upon the sale of a business to the defendant company, and £2,500 for money lent, with interest. The plaintiff also claimed damages for the non-registration by the company of a contract to issue to him fully-paid shares in the company. The defendants admitted that £8,000 was due, subject to a deduction of £2,228, and they counterclaimed for £20,000, being £80 per share on 250 shares, and a declaration that the plaintiff held 200 shares subject to a liability to pay for them in full. The defendants also claimed damages for negligence on the part of the plaintiff as managing

director of the company. The learned Judge gave judgment for the plaintiff for the £10,500 claimed, with interest, and disallowed the set off of £2,228; and he disallowed the defendants' counterclaim for the calls on the shares and for the declaration, and gave judgment in their favour for £1,500 damages for negligence. The present appeal only related to the liability of the plaintiff for calls. The facts, which were very complicated, are stated in the judgment hereunder.

Mr. Tindal Atkinson, Q.C., and Mr. Theobald appeared for the defendants; Mr. Stanger, Q.C., and Mr. T. W. Chitty for the plaintiff.

The COURT, having taken time to consider, delivered judgment to-day dismissing the appeal.

LORD JUSTICE A. L. SMITH read a judgment, in which he said:—The point to be determined upon this appeal has only to be stated to show what I can but call the unrighteous contention of the defendants, who are a company limited, and the appellants in this case. It is this, that, having in the year 1872 contracted to purchase of the plaintiff and his brother their lands and works upon which they had theretofore carried on the business of steelworkers at Sheffield, together with their goodwill, machinery, and plant, for the sum of £74,000, to be paid, in part, by fully-paid-up shares and part-paid-up shares, they now, although they have failed to hand to the plaintiff one single fully-paid-up or part-paid-up share, and do not intend to do so, but have, as they now assert, handed him instead thereof shares with a liability thereon of £40,000, say that they can, nevertheless, keep his property and make him pay to them £40,000 in cash for having thus contracted to part with his property to them. My brother Wright refused to accede to this contention; but, as it has been argued before us for two days that he is wrong, and that this is the effect of section 25 of the Companies Act, 1867, combined with the numerous decisions thereon, I must deal with the case as shortly as I can. Section 25 of the Companies Act, 1867, is as follows:—
"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." It is to be borne in mind that throughout the transactions, which commenced in 1872 and ended in 1877, the contracting parties have acted in perfect good faith; that a valuable business in the year 1872 was contracted to be sold by the plaintiff and his brother to the promoters of the defendant company then about to be formed for the purpose of acquiring the plaintiff's property and business; that no case has been made that the price then contracted to be paid was other than a fair and proper price, and that the company, since they became a company, have successfully carried on the business contracted to be purchased, and have been and still are a prosperous and thriving company. In this case no question arises of a liquidator intervening, or of creditors, or of a winding-up of the company. The facts are as follows:—By an agreement under seal dated May 11, 1872, and made between the plaintiff and his brother of the one part and certain gentlemen who were promoters of the defendant company, which was then about to be formed, of the other part, the plaintiff and his brother agreed to sell to the promoters for and on behalf of the intended company their freeholds, leaseholds, stock-in-trade, goodwill, and plant as and from the preceding January 1 for the price (subject to valuation as therein provided) of £74,000, and it was agreed that the plaintiff's interest in such property (which was two-thirds of the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

whole) should be paid for to him by the company, by, amongst other payments, 200 fully paid-up shares of the intended company of £100 each, representing £20,000 in money, and by 250 shares of £100 each, £80 paid, representing a further £20,000 in money, that is, £40,000 in all. By clause 10 of this agreement it was provided that "the purchase and sale of such of the freehold and leasehold hereditaments and the fixed plant and machinery thereon as were then the property of the vendors, and which were in the meantime to be leased to the company, should commence and take effect as and from the 1st of January, 1877." Four days after this agreement, that is, upon May 15, 1872, the plaintiff subscribed the memorandum of association of the company for 450 shares. Nothing is stated upon the face of the memorandum of what these shares consisted, but they, in fact, represented 200 £100 shares, which were contracted to be fully paid-up, and 250 £100 shares also contracted to have £80 paid thereon as before mentioned. The articles of association are of equal date with the memorandum, and upon May 17, 1872, the company was registered. The agreement of May 11, though set out in the articles and stated therein to have been ratified and confirmed, was never adopted by the company by any formal resolution, though the company upon registration entered upon the premises and works and at once proceeded to carry on the business therein which had heretofore been carried on by the vendors, as if the company had formally adopted the agreement. Share certificates for the shares for which the plaintiff had subscribed the memorandum were handed to him by the company, each party at this time believing that the company were handing to the plaintiff fully-paid-up and partly-paid-up shares in accordance with their contract. It was at this time thought either that registering the articles of association with the Registrar of Joint Stock Companies, which was done, a verbatim copy of the agreement of May 11 being contained, was a sufficient compliance with the requirements of the section, or from want of knowledge, or from forgetfulness of the section, that no contract other than that contained in the articles of association, or no contract at all, needed to be registered. I do not stop to discuss whether the authorities are such as to compel me to hold that the registration of these articles was not in the present case a sufficient registration of a contract within the meaning of section 25, for in the view I take of this case it is wholly unnecessary to do so, and I will assume that no sufficient contract was registered at this time to satisfy the section. But if this be so, it appears to me clear that the company failed to perform their part of their contractual obligation with the plaintiff, which was to in part pay him for his property by fully-paid-up and partly-paid-up shares, for it was only by registering a sufficient contract at the proper time that the company could fulfil their part. It was the duty of the company to pay the plaintiff in fully-paid-up and partly-paid-up shares, and consequently it became their duty to register the necessary contract, for in no other way could they carry out what they had contracted to do. It was argued by counsel on behalf of the company that they had performed their contract with the plaintiff by handing him shares, though not fully-paid-up or partly-paid-up, and with a liability of £40,000 attaching thereto, and that it was the plaintiff's own fault that the shares were not fully-paid-up or partly-paid-up, for he had not registered the contract as he should have done. In this I do not agree. It was the defendant's duty to register a sufficient contract, for to give a man shares with a liability of £40,000 thereon is not. I venture to think, a performance of a contract

to give him shares with no liability thereon. Some five months after the registration of the company it appears that the necessity of registering some contract under section 25, other than the articles of association containing a copy of it, dawned upon the parties, for upon October 22, 1872, I find the company entering into a contract with the vendors which shows that the necessity of registering some other contract was then recognized, and the contract of October 22, 1872, was accordingly executed and registered. This contract with the company, although registered, is said not to be sufficient to satisfy the section because it was not registered "at or before" the issue of the shares, and I will take it that this is so. After this contract matters continued until the year 1877 as they had done before. It will be remembered that it had been expressly agreed by the contract of May 11, 1872, that the purchase and sale of the freeholds and leaseholds of fixed plant to the company, which were to be leased to the company in the meantime, was not to commence and take effect until five years afterwards—viz., from January 1, 1877. There had, during those five years, been no conveyance or assignment of these properties by the vendors to the company; the legal title to the lands, fixed plant, and machinery thereon, subject to the lease thereof to the company, still remained in them. When the year 1877 arrived all parties were fully alive, not only to the position of matters, but also to the requirements of section 25. The plaintiff was aware that he had not received fully-paid-up and partly-paid-up shares for his property as contracted by the company, and instead thereof that he held shares with large liabilities thereon. The company were also aware that they had not carried out their part of their contract with the plaintiff, and that the vendors—that is, the plaintiff and his brother—had not as yet conveyed and assigned their property to them. In these circumstances the company could not have compelled the vendors to convey their property to them, although the time had arrived for their doing so, unless they were ready and willing to perform their part of the contract—namely, pay the price, which they had never done and which they were not then in a position to do, by handing the plaintiff the fully-paid-up and partly-paid-up shares. In my judgment at this time the vendors were in a position to have brought ejectment against the company, and the company would have had no defence, the lease having run out. To get rid of these difficulties an extraordinary general meeting of the shareholders was summoned and held upon August 22, 1877. This meeting was duly convened and the resolutions were duly confirmed on September 8, 1877. At this meeting it was resolved that the articles of association of the company should be altered by repealing and omitting the whole of article 3 (that is, the article containing the agreement of May 11, 1872) and by inserting in lieu thereof the following article:—"In lieu and stead of the agreement of May 11, 1872, heretofore subsisting as the basis of the arrangement between the vendors and the company, Henry Ibbotson Ibbotson and Charles Harvey, as directors of the company, are authorized to execute in the name and on behalf of the company and seal with the company's seal the indenture, a copy of which is as follows"; and article 3 was thus altered. This indenture is dated September 8, 1877, and is made between the company and the vendors, and after reciting that it was the intention of the company and the vendors that the latter were to be paid for their property in part by fully-paid-up and partly-paid-up shares, and that grave difficulties might arise in effectuating such intention and for avoiding which it was agreed between the company and the vendors that mutual releases should be executed and that the

purchase and sale of the property referred to in the agreement of May 11, 1872, should be for cash, it was witnessed that the vendors and the company mutually released each other from the further performance of the agreement of May 11, 1872, and in consideration (amongst other things) of £60,000 (*i.e.*, £40,000 to the plaintiff and £20,000 to his brother) paid by the company to the vendors on the execution of the indenture, the vendors agreed to sell and assure to the company and the company agreed to purchase the property of the vendors, and that a conveyance of the freeholds and leaseholds should be executed by the vendors when required by the company, and that the vendors should assign to the company their goodwill, trade-marks, patents, and patent rights, and in the meantime hold the same in trust for the company. There is no suggestion that the resolution in this case went beyond the memorandum. It is said that it was *ultra vires* of the company to alter their articles so that they should pay cash for what they had already purchased and paid for by shares. That is not the present case or anything like it, for to pay a man for his property with pieces of paper with a liability of £40,000 thereon is not in truth and in fact a payment for his property at all, especially under a contract to pay him by fully-paid-up and partly-paid-up shares. His Lordship said that he could see nothing *ultra vires* in the company *bona fide* resolving to alter the mode of payment for the property which they were authorized to purchase by the memorandum, and which they had not yet paid for as contracted. In his opinion, the resolution did not in the circumstances of the case sin against section 25. When the contract of September 8, 1877, was executed, the company by cheque paid to the plaintiff for his share in the property about to be conveyed to the company the sum of £40,000, and the plaintiff by cheque paid to the company the amount of his liability upon the shares which he held, which also amounted to £40,000. The company, upon the faith of this payment in cash having got the necessary conveyances and assignments executed to them, 18 years afterwards turned round and asserted that they could keep the plaintiff's property and make him pay back the £40,000 in cash for having conveyed his property to them. On September 8, 1877, the company gave a receipt to the plaintiff for £40,000, being £20,000 in payment in full for 200 shares in the company in respect of which the plaintiff had subscribed the memorandum of association, and £20,000 in payment of £80 per share on 250 shares, being the residue of the shares in respect of which he had subscribed the memorandum. Thus it was that the sale and purchase of the plaintiff's property to and by the company was upon September 8, 1877, honestly carried out between the parties, the company obtaining the conveyance and assignment of the plaintiff's property to them, and paying him the value thereof, and all matters between him and the company as regards the purchase and sale were closed. For 18 years after this the company continued to work the business with prosperity and success until a new direction came upon the scene, and the present unrighteous claim for £40,000 was made upon the plaintiff. Mr. Justice Wright had most properly dismissed this claim. He (the Lord Justice) entirely agreed with him, and also with the excellent judgment he had given, and consequently this appeal must be dismissed with costs.

LORD JUSTICE CHITTY read a judgment to the same effect.

LORD JUSTICE COLLINS concurred.

Mr. TINDAL ATKINSON, Q.C., applied for a stay of execution pending an appeal to the House of Lords.

LORD JUSTICE A. L. SMITH.—No. We will not help you at all.

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } March 10.
FOX V. THE "EVENING NEWS" (LIMITED)—SAME V.
THE "STAR" NEWSPAPER (LIMITED).*

Practice—Nonsuit—O. 26—Discontinuance.

The effect of O. 26 is to do away with a plaintiff's right to take a nonsuit.

These were two applications by the plaintiff for new trials in the above actions. The plaintiff was a practising barrister, and was the Registrar of the Croydon County Court, and the actions were brought in respect of alleged libels published in the *Evening News* and the *Star*. At the trial of the action against the *Evening News*, before the Lord Chief Justice and a special jury, the jury found a verdict for the defendants. The action against the *Star* was next in the list before the Lord Chief Justice and a special jury, and the plaintiff's counsel, after the verdict of the jury in the first case, said that he did not propose to offer any evidence in that case. The cases are reported in *The Times* of December 17. For the purposes of these applications the facts are sufficiently set out in the judgments.

The plaintiff appeared in person.

Mr. Blake Odgers, Q.C., appeared with Mr. Haydon for the defendants in the first case. Mr. Temple Franks appeared with Mr. Blake Odgers, Q.C., in the second case.

The Court dismissed both applications.

LORD JUSTICE A. L. SMITH said that the plaintiff, Mr. Fox, brought two actions, one against the *Evening News* and the other against the *Star*, for what he alleged to be serious libels on himself containing reflections on him as the Registrar of a County Court. He would presently read the alleged libel which appeared in the *Evening News*. That which appeared in the *Star* was almost identical with it, though there were some differences. The action against the *Evening News* came on to be tried before the Lord Chief Justice and a special jury immediately after the conclusion of another newspaper libel case, in which a verdict had been returned for the defendants. It seemed that the Lord Chief Justice, having read the libel complained of, made some observations, which might have been strong observations, on the bringing of actions of libel against newspapers on trivial grounds, where no real attack had been made on the plaintiff's character, and he said he thought that Mr. Fox ought to have had more sense than to have taken any notice of these paragraphs. Mr. Fox's counsel opened the case, and put his client in the box. He was examined and cross-examined, and the hearing of the case continued in due course. When the Lord Chief Justice was about to sum up the jury said they were agreed, and gave a verdict for the defendants. Mr. Fox now said that there had been a miscarriage of justice, and that the action had not been fairly tried. His Lordship thought there was great force in the observation of Mr. Odgers that, if the Lord Chief Justice had made the remarks which the plaintiff complained of during his summing-up, there could be no pretence for objecting to them. He did not think there was any unfairness in the trial. The plaintiff contended that he was entitled in law to a verdict. The jury, however, had found a verdict for the defendants, which meant that in their opinion there was no libel. The question in the case was whether the words complained of were a libel. His Lordship read the paragraph in the *Evening News*. It was headed "What the peer said," which was printed in large type to catch the eye. It purported to be an amusing account of an incident in the Croydon County Court, and described how the

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

plaintiff, seeing an elderly gentleman, who was stated to be Lord Cahir, making for the well of the Court, where the solicitors were seated, roared at him, "What are you about, Sir?" The plaintiff at the trial complained of the use of the word "roared," but he passed that by now, and complained that the paragraph omitted to state that the gentleman was shouting and gesticulating in the body of the Court, and that this omission made it appear that the plaintiff had acted unreasonably. The paragraph went on to say that the gentleman paid no attention, and that the plaintiff then roared out, "Turn that man out," and that his lordship then retorted, "Turn me out! that be d--d for a tale"; and that the plaintiff told a constable to turn him out, but not to use unnecessary violence, and that he was turned out accordingly. Could any human being after reading that think any the worse of Mr. Fox, or any the better either? In his opinion it was not in any sense a libel imputing misconduct to the plaintiff in his office, and the verdict for the defendants in the first case could not be disturbed. Then they came to the next case. The paragraph in the *Star* was headed, "The lord turned out," and it did not contain the word "roar." The plaintiff alleged that this also bore a libellous meaning, but, in his opinion, it was impossible to hold that the words carried the innuendo suggested. The plaintiff, however, took a point of law in this case. The first action having failed, when the second was called on before the same jury the plaintiff's counsel advised him not to proceed with it. The plaintiff, however, did not quite agree with this, and he got up and claimed a nonsuit. The Chief Justice said that he was not entitled to a nonsuit, and that there must be judgment for the defendants. The plaintiff now contended that the Chief Justice in so ruling made a mistake in law. The word "nonsuit" was certainly often used at the present day, but, in his opinion, there was not now any such thing as a real nonsuit. Before the Judicature Acts a plaintiff was entitled to claim a nonsuit after having brought a defendant up to the hearing of the action, and in such a case he was able to bring another action. The rules of 1875 were intended to stop a plaintiff from harassing a defendant in this way, and order 41, rule 6, was made for the purpose of putting a fetter on the right of a plaintiff to claim a nonsuit, by enacting that he should not thereby acquire a right to commence a fresh action, unless the Judge allowed it. The rules of 1875 were repealed by the rules of 1883, and therefore that rule no longer stood; but he thought the question was provided for by the rules as to discontinuance, order 26, and that, when an action had reached the stage of trial, the plaintiff could not discontinue with the right of bringing a second action, except by the leave of the Judge. Both appeals must be dismissed.

LORD JUSTICE CHITTY was of the same opinion. The plaintiff said the case had not been fairly tried. No doubt strong observations had fallen from the Lord Chief Justice. But there had been no mistrial. A Judge was not in libel cases any more than in other cases a mere dignified figurehead, but he was entitled to make such observations as he thought fit. The plaintiff complained of an omission in the report of what had taken place in the County Court. But the jury were entitled to decide on the question of libel or no libel, and they said there was no libel. As to the question of nonsuit he was clearly of opinion that the present order 26 covered everything which had formerly been matter of nonsuit. He thought that now, when the plaintiff had reached the stage of meeting his adversary face to face in Court, it was only by the leave of the Judge that he could withdraw his action in such a way as to enable him to bring another action.

LORD JUSTICE COLLINS referred to the facts and said he could not see that the plaintiff had any legal ground of complaint. He did not think that the incident in the County Court had been satisfactorily reported in the *Evening News*; it did not seem to him to have been reported in a way calculated to give a fair impression of what had occurred. He sympathized with Mr. Fox, and was not at all astonished at his feeling nettled at the manner in which the affair was treated. But the jury were the proper tribunal to determine whether the words constituted a libel or not. Then, had there been a miscarriage of justice? The Lord Chief Justice had not ruled anything; he simply made observations, and expressed an opinion that the action was not worth bringing. But a Judge was not muzzled, and generally if a Judge made observations which the jury thought were not warranted, he would not carry the assent of the jury. He thought that the report in the *Star* was milder and less objectionable than that in the *Evening News*, but the effect was much the same. As to the question of nonsuit, he agreed with what had been said by the other members of the Court.

[Solicitors—Nicholson, Graham, and Graham, for the *Evening News*; Harrison and Davies, for the *Star*.]

Q.B. Div. }
(Bigham, J.) }

1898.
March 10.

WESTOLL V. CARTER.*

Ship—General average—Action for contribution
—Defective machinery.

A vessel having had to put back to repair defective machinery became ice-bound in port.

Held, that the expense of breaking up the ice so as to give her a passage to the open sea was not a matter of general average contribution.

This was an action brought by the managing owner of the steamship *Beneficent* against the defendant, as the owner of cargo carried in that steamer, to recover £61 17s., contribution to a general average expenditure. The defendant objected to the admission in general average of a sum of 5,000 roubles paid to the Neptune Salvage Company under the following circumstances. The *Beneficent*, having on board as part of her cargo certain wheat, the property of the defendant, sailed from St. Petersburg for London on November 12, 1896. On that day, when the vessel had proceeded some little distance from her loading berth, one of her boilers became unworkable owing to a defect, and in consequence she was unable to proceed any further, and it became necessary for her to put back to her berth for repairs. The defect was patched, and on November 13 she started again, but the boiler again gave out at the same place, and she again returned to her berth, where the boiler was again repaired. By November 14, when the repairs were finished, ice had formed in the river between St. Petersburg and Kronstadt, and the *Beneficent* was therefore unable to proceed on her voyage. A contract was then entered into with the Neptune Salvage Company to clear a passage for the *Beneficent* to Kronstadt for a sum of 5,000 roubles. A passage was broken for her by tugs and a large steamer, and she was thereby enabled to make her way through the ice to open water and proceed upon her voyage. The sum of 5,000 roubles was paid to the Neptune Salvage Company for the services rendered. This sum was allowed by the average adjuster in general average. Upon the vessel's arrival in London a general average bond was executed by

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

the defendant, which provided that general average should be ascertained and adjusted in the manner provided by the charterparty. The charterparty excepted the usual perils, and contained the usual negligence clause. It also provided that general average should be in accordance with York-Antwerp Rules, 1890.

Mr. BOYD, Q.C., and Mr. T. MATHEW, for the plaintiffs, contended that the cost of cutting a way through the ice was recoverable in general average:—(1) At common law, because the vessel was in danger of being nipped by ice, and cutting a way through the ice was the most reasonable way of extricating her from that danger. (2) Under the York-Antwerp Rules, 1890, Rule X. (a), which provides that, when "a ship shall have returned to her port or place of loading in consequence of accident . . . which renders that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return, shall likewise be admitted as general average."

Mr. JOSEPH WALTON, Q.C., and Mr. T. E. SCRUTTON, for the defendant, contended that the expenses in question were not recoverable either at common law or under York-Antwerp rules upon the facts stated, and that, further, the return to the loading berth was rendered necessary by a defect in the boiler which amounted to a breach of the warranty of seaworthiness.

The chief engineer of the *Beneficent*, who was called, stated that a crack appeared in the boiler within a very short time of the vessel leaving her loading berth, that he had no doubt that the crack was due to frost, and that the injury was done while the vessel was loading her cargo.

His LORDSHIP, in giving judgment, said that the evidence of the engineer confirmed him in the opinion which he had formed—that the vessel was unseaworthy when she started on her voyage, and that the necessity for putting back arose from that unseaworthiness. That conclusion having been arrived at, there was an end of the plaintiffs' case, but even if the vessel had been seaworthy, in his opinion the plaintiffs would not have been entitled to recover contribution in respect of the expenditure in question. They could not do so at common law, because there was no danger threatening the safety of ship and cargo, which could easily have been discharged if there had been such danger. They could not recover contribution under the York-Antwerp rules, because this expenditure was not, in his opinion, an "expense of leaving" her berth within the meaning of those rules. The expenses meant by the rules were the ordinary expenses of leaving, "corresponding" to the expenses of entering such place. This expenditure was part of the cost of prosecuting the voyage, which must be borne by the shipowner. There must be judgment for the defendant with costs.

[Soliditors—Charles E. Harvey, for the plaintiff; Waltons, Johnson, Bubb, and Whatton, for the defendant.]

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.JJ.) March 11.

SMITH AND OTHERS (OVERSEERS OF WORTHING) v.
RICHMOND (SURVEYOR OF TAXES).*

Rating—Agricultural rates—Agricultural land,
what is—Agricultural Rates Act, 1896,
The greenhouses covering a market garden are

rateable as buildings and not as agricultural land.

Decision of Divisional Court (13 *The Times* L.R., 562) reversed (Vaughan Williams, L.J., dissenting).

This was an appeal by the surveyor of taxes from a decision of the Divisional Court—Lord Justice (then Mr. Justice) Collins and Mr. Justice Ridley—dated August 2 last, and reported in *The Times* of the following day; also in *The Times Law Reports*, Vol. 13, p. 562. The matter came before the Divisional Court on a special case stated by the quarter sessions for West Sussex on an appeal by the overseers of the parish of Worthing from a decision of the assessment committee of the union of East Preston under the Agricultural Rates Act, 1896 (59 and 60 Vict., c. 16). The case raised a question as to the rating of glass-houses over market gardens. By section 1 of the Agricultural Rates Act, 1896, "the occupier of agricultural land" in England is made liable, in the case of every rate to which the Act applies, to pay one-half only of the rate in the pound payable in respect of buildings or other hereditaments. The facts were as follows:—Robert Piper was a grower of fruit, vegetables, and flowers at Worthing, and described himself and was commonly known as a market gardener and nurseryman. He was the owner and occupier of land rather more than four acres in extent, on which 57 glasshouses or greenhouses of various sizes were erected. The houses were used by the appellant for the purpose of growing tomatoes, cucumbers, and grapes, and, to a smaller extent, other vegetables, for the purpose of sale. The plants and crops grown therein were watered and heated by artificial means, and grown upon soil placed upon prepared beds inside the houses and matured much earlier than in the open ground. The vines were planted inside the houses and the roots ran partly in the soil under the houses and partly passed through apertures in the walls into the soil outside. Fifty-one of the glasshouses were thus used for growing vines. In the cucumber houses (which were six out of the 57 houses) there were inside the houses dwarf brick walls supporting corrugated iron sheets, upon which sheets earth taken from the other parts of the nursery ground was placed. In this earth so placed upon the iron sheets the cucumber plants were planted. Beneath the iron sheets and between them and the ground there were hot-water pipes. The area actually occupied by the 57 houses was rather more than two acres. The rest (rather more than two acres) consisted merely of vine borders, paths, and the stakeholes. The whole of the houses were built upon dwarf brick walls like an ordinary greenhouse. It is provided by section 9 of the Act that, "unless the context otherwise requires, the expression 'agricultural land' means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse." For the purposes of the Act section 6, subsection 1, requires certain returns to be made to the Local Government Board. Subsection 2 provides that "for the purpose of the returns statements showing the gross estimated rental and rateable value of the agricultural land in a parish, and in the case of any hereditament separately valued which consists in part of agricultural land and in part of buildings or other hereditaments of each such part, shall be made by the overseers

*Reported by H. B. HUMMING, Esq., Barrister-at-Law.

of every parish and corrected by the assessment committee and sent to the surveyor of taxes and be subject to objection or appeal by the said surveyor and overseers" as therein provided. In pursuance of the requirements of subsections 1 and 2 of section 6, of certain regulations made by the Local Government Board under subsection 3 of that section, the overseers made the prescribed statements, and sent them to the assessment committee and the surveyor of taxes, and in such statements they returned Mr. Piper's property and other property of a similar nature as agricultural land. The assessment committee, however, on the objection of the surveyor of taxes, decided that the statement, to the extent to which it includes land partly covered with glasshouses, was incorrect, and corrected it by striking out that entry. Upon the hearing of the appeal before the quarter sessions it was contended for the appellants, the overseers, that the particulars of the gross estimated rental and the rateable value of the hereditaments in question were correctly entered by them in their statement under the heading of "agricultural land," and that the decision of the assessment committee to correct the statement by striking out the entry was wrong, and in support of their contention they cited the case of "Purser v. Local Board for Worthing" (18 Q.B.D., 818). For the respondent it was contended that the case relied on by the appellants did not decide that the glasshouses were not buildings, but merely that the land was not the less used as a market garden because the glasshouses had been placed upon it, and that moreover the definition of agricultural land in the Agricultural Rates Act, 1896, was to be read subject to the context, and that the context in the Act required that any buildings should be excluded from the term agricultural land, that the glasshouses were buildings within the meaning of the Act, and that it followed that either the whole of the hereditaments in question should be excluded from the overseers' statement, or, alternatively, that so much thereof as consisted of buildings should be inserted under the heading of "buildings not being agricultural land." The quarter sessions were of opinion that the contention of the appellants was right, and allowed the appeal and ordered the statement of the overseers to be altered by restoring all the items which formed the subject of the appeal to the condition in which they were before they were altered by the assessment committee, subject to the statement of a case for the opinion of the Court. Upon the appeal to the Divisional Court the Judges differed, Lord Justice Collins being of opinion that the buildings in question were to be treated as part of the market garden, while Mr. Justice Ridley thought that no buildings were entitled to the partial relief granted to agricultural land. Mr. Justice Ridley, however, as the junior Judge, withdrew his judgment, and consequently the appeal was dismissed. The surveyor of taxes appealed to the Appeal Court. The appeal was heard on February 8.

The Attorney-General (Sir Richard Webster, Q.C.), Mr. Day, and Mr. Trevor appeared in support of the appeal; Mr. Joseph Walton, Q.C., and Mr. Clavell Salter were for the overseers.

The Court allowed the appeal (Lord Justice Vaughan Williams dissenting).

The MASTER of the ROLLS said,—The question in this case is whether glasshouses in or on a market garden are to be rated as buildings or as agricultural land under the Agricultural Rates Act, 1896. The Court of Quarter Sessions held that the glasshouses ought to be rated as agricultural land. On appeal to the Queen's Bench Division the members of the Court were equally divided, and the appeal was dismissed, but leave was given to appeal to this Court. The glasshouses in question are clearly buildings in the ordinary

legal meaning of the word. The case stated leaves no doubt on this point. The question turns entirely on the true construction of the Act of Parliament, 59 and 60 Vict., c. 18. The ninth section contains a definition of agricultural land, but no definition of buildings nor of market gardens or nursery grounds. The Interpretation Act, 1889, contains, in section 3, a definition of land; and this word, when used in subsequent statutes, is to include buildings, unless a contrary intention appears. The Interpretation Act, 1889, contains no definition of buildings, market gardens, or nurseries. The ninth section of the Act of 1896 clearly shows that land there cannot possibly mean or include buildings in the early part of the section, for the definition is that agricultural land means any land used as arable, meadow, or pasture ground only. Market gardens and nursery grounds are, however, also declared to be agricultural land, and this is the enactment which gives rise to the difficulty with which we have to deal. The definition in section 9, however, must not be used to contradict other parts of the Act, or to introduce anomalies which the language of the enacting part of the statute does not justify. Market gardens and nursery grounds may or may not have buildings upon them. If they have not no difficulty arises; but if they have, then comes the question, How are those buildings to be rated? To answer this question, we must look to the enacting clause, which is section 1. (His Lordship read the section and continued.) Here we have "agricultural land" used in connexion with, and, as I think, plainly contrasted with, "buildings and other hereditaments." Similar language is used in sections 5 and 6. This express mention of buildings makes the whole statute perfectly clear to my mind, and removes the doubt caused by the use of the words "market gardens and nursery grounds" in section 9. The only conclusion at which I can arrive is that buildings are not to be treated as agricultural land for rating purposes under this Act of Parliament. The case of "Purser v. Worthing" (18 Q.B.D., 818) does not, in my opinion, assist the Court in construing this Act of Parliament. That case merely shows that a market garden *prima facie* includes the buildings upon it used for market garden purposes. To urge that market gardens and nursery ground do not cease to be so because they are more or less covered with glasshouses is to urge what is quite true, but is beside the mark. The question is, How are such houses to be rated under this Act of Parliament? My answer is, if they are buildings, they must be rated as such, and not as agricultural land. Mr. Salter, in his very able argument, suggested that buildings used only for covering land which was cultivated under their protection ought to be distinguished from other buildings, and ought to be held to be agricultural land. I can find nothing to justify a distinction between one class of buildings and another for any such purpose as his argument requires. Section 5 speaks, no doubt, of buildings used only for the cultivation of land, but this clause in no way shows that such buildings or any others are to be rated as agricultural land. The case of "The London and North-Western Railway v. Llandudno Commissioners" ([1897] 1 Q.B., 287) turned on the construction of a provision in another Act of Parliament, and does not really assist me to arrive at the true interpretation of the statute with which we have to deal. In my opinion, the appeal must be allowed and the orders of the Queen's Bench Division and of the quarter sessions must be reversed, with costs here and below.

LORD JUSTICE RIGBY delivered a written judgment to the like effect.

LORD JUSTICE VAUGHAN WILLIAMS differed. His Lordship agreed with Lord Justice Collins that the cases of "Purser v. Worthing Local Board" and "The

London and North-Western Railway Company v. Llandudno Commissioners" showed that *prima facie* this land covered with these glasshouses was part and parcel of the market garden, and therefore agricultural land, the occupier of which was entitled to the benefit of this exemption. The form and collocation of words used in this Act was not new as defining partial exemptions in rating cases. It was to be found as early as the Public Health Act, 1848, and in the Public Health Act, 1875, and had uniformly received such a construction that the hereditaments catalogued in the definition had been held to include the buildings thereon, whenever the buildings in question were part and parcel of the specified hereditament. The buildings in such cases were treated as being practically incapable of beneficial occupation independently of the defined hereditament. He could find nothing in the tenour or details of this Act to lead to the conclusion that the words "market gardens" and the other collocated words should receive a different construction, so as to exclude from agricultural land the buildings on each hereditament, whatever their character. After discussing sections 1, 5, 6, and 9, his Lordship arrived at the conclusion that the land covered with glasshouses fell within the exemption, because the buildings were part and parcel of the market garden, which, by the terms of the definition, was agricultural land, and were used exclusively for the purpose of cultivating the land.

[Solicitors—The Solicitor of Inland Revenue; Ravenscroft, Hille, and Woodward, for Melville Green and Charles, Worthing.]

Court of Appeal (A. L. Smith, J.
Chitty, and Collins, L.J.J.)

1898.
March 11.

THE ATTORNEY-GENERAL V. THE MAYOR, &C., OF
TYNEMOUTH.*

Local Government—Expenses—Application of
borough rate—Validity—Payment of costs of
licensing appeals.

Held, that borough funds cannot be applied by
the town council in payment of costs incurred by
the chief constable in connexion with licensing
appeals.

Decision of Divisional Court (13 *The Times*
L.R., 412) affirmed, but on different grounds.

This was an appeal from a judgment of a Divisional Court (Mr. Justice Grantham and Mr. Justice Wright) on a special case stated in an action between the Attorney-General, on the relation of the Newcastle Breweries (Limited), and the corporation of the borough of Tynemouth. The case is reported in 13 *The Times Law Reports*, 412. The action was one whereby the plaintiffs claimed (1) a declaration that any agreement by the defendant corporation to indemnify the chief constable against costs he might have, or might have had, to bear or pay in connexion with licensing appeals from the borough justices to quarter sessions, and any payment pursuant thereto, or any payment of such costs by the defendant corporation, was *ultra vires* and void; and (2) an injunction restraining the defendants from making or acting on any such agreement or from making any such payment. The plaintiffs, the Newcastle Breweries (Limited), were ratepayers in the borough of Tynemouth, and as such were interested in preventing any misapplication of the borough funds. At a meeting of the watch committee of the town council held on August 13, 1895, a resolution was passed authorizing the chief constable of the

borough to obtain legal assistance at the ensuing brewster sessions. A similar resolution was passed at a meeting of the council held on August 21. At the brewster sessions held at North Shields on August 23 the chief constable of Tynemouth raised objections to the renewal of certain alehouse or full licences under the Licensing Acts for the sale of intoxicating liquors held by persons in respect of premises situate in the borough. After hearing the objections, the justices refused to renew such licences. The holders of five of the licences gave notice of appeal from such refusal to the quarter sessions. On September 27, at a meeting of the watch committee, it was resolved that the opinion of counsel should be obtained whether the watch committee or the council had power to authorize the chief constable to act as respondent in the licensing appeals and pay his costs. On October 10, the watch committee, having had the opinion of counsel submitted to them, refused to authorize the chief constable to act as respondent in the appeals or to indemnify him against any costs. On October 15, at a meeting of the council, it was resolved:—"That the chief constable, who is the respondent in the licensing appeals from the decisions of the borough justices, be authorized to oppose such appeals, and that the council agree to indemnify him against any costs which he may have to bear or pay in connexion with the appeals as such respondent." On the hearing of the appeals the chief constable appeared by counsel and opposed the appeals, which were dismissed with costs. The costs incurred by the chief constable in opposing the appeals exceeded the amount of the costs which, on taxation, he recovered from the appellants by the sum of £132 5s. On November 19, at a meeting of the new watch committee, it was resolved:—"That the committee direct payment of the solicitors' (Messrs. Adamson and Adamson) account, amounting to £132 5s., being the difference between the fees paid to counsel and the amount allowed on taxation. The question for the opinion of the Court was whether the said resolution of the council to indemnify the chief constable against the said costs was *ultra vires*, and if any payment pursuant thereto, or any payment of the said costs by the defendant corporation pursuant to the direction of the watch committee, would be *ultra vires* and void. The Divisional Court gave judgment for the plaintiffs on the ground that the authorization and indemnity given by the council on October 15 were not sufficient, and that there had been no sanction by the watch committee as required, as the sanction of the new watch committee could not reverse the decision of the former committee. The defendants appealed.

Mr. Asquith, Q.C., and Mr. Macmorran, Q.C., appeared for the defendants: Mr. Lawson Walton, Q.C., Mr. T. W. Chitty, and Mr. D. H. Crompton for the plaintiffs.

The COURT, having taken time to consider, delivered judgment to-day dismissing the appeal.

LORD JUSTICE A. L. SMITH read a judgment in the course of which he said that the important question was raised whether the borough fund could be used by the town council for the purpose of opposing publicans seeking to obtain renewals of their licences. The borough fund of this borough had no surplus. Four points were raised, two under the Municipal Corporations Act, 1882, one under the Borough Funds Act, 1872, and one upon which the Queen's Bench Division decided. Part IX. of the Act of 1882 comprised a group of sections which dealt with the appointment of a watch committee and the powers they had over the police of the borough: section 191 had reference to the powers and duties of the watch committee in relation to the borough police, such as their appointment, supervision, dismissal, and making the force generally

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

efficient. The watch committee had nothing to do with the carrying out of the licensing laws in the borough. As regards the formation of the borough fund, section 139 provided what payments were to be made into it so as to constitute the fund; and section 144 provided for the making of a borough rate, should the borough fund be insufficient "for the purposes to which it is applicable under the Act or otherwise by law." Section 140 dealt with the application of this fund when formed. By subsection 1 of this section it was enacted that the borough fund should be applicable to and charged with the several payments specified in schedule 5 of the Act. Subsection 2 enacted that the payments specified in part I. of schedule 5 might be made without order of the council; those specified in part II. might not be made without such order. By subsection 3 it was enacted that no other payment should be made out of the borough fund except under the authority of Parliament, or by order of the council, or by order of the Court of Quarter Sessions for the borough, or by order of a justice in pursuance of the Act, or in cases in which the Court of Quarter Sessions for a county or a justice might make an order for the payment of money on the treasurer of the county. Section 141 enacted that an order of the council for payment of money out of the borough fund should be signed by three members of the council and countersigned by the town clerk. Section 143 enacted that if the borough fund was more than sufficient for the purposes to which it was applicable by law the surplus should be applied under the directions of the council for the public benefit of the inhabitants and improvement of the borough. It was under schedule 5 that the first point was taken by the corporation, and it was said that it authorized the payment of the costs in question out of the borough fund. It was headed "Payments out of the Borough Fund." Part II. authorized payments out of the borough fund upon the order of the council for certain purposes, amongst others (5) to or in respect of the borough police, including (d) all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force. This schedule was explicit as to what payments were to be made out of the borough fund. It was argued for the corporation that sub-clause (d) authorized the payment of the costs incurred in opposing publicans seeking to obtain renewal of their licences out of the borough fund. In his judgment it was out of all reason to attempt to strain the words "in respect of the borough police," "for the purposes of the borough constabulary force," into covering the costs of the counsel and witnesses of a litigant chief constable acting hostilely at quarter sessions to an appellant publican in a licensing appeal. Such a proceeding was not in respect of the borough police nor for the purposes of the borough constabulary at all; it was for the purpose of opposing a publican obtaining a renewal of his licence and nothing else, which was no part of the duty of a police-constable nor of the watch committee nor of the council of a borough. A chief constable might well attend quarter sessions as a witness to give information if required, but it was no part of his duty to act as a litigant party thereat. The recent case of "Boulter v. Justices of Kent" (1897, A.C., 556) had no bearing upon this case. Mr. Justice Blackburn, in "Reg. v. Mayor of Liverpool" (41 L.J., Q.B., 175), when dealing with section 82 of the Municipal Corporations Act, 1835, which was a similar section to clause 5 of schedule 5, held that the last clause therein, which was similar to sub-clause (d), was to be construed as referring to matters *ejusdem generis* with those previously mentioned, and was confined to

acts affecting the constabulary force. In that he (the Lord Justice) agreed, and he was of opinion that no part of schedule 5 authorized the payment of these costs out of the borough fund. The next point was that taken by the corporation upon the Borough Funds Act, 1872. In 1871 the Court of Queen's Bench in "Reg. v. Mayor of Sheffield" (L.R., 6 Q.B., 652) held that under the Municipal Corporations Act, 1835, the borough fund could not be charged with the costs and expenses incurred by the council in opposing before justices certain regulations proposed by a water company which would impose onerous conditions upon the consumers nor in opposing a Bill in Parliament subsequently promoted by the company which was also detrimental to the interests of the inhabitants. The Court held that unless the borough fund showed a surplus it could not be applied in payment of these costs and expenses. In the next year, in consequence probably of that decision, the Borough Funds Act, 1872, was passed. Section 2, in his opinion, meant the taking of some legal proceedings by or on behalf of the inhabitants against some person or persons in order to promote the interest of the inhabitants, or defending some legal proceedings brought against the corporation or the inhabitants by some person or persons in order to protect the interest of the inhabitants. The intervention of a police-constable as a respondent at quarter sessions in a licensing appeal was neither the one nor the other. His Lordship now came to the point raised upon sections 140-142 of the Act of 1882. What Mr. Justice Blackburn said of the Municipal Corporations Act, 1835, in "Reg. v. Mayor of Sheffield" (L.R., 6 Q.B., at p. 661), which was the precursor of the Act of 1882, was, in his judgment, applicable to the Act of 1882. It was argued that section 140, subsection 3 (b), taken in conjunction with section 141, subsection 2, authorized a payment out of the borough fund whenever there was "an order of the council," subject only to the liability of the order being disallowed in whole or in part by the Queen's Bench Division. It was clear to him that this subsection must have some limitation. It could not mean to authorize any payment the council might order. That would be absurd. It was said that the sole limitation was the control of the Queen's Bench Division given by section 141, subsection 2. He did not read the section so. It could not be said that section 140, subsection 3 (c) and (d), dealing with orders of the Court of quarter sessions or an order of a justice in pursuance of the Act, meant that any order of quarter sessions of a justice directing payment out of the borough fund would authorize a payment out of the fund even though they were orders for payment for purposes other than those authorized by the Act or otherwise by law. The words "or otherwise by law" were new in the Act of 1882, and appeared to have reference to the Borough Funds Act, 1872. It could not be said that as to these orders of quarter sessions or of justices section 141, subsection 2, applied, for it obviously did not, and therefore there was no such limitation as was suggested of the controlling power of the Queen's Bench Division applicable to them. Then what was the limit as to the making of the orders by the council, by quarter sessions, and by justices? He could find none other than that orders could only be made for those purposes for which the Act of 1882 and the Act of 1872 might be applied. He could in those Acts find no pretence for saying that the borough fund was to be applied for opposing publicans who were appellants at quarter sessions. The true reading of section 140, coupled as it must be with sections 141, 142, and 143, was that, until the borough fund had discharged the several purposes for which by the Acts of 1882 and 1872 it was applicable, the borough fund could not be resorted to by the council to

pay thereout for matters outside those purposes, but should the borough fund be more than sufficient for the purposes to which by those Acts it was made applicable, then the surplus, if any, might be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. In his opinion section 141 was a restraining and not an enabling section as regards the powers of the council. His Lordship did not wish to be understood that, if there were a surplus, these costs could come within the words "for the public benefit of the inhabitants and improvement of the borough," but this point he had not to decide in this case. For these reasons he was of opinion that neither under schedule 5 nor under the Borough Funds Act, 1872, nor under sections 140-143 of the Act of 1882 could these costs be legally paid out of the borough fund. As regards the last point, the learned Judges in the Court below did not deal with the construction of the Municipal Corporations Act, 1882, nor with the Borough Funds Act, 1872. They determined the case upon the ground that the new watch committee had no jurisdiction to overrule what had been done by their predecessors in office, and make the order they did upon November 19, 1895. He was not satisfied as to this, but as he determined the case adversely to the corporation upon the main points, although the Court below decided it adversely to them upon a different ground, the judgment must be affirmed and the appeal dismissed with costs.

LORD JUSTICE CHITTY read a judgment to the same effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Patersons, Snow, Bloxam, and Kinder, for Ranson, Nelson, and Mesnard, Sunderland, for the plaintiff; Sharpe, Parker, Pritchards, and Barham, for H. A. Adamson, Tynemouth.]

Q.B. Div. }
(Bruce, J.) }

1898.
March 12.

KNIGHT V. NORTH METROPOLITAN TRAMWAYS COMPANY.*

Master and Servant—Master's liability to third persons—Scope of servant's authority—Tramway company—Prosecution for passing bad money—Company held not liable.

This was an action for false imprisonment and malicious prosecution. The defence was that the defendants' servant was not acting within the scope of his authority in detaining and prosecuting the plaintiff. Mr. Ruegg, Q.C., and Mr. Norman Craig were for the plaintiff; Mr. Kemp, Q.C., Mr. C. W. Mathews and Mr. F. Richardson were for the defendants.

It appeared that the plaintiff, a leather merchant, of Hackney, was going home one night last April with his wife on a tramcar belonging to the defendants, and he gave the conductor a sixpence in payment of the fares. The conductor gave him fourpence change, but shortly afterwards came back and said that plaintiff had given him a bad sixpence. The conductor had bent the coin, and plaintiff said that it was good money, and he would not give another instead of it. When he got out of the car the conductor, at the bidding of one of the defendants' inspectors, gave him into custody on a charge of passing false coin. Next day the conductor appeared at the police-court to prosecute the plaintiff, but the magistrate dismissed the charge. Another inspector of the company was present during the hearing. When the sixpence came to be examined it had been found to be a perfectly good coin. The plaintiff

said in his evidence that his credit had been stopped owing to these proceedings. The tramway company had dismissed the conductor for what had happened and had apologized to the plaintiff.

At the conclusion of the plaintiff's case, Mr. KEMP, Q.C., submitted that there was no case to go to the jury, as there was no evidence as to the duties and powers of inspectors and conductors. There was no express authority in them to give a person into custody, and there was no authority to be implied from their position. The property of the company was not in any danger, nor were they acting for the purpose of protecting it. The learned counsel quoted "Abrahams v. Deakin" ([1891] 1 Q.B., 516) and "Charleston v. London Tramways Company (Limited)" (4 *The Times* Law Reports, 629).

Mr. RUEGG, Q.C., said that the first case was clearly distinguishable, and all that the second amounted to was that it was not to be implied that the conductor of a tramcar had authority to give a person into custody. Here there was evidence of direct authority.

MR. JUSTICE BRUCE said that he was inclined to agree with Mr. Kemp, but he preferred to take the opinion of the jury in order to save the possible expense of a new trial.

No witnesses were called for the defence. The following questions were left to the jury:—(1) Whether the act of the conductor was done to serve his own ends in consequence of a dispute with the plaintiff, or was it done, as he supposed, in the interests of his employers and to protect their property? (2) Did the company take steps to support the act of the conductor? (3) What was the amount of the damages?

The jury found that the conductor acted in the supposed interest of his employers; they answered the second question in the affirmative; and they assessed the damages at £60.

Judgment was postponed to admit of the consideration of the legal points raised.

MR. JUSTICE BRUCE subsequently delivered a written judgment, in the course of which he said:—I have felt considerable doubt about this case, and after consideration I have come to the conclusion that I should enter judgment for the defendants. I did not think it right to stop the case at the time, because I thought it better that any facts that either party wished to be submitted to the jury should be found by them, and that the jury should assess the damages, so that in any case the expense of a new trial might be avoided. The only questions that I was asked to submit to the jury beyond the amount of damages related to the authority of the conductor to act on behalf of the defendant company in the manner in which he acted, and to the question whether the defendant company ratified his acts. Both these questions the jury answered in favour of the plaintiff, so that the question now to be considered is whether there was any evidence to show that the conductor acted within the scope of his authority express or implied, or to show that the defendant company ratified his proceedings. The plaintiff, who was travelling with his wife on one of the defendant company's trams, tendered a sixpenny piece to the conductor in payment of the fare for himself and his wife; he received in exchange two tickets and 4d. change. Shortly after, the conductor alleged that the sixpenny piece was a counterfeit, and he asked the plaintiff for another. The plaintiff said, "The sixpenny piece is a good one," and refused to give the conductor another. Shortly after the tram arrived at the place where the plaintiff's journey ended, and the plaintiff and his wife got out. There was a police constable at the spot and the conductor gave the plaintiff in charge for passing a counterfeit coin. A person wearing the uniform of the defendant company, who was identified by the police

*Reported by J. F. WALKER, Esq., Barrister-at-Law.

constable as an inspector of the company, came up at that time. The conductor spoke to him, and the inspector said to the conductor, "Give me your badge and satchel, and take him down to the station and charge him." The plaintiff was then taken to the nearest police-station by the constable, accompanied by the conductor, and the inspector took the place of the conductor on the tram. At the police-station the conductor signed the charge-sheet. The plaintiff was admitted to bail about 2 a.m. on April 8. The plaintiff appeared in Court to answer to the charge the same day, and, after the conductor and the constable had given evidence, the magistrate dismissed the case. In point of fact the sixpenny piece was genuine. During the hearing at the police-court an inspector of the company—not the inspector who was present when the plaintiff was given into custody—was present, but took no part in the proceedings. The first question that arises is whether there is any evidence that the conductor was acting within the scope of his authority as the defendants' servant. It was not suggested that he had any express authority to give into custody persons who might be suspected of passing counterfeit money. This case does not resemble the numerous class of cases, of which "*Goff v. Great Northern Railway Company*" (3 E. and E., 672) is an example, in which persons have been given into custody by the officials of railway companies for travelling on a railway without having paid the fare and with intent to defraud. In those cases power is given by statute, 8 and 9 Vict., c. 20, sections 103 and 104, to all officers and servants on behalf of the company to apprehend such persons. In cases of that class it has been held that where some servant of the company has authority to do a particular act, which, if done at all, must be done immediately, a servant on the spot, in the absence of any superior servant to whom he can refer, may be considered as clothed with implied authority to act on the emergency. In the present case there is nothing to show that any officer of the company had under any circumstances authority from the company to give passengers into custody for passing counterfeit coin. The case of "*Charleston v. the London Tramways Company (Limited)*" (4 *The Times Law Reports*, 629) seems to be conclusive on this point. Had the charge against the plaintiff been that he had attempted to avoid payment of his fare or any charge of a like nature within the 51st section of the Tramways Act, 1870, a very different question would have arisen, and the case would then have come within the principle of "*Goff v. the Great Northern Railway*." See "*Rayson v. South London Tramways Company*" ([1893] 2 Q.B., 304). The ground upon which counsel for the plaintiff contended that the conductor had implied authority was founded upon the direction of Mr. Justice Blackburn in "*Allen v. London and South-Western Railway Company*" (L.R., 6 Q.B., 65). That learned Judge stated that a servant who had the charge and custody of his master's property may be fairly said to have implied authority to do all acts which are necessary for the protection of the property entrusted to him. He adds:—"I am inclined to think that if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till. I am not, however, prepared to pronounce a decided opinion on these supposed cases."

The learned Judge does not pronounce a decided opinion. It is possible that if the matter ever comes up for decision it may be found that it is not enough to confer authority upon the servant to arrest that he should believe that his master's property is in danger. It may be found that it is necessary that the property should be actually in danger. See "*Edwards v. the London and North-Western Railway Company*" (L.R., 5 C.P., 445). But I do not need to consider this distinction for the purposes of this case. I take the words of Mr. Justice Blackburn in the fullest sense, and it does not appear to me that there is evidence to bring the present case within the lines laid down by him. I cannot see that the acts of the conductor can be said to have been done with the view of recovering the property of the company, or that there was any evidence from which the jury could properly infer that the acts were done with any such view. That the acts were done by the conductor to make an example of the plaintiff, and in that sense indirectly to protect the company's property, I do not doubt, but to admit such a state of things as affording any evidence of an implied authority on the part of a servant to give a person into custody would be to go far beyond the principles laid down. It would be to affirm the principle that every servant who is entrusted with the property of his master has an implied authority to put the law in motion with reference to any offence that may be committed with reference to the property. As to the second question, whether there had been any ratification on behalf of the company, there is evidence that the inspector who was on the spot when the plaintiff was given into custody ratified the act of the conductor. But there is no evidence that the inspector had any authority to act on behalf of the company in sanctioning the act of the conductor. There is no evidence of express authority, and the case as to his implied authority is not so strong as that as to the implied authority of the conductor. It is said that the fact that the conductor appeared at the police-court is evidence that the company must have given him leave of absence, but there is nothing to show that he obtained leave from any officer with authority to sanction the prosecution. It must constantly happen that the conductors obtain leave of absence, but it would be going beyond reasonable inference to assume that an officer who had authority to grant leave of absence had authority to sanction a prosecution. An inspector of the company was present at the police-court, but took no part in the proceedings. I do not think his presence was a ratification by him of the proceedings, but, even if it were, there is no evidence that his presence was by the authority of an officer who had the authority of the company to ratify the proceedings. There must, therefore, be judgment for the defendants.

[Solicitors—C. V. Young and Windsor, for the plaintiff; Hugh C. Godfray, for the defendants.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } March 14.

IN RE NEW PAR CONSOLS (LIMITED).*

County Court—Jurisdiction—Contempt of Court
—Committal.

A County Court Judge has power to commit for contempt of Court under sec. 1, subsec. 6, of the Companies (Winding-up) Act, 1890.

This was an appeal by the Official Receiver from an order of Mr. Justice Bigham directing that a writ of prohibition should issue to the County Court of

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

Truro. Proceedings had been taken in that Court for the winding-up of a company called the New Par Consols (Limited), of which company Mr. Charles Gregory was one of the directors, and in the course of such proceedings an order had been made by the County Court Judge on Mr. Gregory to submit and verify a statement of the affairs of the company. Mr. Gregory having failed to comply with the order, the County Court Judge held him to be guilty of contempt and made an order for his committal to prison. An application was then made on behalf of Mr. Gregory for a writ of prohibition restraining any further proceedings on the order for committal. One of the grounds of the application was that the order calling upon him to furnish an account was not in accordance with the form prescribed by the County Court rules, and, further, that it did not bear an endorsement, as according to the rules it ought to have borne, stating that if he did not comply with the order he would be liable to be sent to prison. Mr. Justice Bigham granted a writ of prohibition.

The Solicitor-General and Mr. Muir Mackenzie appeared for the Official Receiver in support of the appeal; Mr. Glenn appeared for Gregory.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said there was no doubt the County Court Judge had jurisdiction to wind up this company, and section 1, subsection 6, of the Companies (Winding-up) Act, 1890, said that every Court having jurisdiction to wind up a company should for the purposes of that jurisdiction have all the powers of the High Court. He thought that was enough to enable them to decide that a writ of prohibition did not lie in this case. Even independently of that enactment he was of opinion that the County Court Judge had jurisdiction to make a committal order, and that therefore a writ of prohibition could not properly be directed to him, though he did think that in this case the County Court Judge had gone wrong in his way of exercising his jurisdiction. That, however, was matter of appeal, and not of prohibition.

LORD JUSTICE CHITTY was of the same opinion. He thought that the Act of 1890 had placed the County Court on the same footing with the High Court with regard to these matters, and that therefore the writ of prohibition had been incautiously granted. He also agreed with Lord Justice A. L. Smith in thinking that the order of the County Court Judge was erroneous, and could not have stood upon appeal.

LORD JUSTICE COLLINS said that on the main ground he agreed. Having regard to the Act of 1890 he thought it was impossible to treat the County Court as an inferior Court, and so liable to prohibition. But, apart from that enactment, his opinion would have been that the County Court Judge in this case had acted without jurisdiction, and that prohibition might have been rightly granted.

[Solicitors—The Solicitor to the Board of Trade, for the Official Receiver; Gregory and Co., for the respondent.]

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.J.J.) } 1898.
March 15.

BENNETT V. CASTLE AND SONS.*

Negligence—Personal injuries—Liability as between contractors and occupiers of house—Finding of jury.

This was an application by the defendants for judgment or a new trial in an action tried before Mr. Justice Lawrance and a common jury. The action was

*Reported by W. F. HARRY, Esq., Barrister-at-Law.

brought to recover damages for personal injuries owing to the alleged negligence of the defendants' servants. The defendants were contractors who were engaged in doing certain work at a private house from the end of September, 1896, until November 24, 1896, when the accident happened. After each day's work was over the ladders were fastened together and laid on and at the side of the path leading to the back door of the house. The plaintiff was a baker who delivered bread at the house in question, and between 6 and 7 p.m. on November 24, 1896, the night being very dark, he walked up the path and delivered the bread, and when returning he stumbled against the ladders and fell, and was injured. The defendants' case was that at first the ladders were placed each night on the lawn, but the occupier of the house objected, and directed the defendants' men to place them on the path in question. The ladders were accordingly placed there, and the defendants contended that, if there was any negligence at all, they were not liable. The jury were asked whether the ladders were placed there by the permission or by the orders of the occupier of the house, and they answered, by the permission of the occupier, and they found a verdict for the plaintiff for £50 damages.

Mr. Montague Lush and Mr. W. H. Griffith appeared for the defendants. Mr. Packard, for the plaintiff, was not called upon.

The Court dismissed the application.

LORD JUSTICE A. L. SMITH said that it was contended that the defendants' men, in putting the ladders on the path, acted as the servants of the occupier of the house, and not as the servants of the defendants. He could not agree with that contention. The answer of the jury disposed of it. The jury were asked if the ladders were placed on the path by the permission or by the orders of the occupier of the house, and they said that the ladders were placed there by the permission of the occupier. That meant that the ladders were not placed there by the orders of the occupier. That finding negatived the suggestion that the defendants' men, in putting the ladders on the path, were acting as the servants of the occupier of the house. There was evidence to justify that finding, and there was no ground for disturbing the verdict.

LORD JUSTICE CHITTY and LORD JUSTICE COLLINS concurred.

Chan. Div. }
(Stirling, J.) } 1898.
March 15.

WHITTHAM V. WATKIN AND OTHERS.*

Limitations, Statutes of—Trustee—Directors of railway company—Trustee Act, 1888—Payments *ultra vires*.

This was an action which had for its object to compel the first three defendants, Sir Edward Watkin, Sir John Maclure, and Mr. Pollitt, to repay to the Manchester, Sheffield, and Lincolnshire Railway Company certain sums which they, along with other directors of the company, had applied in the purchase of certain shares in the Wrexham, Mold, and Connah's Quay Railway Company. The plaintiffs were the holders of £100 deferred ordinary stock of the Manchester, Sheffield, and Lincolnshire Railway Company, and one of them was also the holder of £700 preferred ordinary stock. On July 15, 1890, the plaintiffs, together with a Mr. H. E. Piercy, as trustee of the will of Mr. B. Piercy, entered into a contract for the sale to a company called the Railways and General Company (Limited) of £339,807 consolidated ordinary stock of the Wrexham Company at the price of 182 per cent., and the pur-

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

chasers agreed to purchase at the same price all ordinary stock of the same company which might at any time thereafter be found due to the plaintiffs and H. E. Piercy in respect of certain agreements between that company and their testator. Although on the face of the contract the Railways and General Company were the purchasers, it was, in fact, arranged that the purchase money should be provided by the Manchester and Sheffield Company, and that the stock should be transferred to trustees for that company, the object being to acquire on behalf of the Manchester and Sheffield Company a controlling power over the Wrexham Company; and that arrangement was carried out in the following manner. On August 1, 1890, a cheque for £64,457 16s. 11d., being the purchase money of the stock in question, was by the authority of the directors of the Manchester and Sheffield Company (of whom the defendants Sir E. Watkin and Sir John Maclure were two) drawn on the bankers of the company, and on August 5 this sum was paid to the credit of the Railways and General Company. On August 9 that company paid the amount to the plaintiffs, who transferred the stock into the names of Mr. Pollitt, the general manager of the Manchester and Sheffield Company, and Sir John Maclure. Subsequently, in October, 1890, a similar transaction was carried into effect with reference to £4,101 like stock of the Wrexham Company, the price of which was £768 18s. 9d. The ground upon which relief was sought in the action was that the purchase of the shares in question was *ultra vires* the Manchester and Sheffield Company. The writ was issued on August 6, 1896, against Sir Edward Watkin, Sir John Maclure, Mr. Pollitt, and the Manchester and Sheffield Company.

Mr. Jenkins, Q.C., and Mr. F. Thompson appeared for the plaintiffs; Mr. Cozens Hardy, Q.C., and Mr. M. Romer for the first three defendants; and Mr. Phipson Beale, Q.C., and Mr. Thomas Watson for the defendant railway company.

MR. JUSTICE STIRLING, in giving judgment, said that it was not disputed that, at the dates when these sums were paid, the Manchester and Sheffield Company had no power to apply its funds in the purchase of Wrexham stock, and that the payments were *prima facie ultra vires*; but reliance was placed upon an Act of Parliament passed on July 21, 1891, which, it was alleged, gave the company power to do so; and by a resolution duly passed by the company the directors were authorized to subscribe towards the undertaking of the Wrexham Company the sum of £100,000 and to hold shares in that company to the amount of such subscription. No entries disclosing the application of the sums of £64,457 16s. 11d. and £768 18s. 9d. appeared in the accounts of the company for the half-years ending December 31, 1890, and June 30, 1891; but in the accounts for the half-year ending December 31, 1891, there appeared, under the heading "subscriptions to other railways," the following entry:—"Wrexham, Mold, and Connah's Quay Railway £65,231 18s. 2d., and it was admitted that that referred to the sums paid in August and October, 1890. In his Lordship's judgment these did not constitute a subscription towards the undertaking of the Wrexham Company within the meaning of the Act of 1891. It followed that the whole of the payments must still be regarded as *ultra vires*. The defendants, however, claimed the benefit of the Statute of Limitations, and the first question was whether that afforded a good defence. The statute applicable was the Trustee Act, 1888, but there were certain exceptions contained in section 8, and the only one of them which could apply was—"where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." No such case was alleged or proved against the directors, and his Lordship

thought that they had acted honestly and in the belief that what they did was for the benefit of the company. It was contended, however, that the entry in the accounts for 1891 was a misrepresentation of the transaction and prevented time from running under the statute until the true nature of the transaction was discovered. His Lordship then considered the authorities upon this point and came to the conclusion that, notwithstanding the entry in the accounts, the Statute of Limitations afforded a good defence if the period of six years had elapsed between the time when the cause of action accrued and the issue of the writ. As to the larger sum, which found its way into the banking account of the Railways and General Trust Company on August 5, 1890, the cause of action arose at that time, and the period limited by the statute had elapsed when the writ was issued on August 6, 1896. As to the smaller sum, however, the statute was no defence, and it was necessary to consider the circumstances under which the action was brought. At the time when these transactions took place the plaintiff, Mr. Whitwham, was in business as a stockbroker, and he carried them through on behalf of himself and his co-trustees. From the evidence his Lordship inferred that before October, 1890, the plaintiff knew that the money to pay for the Wrexham stock was to come from the funds of the Manchester and Sheffield Company. He therefore, and his co-plaintiffs through him, had notice of the source whence came the purchase money paid to them. In the ordinary course the proper plaintiff to bring an action for the recovery of moneys applied *ultra vires* would be the company itself, but in certain cases the Court allowed such actions to be brought by one or more shareholders suing on behalf of themselves and all other shareholders of the company. It was said that in the present case the defendant company did not intend to sue, and that was so. The plaintiffs therefore came as shareholders and complained that no action had been brought and insisted that justice should be done as if proper proceedings had been taken in the name of the company. Against whom would such proceedings properly be taken? Against the directors of the company, doubtless, but also, as it seemed to his Lordship, against the plaintiffs themselves. Was it in accordance with justice that this should be permitted? His Lordship thought not. He disapproved of what the defendants had done, but thought that the plaintiffs, into whose pockets the company's money had gone, were not the persons to raise the question. The action would, therefore, be dismissed with costs.

Q.B. Div. (Wright and }
Darling, JJ.) }

1898.
March 15.

BEEVOR V. MARLER.*

Gaming—Agreement by way of wagering—Deposit with stakeholder—Mistake—Action to recover plaintiff's stake from defendant after stakeholder had paid it over—Judgment for defendant.

This was an appeal from the Yarmouth County Court in a case of a somewhat unusual description.

Mr. G. M. Cohen appeared for the plaintiff, the appellant; Mr. E. Wild for the defendant.

It was stated that the verdict was found for the plaintiff, and judgment was entered for the defendant. The facts were stated to be that the plaintiff made a wager with the defendant that one Thompson would walk 20 miles in four hours. Next day a course of a

measured half-mile was marked out on the Yarmouth road. Mr. Watson was the referee for fair walking only. Thompson walked over it 40 times. He, however, exceeded the four hours by 30½ seconds. Thereupon the stakeholder paid over the stakes to the defendant Marler. Thompson, however, was not satisfied, and subsequently the course, in the absence of the defendant, was remeasured. It was then found that there had been a mistake and that the distance really was considerably over 880 yards. The result of this was that Thompson had walked 900 yards more than the 20 miles. It was therefore evident that he had, in fact, covered the 20 miles in four hours. The plaintiff asked for his stake to be returned under these circumstances, but this was refused, and accordingly he brought an action in the County Court to recover his money that had been paid. The County Court Judge asked the jury these questions—first, was the distance measured and walked inaccurate; secondly, did the plaintiff acquiesce in the said distance being accurate? The jury returned a verdict for the plaintiff, saying, "We think the money ought to be returned." The County Court Judge held that the action was not maintainable, on the ground that it was an action to recover a bet within 8 and 9 Vict., c. 109, s. 18, and was not a case where the money was still in the hands of the stakeholder.

Mr. COHEN urged that the County Court Judge was wrong. The plaintiff was not seeking to recover money won, as he was only demanding his own stake back. The Gaming Act did not, therefore, apply. It only applied to recovering money won. He contended that the money had been paid under a mistake, in fact, and was therefore recoverable. He cited "Bize v. Dickason" (1 T.R., at p. 286), "Hodson v. Terrill" (1 Cr. and M., 797), "Strahan v. Universal Stock Exchange" ([1895] 2 Q.B., 697).

Mr. WILD, for the defendant, suggested that the plaintiff had acquiesced in the original measuring. The subsequent measuring in his absence was unsatisfactory. The referee had decided the event; at any rate, the plaintiff was relying on the wager.

Mr. COHEN replied, pointing out that the referee had only to decide whether the walking was fair heel-and-toe walking, and whether the time had expired. He had left the measuring of the distance to the parties themselves.

The COURT dismissed the appeal.

Mr. JUSTICE WRIGHT said he would say nothing on the point as to whether the Gaming Act of 1845 applied. Apart from that there were two fatal objections to the plaintiff's case. The doctrine that a person could recover money voluntarily paid over without full knowledge of the facts was subject to an exception that a person who had waived all inquiry into the facts could not on subsequently ascertaining fresh facts recover the money. There was in this case evidence that the plaintiff had acquiesced in the correctness of the measurement. In the Judge's notes appeared this passage:—"The referee asked us if we were both satisfied with the measurement, and we both said, 'Yes.'" The second objection was more important and equally decisive against the appellant, who was seeking to get back money against the decision of the referee. So long as the referee's decision stood the appellant could not get behind it.

Mr. JUSTICE DARLING concurred. He had been pressed at one time by the case of "Hampden v. Walsh" (1 Q.B.D., 189), but he thought in this case the events had come off and had been decided by the referee. The Court could not go behind that decision. His Lordship referred to the case of "Cox v. Prentice" (3 M. and S. 344), and pointed out that that was a case of a purchase of silver, and actual property

had passed. It was not, therefore, a case of the same class as the present.

Mr. COHEN then made an application for leave to appeal. This was refused, Mr. JUSTICE WRIGHT saying that, in view of the mass of authorities to the effect that the Courts ought not to be called on to deal with such cases, it would be better to leave it to the Court of Appeal to give leave if they thought fit.

[Solicitors—F. J. Macarthur and Co., for A. F. Clowes, Great Yarmouth, for the appellant; Dubois and Williams, for Harold Chamberlain, Great Yarmouth.]

Q.B.Div. (Wright and
Darling, JJ.)

1898.
March 15.

LONDON AND NORTH-WESTERN RAILWAY COMPANY V.
DONELLAN.*

Railway—Charges—Siding rent—County Court—Jurisdiction—Arbitration of "differences"—London and North-Western Railway (Rates and Charges) Order Confirmation Act, 1891.

This was an appeal from the Deputy County Court Judge at Crewe. The action was one brought by the London and North-Western Railway Company for siding rent. The defence raised was that the County Court Judge had no jurisdiction, because under the London and North-Western Railway (Rates and Charges) Order Confirmation Act, 1891, the jurisdiction was given to an arbitrator appointed by the Board of Trade. The County Court Judge held that he had no jurisdiction, and directed a verdict for the defendant, thinking that the reasonableness of the matter should be determined by an arbitrator. The County Court Judge found that the plaintiffs demanded the siding rent from the defendant, but that he always refused to pay, and, in fact, had never paid it, and that he had always told the company's servant that it was "exorbitant and unjust." In January, 1895, the railway company had issued a circular to all their traders, including the defendant, stating that a charge would be made for the accommodation of trucks when standing on the company's sidings for more than four days. Evidence was given that a charge of 6d. a day per truck after four days had elapsed was made on all traders over the system of the London and North-Western Railway Company. The same charge was made by other railway companies. In cross-examination, the defendant said the charge was exorbitant and unjust, and he objected to pay any sum at all, and he had never paid. The clause on which the County Court Judge had acted was section 5 of the schedule to the order scheduled to the Act, which is as follows:—"The company may charge for the services hereunder mentioned . . . when rendered to a trader at his request or for his convenience a reasonable sum, by way of addition to the tonnage rate. Any difference arising under the section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that when, before any service is rendered to a trader, he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience." Among the services specified was the "use or occupation of any accommodation before or after conveyance."

Mr. NOBLE said that the company had given notice of the charge they would make if the trucks were not emptied in the four days. If after this the trader accepted the service he should pay for it.

*Reported by F. EVANS, Esq., Barrister-at-Law.

There was no case for arbitration made out. No difference had arisen, for the defendant refused to pay *in toto*. There had never been a dispute as to the question whether the four days were reasonable. That was a question which the Railway Commissioners, and not an arbitrator, ought to decide. He referred to several unreported cases on the same subject.

Mr. WILLES CHITTY submitted that the matter was one for arbitration under the section.

The COURT allowed the appeal on the ground that the railway company had served notice on the traders that if they required the wagons to be kept beyond the four days a charge would be made. It was plain that the railway company were not obliged to give these services for nothing. If it were left to the decision of an arbitrator to say what they should be paid it might result in the railway company getting nothing. It was very doubtful if the 5th section had given to traders the protection desired. There must be judgment for the plaintiffs for £27 15s. 6d.

Leave to appeal was given.

[Solicitors—George Turnbull, for the defendant ; C. H. Mason, for the Railway Company, plaintiffs.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } March 16.

MEDWAY V. GREENWICH INLAID LINOLEUM COMPANY (LIMITED).*

Master and Servant—Master's liability to servant
—Employers' Liability Act, 1880, sec. 1, subs. 3
—Order of person in authority—Evidence for jury.

This was an appeal by the defendants from the judgment of the Divisional Court (Mr. Justice Wright and Mr. Justice Kennedy) affirming the judgment of the Greenwich County Court Judge. The action was brought under the Employers' Liability Act, 1880. The plaintiff was a workman, about 20 years of age, in the employment of the defendants, and he was employed as a linoleum mixer, his duty being to work at a machine which consisted of a box used for mixing certain substances, at the bottom of which was a pair of blades revolving horizontally which mixed the substances and threw up the stuff when mixed. There were two machines at the works, a large one and a small one. In the large one in order to get the mixture out of the box the machine was stopped and the box tilted. In the small one there was a wheel by means of which the machine could be stopped, but the almost universal practice was for the workmen to take the mixture out of the box with their hands while the blades were revolving. The plaintiff had been in the defendants' employment for 2½ years and had been employed in working at the large machine, but he had also worked at the small machine once a fortnight or once a month. When the plaintiff first entered the defendants' employment the foreman, O'Brien, taught him how to work the small machine, but did not tell him how to use the wheel to stop the machine. The foreman himself always took out the mixture with his hands while the blades were revolving. On February 27, 1897, the foreman ordered the plaintiff to mix 9lb. of stuff in the small machine, and after mixing it the plaintiff attempted to take the mixture out with his hands while the blades were revolving, when his right hand was caught by the blades and cut off. The plaintiff brought this action under section 1, subsection 3, of the Employers' Liability Act, 1880, alleging negligence in the foreman to whose orders or directions he was bound to conform and did conform. There was evidence that it

was dangerous to take the mixture out with the hands while the blades were revolving. The action was tried in the County Court, when the following questions were left to the jury :—(1) Was O'Brien a person to whose orders or directions the plaintiff was bound to conform and did conform ? (2) Was O'Brien guilty of negligence in ordering the plaintiff to take out this stuff, knowing that the usual way (in which he expected him to do it) was to clear it from the top without stopping the machine, without warning him ? (3) Did the plaintiff bring the injury upon himself by voluntarily incurring the risk ? The jury answered the first question in the affirmative. In answer to the second question, they said that O'Brien was guilty of not warning the plaintiff and of not giving him instructions as to the proper way of using the machine. To the third question they said that the plaintiff did not voluntarily bring the injury upon himself and could not have appreciated the risk. The jury found a verdict for the plaintiff, with £200 damages. The defendants appealed, and contended that there was no evidence of any order or direction of the foreman to the plaintiff to take out the mixture with his hands, the example of the foreman not being an order or direction ; and that upon the evidence the plaintiff knew that in order to start or stop the machine he must use the wheel, and that he had on previous occasions started and stopped the machine, and that he knew of the danger involved in taking the mixture out with his hands. The plaintiff contended that there was evidence of an order to work the machine coupled with a direction by implication to the plaintiff to use his hands when taking the mixture out without stopping the machine, and that there was no evidence of an agreement by the plaintiff to run the risk so as to make the maxim *Volenti non fit injuria* applicable within the decision in "Smith v. Baker" ([1891] A.C., 325). The Divisional Court affirmed the judgment of the County Court Judge. The defendants appealed.

Mr. W. S. Robson, Q.C., and Mr. H. Lynn appeared for the defendants ; Mr. J. Lawson Walton, Q.C., and Mr. Groser appeared for the plaintiff.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the only question was whether there was evidence for the jury that the plaintiff met with the accident under the circumstances stated in section 1, subsection 3, of the Employers' Liability Act, 1880. According to his view of the evidence, what O'Brien taught the plaintiff to do was to take the mixture out of the machine with his hands while the blades were revolving. There was evidence that this was dangerous. The evidence showed that O'Brien always took out the mixture with his hands without stopping the machine, and the plaintiff saw that he did so. That was the usual way of doing the work. Upon the day in question O'Brien told the plaintiff to work at the machine. What was the meaning of that order ? The clear intention of O'Brien was that the plaintiff should work it as it had been always worked for the last two-and-a-half years. He was inclined to think, though he did not decide it, that if the plaintiff had worked the machine in a different way he would not have obeyed the foreman's order, to which he was bound to conform. That was the interpretation which the plaintiff put upon the order, and in obeying it he had his hand cut off. That brought the case within section 1, subsection 3. As regards the maxim *Volenti non fit injuria*, if it could be made out that the injured person had agreed to undertake the risk, the maxim would apply. That was for the jury, and they found that the plaintiff did not appreciate the risk. The judgment, therefore, must be affirmed.

LORD JUSTICE CHITTY and LORD JUSTICE COLLINS concurred.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.J.J.) }

1898.
March 17.

BUCKWELL V. NORMAN.*

Bankruptcy—Proof—Debts incurred between the act of bankruptcy and receiving order—Notice of act of bankruptcy—Bankruptcy Act, 1883, sec. 37, subsecs. 2 and 3.

When a creditor has had notice of an act of bankruptcy he is not entitled to prove for a debt incurred between the act of bankruptcy and the making of the receiving order; but the debt being in itself a provable debt, the debtor cannot be sued in respect of it.

This was an appeal by the plaintiff from the judgment of a Divisional Court (Mr. Justice Wright and Mr. Justice Kennedy) affirming the judgment of the Brighton County Court Judge in an action by a solicitor upon a bill of costs. The defendant, who already owed the plaintiff a sum for costs, instructed the plaintiff to file his petition in bankruptcy, at the same time stating that he was unable to pay his debts. The plaintiff accordingly did so, and a receiving order was made against the defendant, and he was subsequently adjudicated bankrupt. The plaintiff received in respect of part of the costs incurred in connexion with the filing of the petition the sum of £4 from the defendant's estate, under rule 125 of the Bankruptcy Rules, 1886, which renders the estate liable to the payment of, amongst other things, "the taxed costs of the petitioner." The plaintiff thereupon brought this action against the defendant, claiming the balance of his bill of costs in connexion with the filing of the petition. These costs were incurred before the making of the receiving order. The County Court Judge held that the defendant had committed an act of bankruptcy under section 4, subsection 1 (h), by stating to the plaintiff, who was a creditor, that he was unable to pay his debts, and he held that the plaintiff could not recover. The plaintiff appealed.

Mr. FIRMINGER (Mr. E. Rowen Rowlands with him), for the plaintiff, contended that the plaintiff, having had notice at the time when the costs were incurred that the defendant had committed an act of bankruptcy under section 4, subsection 1 (h), of the Bankruptcy Act, 1883, could not prove in the bankruptcy in respect of these costs (section 37, subsection 2). Section 9 only prevented an action from being brought against a debtor, against whom a receiving order had been made, in respect of debts provable in bankruptcy, and, therefore, as this debt was not provable, the plaintiff could sue for these costs. By section 30 an order of discharge only released a bankrupt from debts provable in bankruptcy.

Mr. E. T. HOLLOWAY, for the defendant, contended that this was a debt provable in bankruptcy under section 37, subsection 3, though the plaintiff, who had notice of an act of bankruptcy when the debt was incurred, was personally disqualified by section 37 subsection 2, from proving in respect of it.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether the debt which the plaintiff sought to recover in this action was a debt provable in the bankruptcy of the defendant within the meaning of the Bankruptcy Act, 1883. In his opinion these costs, having been incurred between the act of bankruptcy and the making of the receiving order, were a debt provable in the bankruptcy under section 37, subsection 3, of the Bankruptcy Act. Subsection 2 cast an incapacity for proving

a debt on any person who at the time when the debt was incurred had notice of an available act of bankruptcy having been committed. This was a positive enactment that such a person should not prove. Though the debt was in itself a provable debt, any one who had notice of an act of bankruptcy was personally incapacitated from proving it. But, the debt being a provable debt, the debtor could not be sued in respect of it, and the decision of the Queen's Bench Division must therefore be affirmed.

LORD JUSTICE CHITTY was of the same opinion. It seemed at first sight a strange proposition that there could be a debt provable in bankruptcy which could not be proved. But he thought that such was the true construction of the Act. It was clear from section 168, the interpretation clause, and from subsection 3 of section 37, that debts incurred between the act of bankruptcy and the making of the receiving order, such as the debt claimed in this action, were provable in bankruptcy. Subsection 2 of section 37 enacted a personal exception in the case of a man who had notice of an act of bankruptcy. The result was that these costs were a provable debt, but the personal exception contained in subsection 2 prohibited the plaintiff from proving. He therefore agreed that the appeal should be dismissed.

LORD JUSTICE COLLINS was also of the same opinion. In order that a debt could be proved in a bankruptcy two things must concur—the debt itself must be a provable debt, and the person seeking to prove it must not be incapacitated from proving it. It was necessary to draw a distinction between the question as to the quality of the debt itself, whether or not it was a provable debt, and the question as to the personal capacity of the person who sought to prove it, whether or not he had notice of an act of bankruptcy. He thought that was the natural as well as the logical interpretation of the language of the Act.

[Solicitors—C. R. Sawyer and Ellis, for the plaintiff; R. Hewlett, for A. Mirams, Brighton, for the defendant.]

Q.B. Div. (Wright and }
Darling, J.J.) }

1898.
March 17.

SPENCER V. LANCASHIRE, &C., RAILWAY COMPANY.*
Railway—Passenger fares—Cheap Trains Act, 1883, sec. 6.

A railway company is not bound to supply a ticket at a reduced fare under sec. 6 of the Cheap Trains Act, 1883, to a police constable when travelling as an inspector under the Weights and Measures Act, 1878.

This was an appeal from the Manchester County Court Judge, sitting without a jury, in an action brought against the Lancashire and Yorkshire Railway Company for the return of 2d., which the plaintiff had paid in consequence of the company's refusal to give him a ticket at a reduced fare under the provisions of section 6 of the Cheap Trains Act, 1883 (46 and 47 Vict., c. 34). The plaintiff was inspector under the Weights and Measures Act, 1878, and he was also a constable in the county force. On the day in question he was travelling on duty connected with the inspectorship. He was made to pay the full fare and not a reduced fare. The County Court Judge held that the plaintiff was not entitled to recover the difference.

Mr. Pickford, Q.C., and Mr. E. W. Jordan appeared

*Reported by G. F. ROCKER, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

for the appellant, the plaintiff; Mr. C. A. Russell, Q.C., and Mr. T. F. Byrne for the respondents.

The facts were these. The plaintiff was for many years a constable in the county force, and in November, 1890, he was appointed an inspector under the Weights and Measures Act, 1878. On December 1, 1896, the plaintiff went from Ormskirk to Liverpool with an assistant on duty connected with weights and measures principally. He produced a "route" signed by a police officer, and claimed a ticket at three-quarters of the ordinary fare. The route was admitted to be "a route duly signed by a police authority," but it was not admitted that the plaintiff was travelling on police duty. Spencer stated that he was under the control of the chief constable and the superintendent of his division. When on duty inspecting weights and measures he had on several occasions acted as constable and had made arrests when away on such duties. His salary was paid by Superintendent Jervis, of the county police. Any fees he took he handed to his superintendent. He was paid out of the county fund, but not out of the police fund. The County Court Judge thought the police ought not to be appointed inspectors, and he referred to section 19 of 3 and 4 Vict., c. 88, under which the appointment had been made, and to section 10 of 2 and 3 Vict., c. 93, which enacted that constables were to be restrained from employing themselves other than as policemen. At any rate, this inspector was not travelling as a policeman, and it was only travelling as such that came within the Act. The material words of the Cheap Trains Act, 1883 (46 and 47 Vict., c. 34, section 6) were these:—"For the purpose of moving by railway on any occasion of the public service . . . (c) any officers or men of the police force . . . every railway company shall on the production of a route duly signed for the conveyance of forces provide conveyance for them . . . on such terms as may be agreed on between the railway company and the Secretary of State, Admiralty, or police authority," and in default on the terms specified in the remainder of the section.

MR. PICKFORD said that up to last year the companies had always carried these inspectors at a cheap rate. Then they had consulted together and determined to refuse the allowance of reduced fares. The plaintiff on this occasion was travelling for the public service.

MR. JUSTICE WRIGHT suggested that he was only travelling for the service of the county. The service of the county might not be public service, even in the case of police.

MR. PICKFORD contended that this was public service. If the movements of police were not included, what was the good of putting the police into the section at all. He was travelling to perform duties imposed on him by statute. He contended that all policemen travelling on duty were obviously entitled to travel at the reduced rate. The railway companies admitted that. The plaintiff, a policeman, was travelling on the public service. The Act did not say that the policeman must be travelling as a policeman.

The COURT, without calling on the counsel for the railway company, dismissed the appeal.

MR. JUSTICE WRIGHT said it might be well not to express an opinion on anything not directly raised in the case. It was enough to say that, in his opinion, the Cheap Trains Act did not apply to inspectors of weights and measures travelling as such.

MR. JUSTICE DARLING concurred. He very much doubted whether the railway companies had not already conceded more than they need have done. The appeal must be dismissed.

[Solicitors—Christopher Moorhouse, for the respondents; F. C. Hulton. Preston, for the appellant.]

Q.B. Div. } 1898.
(Bigham, J.) } March 17.

FOXWELL AND OTHERS V. VAN GRUTTEN.*

Will—Construction—Devise of real estate—Estate tail—Gift over—Purchase.

This was an action brought to recover possession of certain lands in Cornwall. The case was originally tried in June, 1895, at Bodmin, before Mr. Justice Vaughan Williams and a special jury, and judgment was given for the plaintiffs. The defendant appealed, and the case was carried up to the House of Lords, the result being that a new trial was ordered. The case is reported in [1897] A.C., 658. The second trial came on at the recent assizes at Bodmin, before Mr. Justice Bigham and a special jury, and the case was subsequently argued in town before his Lordship.

MR. ALDERSON FOOTE, Q.C., and Mr. H. E. DUKE appeared for the plaintiffs; and Mr. Haldane, Q.C., Lord Coleridge, Q.C., Mr. E. U. Bullen, and Mr. T. H. CARSON represented the defendant.

MR. JUSTICE BIGHAM read the following judgment:—"This action was brought by the plaintiffs to recover possession of an estate in Cornwall known as Rosewarne, and they claimed alternatively as being the heirs of one William Harris or of Mary his daughter and only child. The defendant pleaded possession. The material facts are as follows:—William Harris (whom I shall afterwards refer to as the testator) died on December 8, 1815, being at that date seised in fee simple in possession of the estate in question. By his will dated October 31, 1804, he devised the same to his child or children for an estate in fee tail. He died in 1815, leaving an only child, Mary, who afterwards—viz., on September 30, 1819—married one Winchcombe Hartley. By him she had one son—namely, William Henry Hartley, who was born on January 1, 1823. Mary survived her husband, and died on October 22, 1868, and her son, William Henry Hartley, died intestate on June 27, 1894, without leaving any heirs of his body. The plaintiffs are the heirs of the testator and of his daughter Mary. These facts were admitted by the defendant. The plaintiffs contended that the testator had not by his will disposed of the fee simple expectant on the determination of the estate tail, and that therefore they, as his heirs, were entitled, and, further, they contended (in the alternative) that the fee simple was devised by the will of the testator to his daughter Mary, who took the same as devisee (that is, as purchaser) within the Inheritance Act, and that, as she never disposed of the estate, it devolved at her death on her heirs, whom the plaintiffs also were. The main contention on the part of the defendant was that by the testator's will the fee simple (expectant on the determination of the estate tail given to Mary) was disposed of to her son William Henry, whose heirs the plaintiffs were not; and they contended, further, that if by the will the fee simple expectant as aforesaid was disposed of to Mary, yet she by the exercise of a power contained in her marriage settlement effectually disposed of it away from the plaintiffs and their ancestors. I understood that the defendant was the representative of the child or children of Winchcombe Hartley by a wife whom he had married before his marriage with Mary Harris. It appears from the foregoing that very much turns on the construction of the testator's will. His Lordship then referred to the terms of the will by which the testator left the lands in question to trustees upon trust to receive the rents for the benefit of the child or children living at his death and to apply the same in their maintenance, and from the date of such

* Reported by F. O. ROBINSON, Esq., Barrister at-Law.

child or children attaining the age of 21 or marrying, upon trust to permit them to take the rents for life, and from and immediately after the death of such child or children the trustees were to stand possessed of the lands therein before devised "unto and to the use of the heirs of the body and bodies of such child or children lawfully begotten; if more than one, to be equally divided between them, such freehold lands . . . to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of 21 years or be married, and to their several and respective heirs and assigns for ever." His Lordship then continued:—Now this will has already been the subject of much legal argument and of one clear decision. The plaintiffs issued their writ within a few months of the death of William Henry Hartley—viz., on February 27, 1895—and by their original statement of claim, delivered on March 7, 1895, they claimed only as being the heirs of the testator, and not in the alternative as being the heirs of Mary. With the pleadings in this state the action came on for trial before Mr. Justice Vaughan Williams on June 13 and 14, 1895. At that trial the plaintiffs proved to the satisfaction of the jury that they were the heirs of the testator, and the finding on that point has remained undisturbed. The plaintiffs then claimed judgment on the ground that under the testator's will Mary took an estate tail, which came to an end upon the death of her son, and that the remainder in fee expectant on the determination of such estate tail was undisposed of by the testator, and therefore went to the plaintiffs as his heirs. On the other hand, the defendants claimed judgment, contending that on the true construction of the will Mary took only an estate for life, with remainder in fee simple to her son William Henry, whose heirs the plaintiffs were not. The defendant also put in evidence a disentailing assurance dated February 28, 1835, made by Mary Hartley, and duly acknowledged by her on March 2, 1835, and said that, even if she took an estate tail under the will of the testator, yet by the execution of this disentailing deed she became entitled to the fee simple, and that the estate would therefore descend to her heirs, and he pointed out that the plaintiffs had not by their pleadings claimed as such. To this disentailing deed the plaintiffs made answer by proving that Mary had by inquisition dated December 7, 1843, been found lunatic as from October 31, 1834, and the learned Judge accepted this as satisfactory evidence that she was at the date of the disentailing deed not mentally fit to execute it. In these circumstances the learned Judge gave judgment for the plaintiffs, holding in effect that Mary took an estate tail which she never barred, and which came to an end on the death of her son William Henry, leaving the fee expectant on the determination thereof undisposed of by the testator. His Lordship then dealt with the history of the case in the Court of Appeal and the House of Lords, in which Courts the decision of Mr. Justice Vaughan Williams as to the construction of the will was upheld, but a new trial was ordered by the House of Lords on the question of her sanity. The House of Lords also inferred that the plaintiffs were the heirs of Mary as well as of the testator, and permitted the claim to be amended accordingly. His Lordship continued:—Accordingly the case came before me at Bodmin for a new trial, and a special jury was impanelled to try it. Then an entirely new position was taken by the defendant. The plaintiffs began by putting in a quantity of documentary evidence for the purpose of proving that Mary was incapable of executing any deed after October 31, 1834—evidence which, if it were accepted as satisfactory, would have the effect of displacing the disentailing deed of February, 1835. No witness was

called, and the plaintiffs closed their case. Thereupon the defendant's counsel declined to address the jury, and in effect submitted to, and, indeed, I think, invited, the verdict which the jury, after my summing up, returned—viz., that Mary Hartley was incapable of making any will or deed as from October 31, 1834. No doubt the defendant had his reasons for taking this course, and, as Mr. Haldane frankly admits, he went to trial at Bodmin having made up his mind to take it. He tendered in evidence no will of Mary Hartley, because, no doubt, there was no will in existence which he could produce. Thus the new trial directed by the House of Lords was of no service to any one. It left the case exactly where it was when Mr. Justice Vaughan Williams delivered his judgment; the whole question once more depending upon the true construction of the testator's will, with this point, however, finally decided—viz., that whatever else the will did, it certainly gave to Mary an estate tail and not an estate for life. The point now taken by the defendant before me, and taken for the first time, is that the testator by his will disposed of the remainder in fee expectant on the determination of the estate tail in favour of the child or children of Mary, the devise to take effect on the child or children attaining the age of 21 or marrying, and he says that William Henry on the death of his mother, he being then of age, became by the operation of the will the last purchaser. The main question in the case is whether that is or is not the true construction of the will. The words in the will upon which the defendants more particularly rely are the following:—"Such lands to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of 21 years or be married, and to their several and respective heirs and assigns for ever." The plaintiffs contend that these words either (1) are repugnant to the previous provisions of the will giving an estate tail to Mary, or (2) amount simply to a discretion to the trustees to convey the legal estate tail to William Henry Hartley on his attaining 21, he being equitable tenant in tail at that time. The defendant, on the other hand, contends that the words in question amount to a direction to convey to William Henry Hartley in fee simple expectant on the determination of the estate tail, which he says amounts to an executory devise of such fee simple in remainder to William Henry Hartley. His Lordship next referred to the judgments in the House of Lords which incidentally dealt with this point, although it had not been raised in argument. Their Lordships' judgments on this point, with the exception of that of Lord Davey, supported the view now contended for by the defendant. Lord Macnaghten, at p. 679 of [1897] A.C., said, "The gift is not nor was it, I think, intended to be, in defeasance of the estate tail. What the testator says in effect is this:—'If one or more of my descendants, being tenant in tail, or tenants in tail in possession, should marry or attain 21, I cancel all ulterior limitations in favour of collaterals, and give him or them the fee simple expectant on the determination of the estate tail.'" Mr. Justice Bigham continued:—I have come to the conclusion that I ought to give effect to Lord Macnaghten's view, and for these reasons. Applying the rule as to the construction of a will laid down by Lord Macnaghten in an earlier part of his judgment, I find in the first place that Lord Macnaghten's interpretation of the clause in question gives full and literal effect to every word in it, for it cannot be denied that a direction to trustees (in whom the estate is vested) at a certain time to convey the estate to a designated person, "his heirs and assigns for ever," is a substantive gift of the fee simple to such designated person. Nor do I think this construction leads to any

absurdity; an unusual thing is not necessarily absurd. Now Lord Davey's judgment involves giving the go-by to the expression "heirs and assigns," and treats the clause as if those words were not there. No doubt there is ample authority for saying that such words must be disregarded if they are introduced into a clause by which an estate tail is created, but that is because they are clearly inconsistent with the existence of such an estate. Here they are not introduced in such a connexion; they are found in a different part of the document, and are capable of bearing an interpretation which is inconsistent with nothing that has gone before. The words do not seek to modify the legal effect of the gift to the heirs of the body in the previous passage, but amount to a gift of a new estate—viz., the reversion in fee simple to the tenant in tail at a certain time. Another reason why this is not an absurdity is that the testator may well have desired to put his grandchild on attaining his majority in a position to deal with the fee simple without having recourse to the cumbrous and expensive procedure of suffering a recovery. But the plaintiffs say that the interpretation suggested by Lord Macnaghten is inconsistent with the scheme of the will, which provides, according to them, for the creation of a continuous succession of estates tail, each one taking effect on the determination of the preceding one. This, however, is not so, for the words of the will are—"And if it shall happen that I shall depart this life leaving no child or children or issue of any child or children, or if such child or children as I shall leave and the issue of such child or children shall die before he, she or they shall attain the age of 21 years or be married." Now, these words do not point to a gift over upon the determination of Mary's estate tail, but only point to a gift over in the event of the grandchild not attaining 21—that is to say, in my opinion, in the event of his not acquiring the fee under the preceding clause. So far, therefore, from Lord Macnaghten's interpretation being inconsistent with the scheme of the will, it would appear to give effect to its intention. The plaintiffs further contend that if the grandchild is to be held as taking the reversion of the fee he does so not as purchaser, but as heir, because they say the rule in Shelley's case applies and vests this reversion in Mary, to whom by the same will an estate tail is given. The answer, however, to this contention is two-fold. First, the devise is, in my opinion, an executory devise and not a remainder, because it was to take effect during the continuance of the estate tail; and, secondly, the beneficiaries under the devise were not the heirs of the body at large but designated individuals of that class. Either of these circumstances is sufficient to prevent the operation of the rule in Shelley's case. The conclusion to which I have arrived on this point makes it unnecessary that I should deal with the second point taken by the defendants; but inasmuch as it was argued before me I will express my opinion upon it. The defendant said that even if the testator's will had the effect of leaving the reversion in fee undisposed of, so that in the event which happened it went to Mary as his heir, yet she, by the exercise of a power reserved to her, as defendant says, under her marriage settlement of 1819, disposed of it by a will made in 1824. On the construction of the power, having regard to the whole settlement, and especially to the clauses immediately following the words of the power, I am of opinion that no power of appointment was here intended to be given, but if any such power was given it was a power to be exercised only after the death of Mary's husband; and the will relied on was therefore ineffectual to dispose of the estate. As to the costs, I think the defendant quite needlessly brought the plaintiff down to Bodmin. (See Lord Herschell's judgment). As soon as he had made

up his mind that he was going to call no evidence on the question of Mary's insanity and would accept the plaintiff's contention on that question, he should have said so, and there would then have been no trial at all at Bodmin. He must pay the plaintiff the costs of the trial there, and, inasmuch as the point upon which he now succeeds might have been taken by him at the very beginning of this long litigation, I do not think I do him an injustice by leaving him to pay his own costs of the arguments before me in London.

His LORDSHIP granted a stay of execution pending an appeal.

[Solicitors—Robbins, Billing, and Co., for Clarke, Son, and Walsh, Preston, for the plaintiffs; Collyer-Bristow, Russell, Hill, and Co., for the defendant.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Herschell, Macnaghten, and } March 18.
Shand)

THE LIQUIDATION ESTATES PURCHASE COMPANY
(LIMITED) V. WILLOUGHBY AND OTHERS.*

Mortgage—Purchase of equity of redemption—
Payment of mortgage debt by purchaser—Basis
of account.

Decision of Court of Appeal ([1896] 1 Ch., 726)
reversed.

Their Lordships gave judgment in the above appeal, which was argued on November 11 and 12 last. The case before the Court of Appeal is reported [1896] 1 Ch., 726; 65 L.J., Ch., 486. The following statement of facts is taken from the judgment of Lord Herschell. In the year 1888 Edward Joshua Walker had contracted to purchase the business and assets of the firm of Walkers, Parker, Co., for the sum of £502,000, and was required to pay into Court a deposit of £25,000 on account of such purchase. By an agreement made June 20, 1888, between E. J. Walker of the one part, and Lord Henry Paulet, Sir John Willoughby, and Arthur Kennedy of the other part, E. J. Walker charged all his present and future interest in his purchase contract with the payment of the moneys subscribed by the persons named, and the bonuses thereon, and it was further provided that the subscribers should, as between themselves, rank rateably and *pari passu* as against the property thereby charged for the sum subscribed by them respectively and the bonuses thereon. The sum of £25,000 required for the deposit was paid by the subscribers upon the terms of the agreement, and was applied in payment of the deposit. The amount paid by Kennedy was £6,000, in respect of which he became entitled to the benefit of the agreement of June 20, as a security for the repayment of that sum with a bonus of equal amount, making together £12,000. The amount subscribed by Sir John Willoughby was £10,000 and by Lord Henry Paulet £9,000. On September 21, 1888, by an agreement of that date, Kennedy charged all his interest under the agreement referred to and the money and bonuses thereby secured with the payment to John Norton of sums amounting altogether to £6,200. Notice in writing of this charge was, on October 24, 1888, duly given to E. J. Walker, and acknowledged by him. In the month of January, 1889, E. J. Walker sold the greater part of the property which he had contracted to purchase from the firm of Walkers, Parker, and Co. to a company called Walkers, Parker, and Co. (Limited) for the sum of £850,000, payable as to £550,000 in cash and as to £300,000 in shares of the Walker Company of £10 each fully paid up. In April, 1889, £5,122

*Reported by J. EYNE THOMPSON, Esq., Barrister-at-Law.

was paid to Kennedy by the Walker Company by the direction of E. J. Walker, and in June, 1890, certain property at Bagillt, in Wales, of the value of £5,000, included in the original purchase, was conveyed to Kennedy. This payment and conveyance must be taken as both Courts below have held to have been made and executed without the knowledge and concurrence of Norton. By a deed dated August 7, 1890, Kennedy assigned all moneys receivable or recoverable by him under the agreement of June 20, 1888, to Lord Windsor, upon certain trusts therein declared for securing the payment of all moneys then owing to him by Kennedy. By two other deeds, dated December 20, 1890, and June 18, 1891, all the interest of Kennedy under the agreement of June, 1888, and the benefit of the deed of August 7, 1890, became vested in Robert Forrest, upon trust to apply all moneys received or realized from the property comprised in the agreement, in payment of all moneys then owing by Kennedy to Lord Windsor, and to pay any surplus to Kennedy. The deed, as to the effect of which the controversy between the parties has arisen, was made between Forrest of the first part, Norton of the second part, Lord Windsor of the third part, the Capital Finance Company of the fourth part, and the appellant company of the fifth part. It recited a contract for sale to the Capital Finance Company, at the price of £6,000, of certain property, including all the interest of Lord Windsor or of Norton in the premises comprised in and charged by the agreement of June 20, 1888, and that this contract, so far as regarded Norton's rights, was entered into by Lord Windsor with his privity and approbation and upon the terms that he should receive £1,000, part of the purchase money of £6,000. It further recited a contract of sub-purchase by the appellant company from the Capital Finance Company. The deed witnessed that John Norton, "at the request of Lord Windsor, and in respect of his rights, powers, benefits, and interests under the said agreement of September 21, 1888, and as mortgagee," thereby assigned and Lord Windsor and Forrest also assigned, "all the estate and interest of the said Lord Windsor, John Norton, or Robert Forrest of and in the interest formerly of the said Arthur John Clarke Kennedy in or under the said agreement of June 20, 1888, and the moneys and bonuses thereby secured to hold the same unto the said Liquidation Estates Purchase Company (Limited) absolutely." It was declared by the deed that if Norton and Lord Windsor or either of them had a power of sale over the premises the deed should operate as a conveyance upon a sale in exercise of such power. The respondent, Sir John Willoughby, in June, 1889, instituted an action against Lord Henry Paulet, Kennedy, and others to realize his security under the agreement of June 20, 1888. John Norton was not a party to that action. Certain funds having been brought into Court representing the proceeds of the property charged by the agreement, a distribution of such funds was ordered, upon the footing of Kennedy having already received the sum of £10,122 on account of his share. Further sums were subsequently brought into Court, and the appellants, who until that time had had no notice of the action, obtained leave to attend the proceedings. The respondent, Sir John Willoughby, and the persons claiming under Lord Henry Paulet, contended that such further funds belonged to them, inasmuch as they had not received an amount equal to that received by Kennedy if he were bound to bring into account the sum of £10,122. It being considered incompetent for the appellants to enforce their rights as transferees of Norton's security in that action, the present action was instituted, and the defendants in this action were enjoined from obtaining the transfer or payment of the

funds in "Willoughby v. Paulet" until this action could be disposed of. At the trial of the action Mr. Justice North came to a conclusion adverse to the appellants, and this judgment was affirmed by a majority of the Court of Appeal, Lord Justice Kay dissenting.

Mr. Swinfen Eady, Q.C., Mr. Dauney, and Mr. E. Ford were counsel for the appellants; Mr. Cozens-Hardy, Q.C., Mr. Vernon Smith, Q.C., and Mr. W. C. Druce for the respondents.

THE LORD CHANCELLOR.—The facts out of which this appeal arises may be very simply stated. The business and assets of a mercantile firm were for sale in the year 1888, and a Mr. Walker had procured the sale to himself of the business and assets for the sum of £502,000. He was, however, under the obligation of bringing into Court the sum of £25,000. This he did not possess, and accordingly he procured the assistance of Lord Henry Paulet, who advanced £9,000; Sir John Willoughby, who advanced £10,000; and Mr. Arthur Kennedy, who advanced £6,000. The £25,000 was advanced under a bargain, among other things that the lenders should be repaid their advances rateably together with certain other advantages in proportion to their advances. The whole arrangement assumed that Walker was to manage the whole adventure and to be the recipient of the money paid and to distribute it in pursuance of the agreement when obtained. Three months after the date of this agreement Kennedy, who had advanced £6,000, charged his interest in the agreement to one Norton for the sum of £6,200. Of this charge Walker received due notice, and at the beginning of the following year Walker succeeded in reselling the property for £850,000. In the April following, Walker, notwithstanding Norton's notice, thought proper to hand over to Kennedy £5,122, and conveyed property to him which is assumed to be worth £5,000. I do not understand it to be denied that this payment, or, to speak more accurately, this handing over to Kennedy of what Walker had received, notwithstanding his knowledge of Norton's charge, was a breach of Walker's duty, something that he had no right to do, and for which he had neither received any authority from Norton, and of which, indeed, Norton had no knowledge. I desire to treat this part of the case as entirely independent of questions which arise upon further arrangements by Kennedy a year afterwards. But, stopping at this point, I am unable to understand in what way Walker's improper use of his possession of the property realized by the resale can affect Norton's rights or any person claiming under Norton. If, instead of handing it over to Kennedy, he had been robbed of it, and all that remained of the property was insufficient to pay all the persons having rights under it, why should Kennedy's assignee be in a less favourable position for receiving his proportionate amount because the whole fund had been diminished by the unlawful act of the robber? Can it make any difference that Walker, in defiance of his duty, thought proper to divert a certain sum of money from the gross fund in favour of Kennedy at a time when to his knowledge Kennedy had no right to receive it? What Norton, in right of Kennedy's previous rights, was entitled to was the amount of his debt from Kennedy, and why Norton should be selected as the victim of a loss to which he in no way contributed I am unable to understand. Lord Justice Lindley uses the phrase that he did not understand why Norton's loss should be thrown on the other adventurers. It appears to me that the words "Norton's loss" involve the fallacious assumption that in some way or another the share which had once belonged to Kennedy, and which by the hypothesis at the time of the handing over to Kennedy no longer belonged to him, must be so earmarked as already Norton's—

that it becomes Norton's loss; but this I think is erroneous. If the whole fund created has been *pro tanto* diminished by an unlawful act of the person who by the agreement of all the parties was the custodian of the money, and the person through whose hands it was to be distributed, it appears to me that the observation to which I have referred might be retorted, and it might with propriety be asked—Why should the part of the loss which was a loss to the whole fund be appropriated to one particular adventurer? No one has ever yet explained what Norton did or what Norton omitted to do which made him more responsible for a loss of any part of the fund than any other one of the adventurers, and I am therefore of opinion that on this part of the case the judgment of the majority of the Court below is erroneous. So far, although I respectfully dissent from the conclusion, I understand the argument. The money and property handed over to Kennedy are assumed to be payments to Kennedy which he had a right to receive, and by that process Norton's claims were *pro tanto* defeated. I fear that with respect to the remaining part of the case I have some difficulty in understanding the ground of the decision. Kennedy in 1890 executed a deed assigning to Lord Windsor whatever he was entitled to under the original bargain of 1888. As I have already said, I think he was entitled to nothing at the date of that assignment except what remained to him after discharging the debt due to Norton. By a subsequent deed, through the medium of a company called the Capital and Finance Company (Limited), the present appellants purchased Lord Windsor's interest and Norton's interest under the original bargain of 1888. Lord Windsor took, and could only take, from Kennedy what Kennedy had left after his assignment to Norton. But the appellant company purchased for £1,000 Norton's interest which had been created by Kennedy on September 21, 1880. Some litigation had arisen in which Norton's rights were held not to be capable of being enforced, and accordingly this action was brought to enforce those rights against the funds that had been deposited in Court—the practical question in the cause being whether in taking the account of what was due to Norton the moneys and property handed over to Kennedy could be taken into account as being payment of Norton's claim. I am unable to follow the reasoning for one or two grounds. In the first place the thing assigned and of which title was conveyed to Lord Windsor was not the whole sum and could not have been the whole sum which was due to Kennedy under the original bargain, but only so much of it as remained after providing for £6,200 due to Norton. The thing assigned by Norton was that original sum and I am unable to follow what merger is supposed to arise when Norton sold one sum of money with right to it, and Lord Windsor sold another sum of money or the right to it. So far as the deed itself is concerned, I can see no indication of anything but an intention of two different vendors to sell two different things to the same vendor. Nor am I quite certain that I understand what is meant by extinguishing Norton's interest, or how, if such a thing could be done, there is any indication of any intention to do it. Norton's title to what he originally got seems to me to be untouched by anything disclosed in the course of the narrative. He has sold that interest to the appellant company for £1,000, and it appears to me, therefore, that the appellants are entitled to a decree for that interest whatever that may be; and in arriving at that amount it is wholly impossible to treat the moneys handed over to Kennedy as moneys paid to Norton. I am therefore of opinion that the judgment of the Court below ought to be reversed, and the account taken upon the basis I have described—viz., that up to the amount which is due to Norton the

appellant company are entitled to obtain their proportionate amounts of what is due under the bargain of 1888, and I move your Lordships accordingly. The respondents, of course, must pay the costs both here and below.

LORD HERSCHELL, after expressing his dissent from the reasoning of the majority of the Court of Appeal and observing that an assignee could not be made responsible for the wrongful act of an assignor after notice of the assignment had been given, concluded as follows:—In view of the nature of the interests assigned by Norton and Lord Windsor respectively, to which I have called attention, I find it difficult to understand how the doctrine of merger, on which "*Toulmin v. Steere*" ([1817] 3 Mer., 210) rested, can have any application in the present case. Assuming the appellant company to be purchasers from Lord Windsor, what was the nature of the so-called "property" which they purchased? It could be no more than this—the right which Kennedy possessed on August 7, 1890, under the agreement of June, 1888. What was vested in Norton, and what he assigned was the right which Kennedy possessed on September 21, 1888, under the agreement just referred to, to the amount of the debt due to Norton. How could the right which Norton thus assigned merge in what the appellants bought from Lord Windsor? It seems to me that it can only be necessary to show an intention to keep alive that which would otherwise cease to exist by reason of merger. In any other case, the assignment of itself vests the right assigned in the assignee, and it remains in him unextinguished. But, further, I am unable to see any ground for the conclusion that Norton's interest was transferred in order to be extinguished. There is, in my opinion, nothing on the face of the deed, or in the nature of the transaction, to show such an intention. If this had been the intention, I think, having regard to the nature of the interests possessed by the parties to the conveyance, the instrument would have been differently framed. Reliance was placed by the majority of the Judges in the Court below on what was called "the speculative character of Norton's claim against the other lenders," and in another part of the judgment it was said that "the opportunity of making a very doubtful claim against third parties" was not such a benefit as to give rise to the presumption of an intention to keep alive Norton's charge. I think these expressions indicate an erroneous view of the nature of Norton's rights. In my opinion no claim of Norton against third parties, by which is meant the other lenders, is in question. Nor do I think his rights are open to any doubt. He was entitled to claim payment to the amount due to him out of the fund in Walker's hands in respect of Kennedy's original charge *pari passu* with the other lenders who had a charge on that fund. If a part of this fund had been improperly applied by Walker, and the fund thus diminished, Norton was entitled in virtue of the assignment of Kennedy to a rateable proportion of what remained *pari passu* with the other lenders. He was no more affected by its improper application than they were, and there is no more reason in point of law, or as it seems to me in point of justice or equity either, why the loss should fall on him rather than on them. For these reasons I am unable to see any ground for holding that the assignment to the appellant company by Norton of all his rights in Kennedy's interest under the agreement of June 20, 1888, and the moneys and benefits thereby secured did not vest that entire interest in them and give them precisely the rights which he possessed at the time of the conveyance. If it were necessary to hold that Norton's right was kept alive under the conveyance of 1893, there appears to me

ample reason for so holding, inasmuch as it would be obviously for the benefit of the appellant company to keep alive Norton's interest so that they might not be affected by any transactions of Kennedy, subsequent to his assignment to Norton, and prior to his assignment to Lord Windsor. For these reasons, I think the judgment of the Court below ought to be reversed, and that the order made by Mr. Justice North on July 10, 1895, should be varied by stating that the payments to Kennedy are not to be taken into account in ascertaining the amounts to which the plaintiffs are entitled in respect of Kennedy's interest under the agreement of June 20, 1888, until the plaintiffs have received an amount equal to the sum which was on March 17, 1893, due to John Norton. I think the respondents must pay the costs in this House and in the Courts below.

LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred.

[Solicitors—Howard Rumney, for the appellants; Dawson Bennett and Ryde, for the respondents.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Watson, Herschell, Mac- } March 18.
naghten, and Morris)

THE SOUTH AFRICAN TERRITORIES (LIMITED) V.
WALLINGTON.*

Contract—Contract to make a loan—Breach—
Damages.

Decision of Court of Appeal (13 *The Times*
L.R., 361, and [1897] 1 Q.B., 692) affirmed.

The House heard the arguments in this appeal (which is reported 13 *The Times* L.R., 361; [1897] 1 Q.B., 692; and 66 L.J., Q.B., 551) on November 29 and 30 last, and reserved judgment. The following statement of facts is from the judgment of Lord Watson.

The appellant company, in September, 1895, invited tenders for a loan of £75,000, to be secured by the issue of first mortgage debentures for £50, and bearing interest at 6 per cent., repayable with a bonus of £5 10s. on each debenture on September 30, 1900. The whole floating assets of the company were to be conveyed to trustees, for behoof and for security of the bondholders. Ten per cent. of his advance to the company was to be paid by the subscriber upon application for an allotment, and the balance in four subsequent instalments. The respondent applied for an allotment of 16 debentures, representing an advance of £800, and with his application remitted the sum of £30. His offer was duly accepted and the remittance retained by the company. The respondent having declined to make any further advance, the present action was brought against him by the company for payment of a capital sum which they claimed (1) as in specific performance of his obligation; (2) as the balance of the price which he had undertaken to pay for the debentures; and (3) as damages which they had sustained by his breach of contract. Mr. Justice Wright gave judgment for the company for the price of the debentures, but his decision was reversed by the Court of Appeal.

Sir R. Reid, Q.C., Mr. C. Herbert Smith, and Mr. H. D. Woodcock were counsel for the appellants; Mr. Reginald Bray, Q.C., and Mr. Gore Browne for the respondents.

The appeal was dismissed.

The LORD CHANCELLOR.—The terms which have been contrived for the business of joint stock companies and which, when applied to their proper purposes, are

convenient, are nevertheless somewhat calculated to mislead when their mere language is regarded. The applicant for debentures on the face of the instrument contracts to pay something, but the real nature of the whole transaction is an agreement by the applicant to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do. With respect to the claim for specific performance, a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge below to grant a decree for specific performance was perfectly right. But, of course, in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he is entitled to such damages as are appropriate to the nature of the contract. In this case, as I have said, the contract was to lend money. Referring to the question of damages, the amount of interest to be paid for the loan, and the fact that £80 was under the contract itself forfeited to the company for the non-performance of the contract in its entirety, render it difficult to see what substantial damages could have been recovered, and I regret that under the circumstances it should have been thought advisable to appeal to your Lordships in a case which, upon a review of the facts, does not appear in any view of it to have been worth the expense necessarily involved in such an appeal. Your Lordships were informed that it took seven minutes to try, with the result that it has now been to two Courts of Appeal, and, but for what I am about to say, might have resulted in a new trial. Upon a careful review, however, of the facts I have come to the conclusion that it would be impossible to suggest any serious damages in this case, and the tacit admission of the parties by their declining to consider the question of a new trial upon payment of costs renders it unnecessary for me to do more than to say that in this case justice has been done by the Court of Appeal reversing the decision of the learned Judge below. I think it right, however, to add that if any serious right were involved, or if it was reasonably possible that injustice had been done, I should have felt myself at liberty to give my opinion in favour of a new trial. I agree that in this case the parties had in a great measure themselves to blame, but I think the blame was not entirely theirs, and where a miscarriage has taken place by errors in procedure I think the proper remedy is to make the party in default pay for his error in the shape of costs and not to deprive him of important rights, if any such exist. Of course, where error in procedure leads to altering the position of the other litigant party, it may well be that mere payment of costs will not do justice, and in such cases the party in default must suffer. But, speaking generally, a blunder in procedure, if it can be set right, and if important rights are involved, receives its most appropriate penalty on being made the subject of an order for costs. I think, therefore, in this case that the appeal ought to be dismissed, and dismissed with costs.

LORD WATSON, after stating the facts as above, said:—The only engagement made by the respondent with the company consisted in a promise to advance money to them on loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance. It is equally clear, in my opinion, that the obligation of the company to issue mortgage bonds against the loan did not in any way alter or affect the character of the transaction or give the company any right to sue as for the price of an article sold

*Reported by J. EYRE THOMSON, Esq., Barrister-at-Law.

by them which they were ready to deliver. The only remedy open to the company was by action against the respondent for any loss or damage which they might sustain through his breach of promise. The case was tried before Mr. Justice Wright, who gave the company a decree for the price of the debentures which the respondent had agreed to take up. I cannot say that the trial was satisfactory. The proceedings were chiefly occupied by a discussion between the learned Judge and the respondent's counsel, in the course of which the former indicated the terms of the order which he meant to pronounce. No evidence of damage was tendered by the appellant company. An appeal was taken by the respondent upon a notice of motion that the decree of Mr. Justice Wright should be reversed or varied, and that judgment should be entered for him or a new trial allowed. At the hearing of the appeal counsel for the company urged the first and second of the claims made by them, and did not refer to their claim of damages. After the judgment of the Appeal Court was delivered, reversing the order appealed from and entering judgment for the respondent, counsel, in the absence of the head of the Court, moved two Lords Justices to remit the case for trial of the question of damage. Their Lordships declined to entertain the application. On the hearing of this appeal, counsel for the company again pressed upon your Lordships the desperate arguments which they had addressed to the Court of Appeal, and moved your Lordships to send back the case, in order that the company might have an opportunity of proving damage. I do not doubt that it is within the discretion of the House to grant or refuse that motion; but I am very clearly of opinion that, in the circumstances of this case, that discretion ought not to be exercised in favour of the appellants, and that the order appealed from ought to be affirmed, with costs.

LORD HERSCHELL gave judgment to the same effect.

LORD MACNAGHTEN, in the course of his judgment, said,—It is quite plain that the contract made by the offer of these debentures and the acceptance of that offer is nothing more or less than a contract to borrow and a contract to lend so much money payable by instalments. The essential character of the transaction is not altered either by the circumstance that the creditor in a certain event is to have the option of exchanging his position for that of a shareholder or by the complicated nature of the arrangements made for the lender's security. That specific performance of a contract to lend money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it. As regards the second head of claim it is enough to observe that there is no contract to pay except as incidental to the contract of loans. There is no contract of sale at all. The term "price" applied to such a transaction as this is quite out of place. To order payment, by way of damages, of an amount equal to the sum of the remaining instalments is to enforce the agreement against one of the parties to the contract and to set the other free—free from any obligation to pay interest, and free, too, from any obligation to repay the principal. That would be a very one-sided sort of specific performance, contrary to all precedent, and in the result plainly unfair. So far there is no difficulty and there can be no room for doubt. But the learned counsel for the appellants raised a point in connexion with the third head of claim which requires rather more consideration. That claim, as they said, and said truly, had not been dealt with at all. It was not disputed that the contract has been broken. There was, therefore, *prima facie* a case for damages. That there were no materials before the Court for assessing the amount of compensation was not, they said, wholly their fault, and so they asked

this House, under the circumstances, to allow a new trial on that one point. If I thought there had been any miscarriage of justice—if I thought that, owing to some accident or to anything but the neglect or the prudence of the appellants themselves, they had been shut out from the trial of a question which they seriously desired to try, I should have been disposed to grant the indulgence, assuming that it could be granted on terms not unfair to the other side. But I think there is no substance in this claim: and I much doubt whether the appellants ever really meant to put it forward except as a sort of cover in case of disaster, or as a justification or excuse for embarking on this litigation. Thinking as I do that there is nothing substantial in the claim for damages, and that the appellants, if they keep the deposit, will be more than compensated for any loss which they could possibly prove, and thinking, too, that this claim for damages was advisedly not pressed before the Court of Appeal, or put forward until after judgment was given, I am of opinion that the application for a new trial ought to be rejected. To admit such a claim would, I think, be a very dangerous precedent. I think the appeal should be dismissed altogether, and with costs.

The other noble and learned LORDS concurred, and the appeal was dismissed, with costs.

[Solicitors—Francis Vowles and Co., for the appellant; Ranger, Burton, and Frost, for the respondent.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } March 18.

IN RE RIPLEY AND SON'S TRADE MARK.*

Trade Mark—Registration—Capacity for—invented word—"Pearl" and "Pirle"—Application for registration refused.

Decision of Kekewich, J. (*ante*, p. 94), affirmed.

This was an appeal from a decision of Mr. Justice Kekewich (reported *ante*, p. 94) affirming the refusal of the Comptroller-General of Patents to register the word "Pirle" as a trade mark for woollen fabrics in class 34 under the Patents, Designs, and Trade Marks Acts. The applicants, Messrs. Ripley and Son, who were dyers and cloth finishers of Bradford, had also applied to register the word "Pearl" for the same goods, and that application was refused; but there was no appeal as to that. The Comptroller held that the word "Pearl" was incapable of registration on the ground that it was a commendatory word, and that the word "Pirle" was a mere misspelling of the word "Pearl." The applicants stated that the word "Pirle" was formed by the transposition of the letters in the name "Ripley," omitting the final "y," and they contended that it was registrable as an "invented word," and was not open to objection as being a "geographical" word, or a word "descriptive of the character or quality of the goods." Mr. Justice Kekewich agreed with the Comptroller that if the applicants failed as to the word "Pearl" they must fail equally as to the word "Pirle," and he refused the application. The applicants appealed.

Mr. Moulton, Q.C., and Mr. A. J. Walter were for the applicants; the Attorney-General (Sir Richard Webster, Q.C.) and Mr. Ingle Joyce for the Comptroller were not called upon.

The MASTER of the ROLLS said that it was impossible to grant this application unless the Court was prepared to lay down a new proposition of law and say that whenever a man could not register a particular word he

might register another word sounding exactly like it but spelt differently. The appeal would be dismissed.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

[Solicitors—Speechly, Mumford, and Rodgers; The Solicitor to the Treasury.]

Court of Appeal (A. L. Smith,)
Chitty, and Collins, L.J.J.)

1898.
March 18.

IN RE PIERS—EX PARTE ASSIGNEE OF TURNBULL.*

Bankruptcy—Proof—Valuation of security—
“Inadvertence,” what is—Bankruptcy Act,
1883, Sched. 1, r. 10.

This was an appeal by the assignee of Turnbull from an order of Mr. Justice Wright refusing him leave to amend a proof by altering the valuation of his security under Schedule 1, r. 10, of the Bankruptcy Act, 1883. The facts are sufficiently stated in the judgment. It is only necessary here to state that the debt and security were assigned to the appellant on March 20, 1896.

Mr. McIntyre appeared for the appellant; Mr. Cozens-Hardy, Q.C., and Mr. E. A. Nepean *contra*.

THE COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The question raised upon the appeal is whether Mr. Turnbull, who was a creditor of Sir Eustace Piers, a bankrupt, has omitted to value his security, and that such omission has arisen from inadvertence within the meaning of Rule 10 of Schedule 1 of the Bankruptcy Act, 1883. Mr. Justice Wright decided against Mr. Turnbull's assignee, Mr. Piers, who appeals. Rule 10 is as follows:—“For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.” Sir Eustace Piers was adjudicated a bankrupt upon October 1, 1890, and Mr. Turnbull, upon October 3, 1891, sent in his proof against the estate, which, so far as material, was as follows:—“The said Sir Eustace Piers was at the date of the receiving order—viz., October 1, 1890—and still is justly and truly indebted to Thomas Turnbull in the sum of £494 5s. for professional services rendered, work done, and fees payable by the said Thomas Turnbull as solicitor for and on behalf of the above-named bankrupt at his request, for which sum I say that I have not received any manner of satisfaction or security whatsoever, save and except a charge upon certain debentures which is considered worthless.” Having thus sent in his proof, Mr. Turnbull in March, 1892, voted at a meeting of creditors in respect of his whole debt of £494 5s. Mr. Turnbull's assignee in the year of 1897 for the first time contended that when Mr. Turnbull sent in his proof upon October 3, 1891, he omitted to value his security, and that this arose from inadvertence. Now pausing here, can it be truly said that Mr. Turnbull, when he sent in his proof upon October 3, 1891, omitted to value his security? It seems to me that he did not, for he then deliberately elected to assess the

value of his security as being worthless, and to prove against the estate of Sir Eustace Piers in respect of his whole debt, and having done so proceeded to vote at a meeting of creditors as being a creditor against his estate for the whole amount of his debt. It appears to me that he then omitted nothing. He assessed the value of his security at what he then believed to be its value—i.e., as worthless. Assessing the value of a security as worthless is equally an assessment as if the assessment had been of some value. This, in my opinion, suffices to determine the present case against the appellant. But assuming that Mr. Turnbull had omitted to value his security, which I think he had not, did he do so by inadvertence? What is said is this—that Mr. Turnbull was induced in October, 1891, to assess the value of his security as being worthless by information which led him to believe that it was so, but that by reason of a litigation which has taken place in subsequent years it has been found out that his security is not worthless, and in 1897 the appellant sought to amend the proof by valuing his security at £494 and to adhere thereto rather than to prove as he did against the estate for his debt. The finding out by subsequent events that in October, 1891, Mr. Turnbull was in error in electing to assess as worthless his security is not, in my opinion, “inadvertence” within the meaning of the rule. This word points to forgetfulness or accident and not, as Mr. Justice Vaughan Williams well puts it in “*Ex parte Clarke*” (40 W. R., 608), to the case of a creditor having the choice before him of what he will do and balancing the advantage and deliberately electing to prove and abandon his security. I agree with Mr. Justice Wright that the word “inadvertence” in this rule means the opposite of deliberate election, and that it does not cover a deliberate election, though based upon false grounds. What Mr. Turnbull did in October, 1891, did not arise either from forgetfulness or accident, though it may have been a mistake. But this is not the word in the rule, and when I see that in rule 13, schedule II., the Legislature has used the words “mistaken estimate,” it shows me that it meant by “inadvertence” something other than a mistake. If Mr. Justice North in the case of “*In re Lister and Co.*” ([1892] 2 Ch., 417) intended to hold that the words inadvertence and mistake were convertible terms I cannot agree with him. In my judgment the appellant fails to show that Mr. Turnbull has either omitted to value his security, or that he did so by inadvertence, and the appellant must establish both to bring himself within the rule. I say nothing about the length of time which has elapsed nor the other circumstances of this case, for the appellant does not, in my judgment, bring himself within the rule. I agree with the Judge of the Court below, and the appeal must be dismissed with costs.

LORD JUSTICE CHITTY read a judgment to the same effect.

LORD JUSTICE COLLINS said that he agreed that upon the facts of this case Turnbull had not omitted to value his security from “inadvertence.” But upon the question whether the words “omission to value the security,” in schedule 1, r. 10, might not cover a valuation at nothing as well as an omission to put any value on the security at all, he was far from satisfied that the Legislature did not intend those words to cover both cases. The word “value” in the schedules was, in his opinion, used as denoting positive value. It was not, however, necessary to decide this point now because the case was not brought within the “inadvertence” clause.

[Solicitors—W. Eley, for the appellant; T. Edwards, for the respondent.]

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Q.B. Div. (Wright and } 1898.
Darling, J.J.) } March 18.
LONDON COUNTY COUNCIL V. LONDON HYDRAULIC
COMPANY.*

Metropolis—Subways—London County Council (Subways) Act, 1893—Charges for using subways—"Water company," what is—Company for supplying hydraulic power.

Decision of Divisional Court (*ante*, p. 22) affirmed.

This was an appeal by the defendants from the judgment of the Divisional Court (Mr. Justice Wright and Mr. Justice Kennedy) upon a special case, reported *ante*, p. 22. The case was stated by consent, under Order XXXIV., rule 1, in an action by the London County Council against the London Hydraulic Company, in which they sought to recover £185 5s. for remuneration or rates payable by the defendants in respect of their use of certain subways under Queen Victoria-street, Victoria Embankment, Northumberland-avenue, Shaftesbury-avenue, Charing-cross-road, Southwark-street, and Rosebery-avenue. The question raised by the case was whether the London Hydraulic Company was a water company, for, if it was, the charge for use of the subways would only be £32. The defendants were constituted under the Wharves and Warehouses Steam Power and Hydraulic Pressure Company's Act, 1871 (34 and 35 Vict., c. 121), for applying motive power by hydraulic pressure to waterside and land cranes used for working lock gates and other machinery. Under the Act they were authorized to take water for this purpose from the Thames to an amount of one million gallons a day. Section 2 of the Act incorporated therein certain general Acts, including the Companies Clauses Act, 1845, and the provisions of the Waterworks Clauses Act, 1847, with respect to the breaking-up of streets for the purpose of laying pipes. Section 30 provided that the company should construct all proper works, apparatus, and conveniences necessary to secure the return to the River Thames of all waters taken therefrom and used by them immediately after the use of the same for the purposes of the said Act. Section 31 provided that the said company should not at any time supply water to be used for any purpose other than as a motive force, and that if they should supply water at any place contrary to the said enactment they should for every such offence forfeit to every company then incorporated by Act of Parliament for the supply of water within the district the sum of £20. By section 38 the company was authorized to supply within their district motive power by hydraulic pressure to any persons or company. The London Hydraulic Power Act, 1884 (47 and 48 Vict., c. 72), by section 9 imposed a penalty on any person who, being supplied by the said company with pressure water under the powers of the said Act, should use the water so supplied for any other purpose than as a motive force. By the London County Council (Subways) Act, 1893 (56 and 57 Vict., c. 202), it was enacted that it should be lawful for the London County Council to require a company to lay in or remove into a subway of the Council any pipes belonging to the said company where the Council had a subway in the same street. By section 5 it was provided that it should be lawful for the Council to make on the company using any subway a charge for the use of the subway according to a scale to be determined. And it was provided that, in the case of any water or gas company having statutory powers to break up streets, regard should be had only

to such saving (if any) as might result to such company by reason of the pipe being laid and accessible in a subway instead of being laid or remaining under a street, and to any other saving resulting to such company by reason of the subway. By section 10 of the Acts power was given to the Council to make and enforce by-laws, and to fix the scale of fees and charges to be paid by any company or person using any subway. A scale of charges was accordingly drawn up. One table consisted of the charges to be made on water and gas companies having power to break up streets, and the other of the charges for companies, bodies, and persons other than water or gas companies having power to break up streets. The latter was on a higher scale. The pipes of the company have been laid in the subways under the streets named. A question arose between the Council and the defendant company as to the scale of charges applicable. The question for the Court was on which scale the charges were to be made. The Divisional Court held that the defendants were not a water company, and should therefore be charged upon the higher scale. They accordingly gave judgment for the plaintiffs.

Mr. Cripps, Q.C., and Mr. Loehnis appeared for the defendants; Mr. Dickens, Q.C., and Mr. English Harrison, Q.C., appeared for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the only thing that made him doubt at all in this case was the hesitation felt by Mr. Justice Kennedy in the Court below and by Lord Justice Collins in this Court. Speaking for himself he thought the case perfectly clear. The defendants were a company for the purpose of supplying water power for lifting weights and similar purposes. They were prohibited from supplying water for ordinary purposes. Were they a water company? In his opinion they were not. They used water for hydraulic purposes and for nothing else. Section 5 of the Subway Act of 1893 made a special exception as to charges in the case of gas and water companies, and all other companies were to pay the ordinary charges as laid down in the by-laws.

LORD JUSTICE CHITTY delivered judgment to the same effect.

LORD JUSTICE COLLINS agreed. During the argument he shared the misgivings felt by Mr. Justice Kennedy in the Court below. The point he had a difficulty about was not whether this was an ordinary water company, but what was the meaning of the term "water company" as used in this Subway Act and in the by-laws. This company equally had a right to break up the streets for the purpose of laying pipes. But he came to the conclusion that for some reason which he did not understand the Legislature had placed ordinary gas and water companies upon a different and better footing than other companies.

[Solicitors—W. A. Blaxland, for the plaintiffs; Beale and Co., for the defendants.]

Q.B. Div. (Wright } 1898.
and Darling, J.J.) } March 18.
SOUTHWARK AND VAUXHALL WATER COMPANY V.
HAMPTON DISTRICT COUNCIL.*

Rating—Rateable value—"Land covered with water"—Reservoir of water company—Public Health Act, 1875, sec. 211, subs. 1 (b).

This was a case stated by justices of Middlesex on the hearing of a complaint by the Hampton District Council against the Southwark and Vauxhall Water Company for non-payment of certain general district

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

rates. The question was whether a large reservoir belonging to the company was "land covered with water" within the meaning of section 211, subsection 1 (b), of the Public Health Act, 1875. That section enacts that certain classes of hereditaments, among them being "land covered with water," are to be rated at one-fourth of their net annual value. The justices held that the reservoir in question was not land covered with water, but was in the nature of an artificial tank, and that it was, therefore, rateable at its full value. The water company obtained a statement of this special case.

Mr. CRIPPS, Q.C., and Mr. RYDE, appeared for the water company and cited "Reg. v. Birmingham Waterworks" (1 B. and S., 84), "Reg. v. Newport Dock Company" (2 B. and S., 708), and "East London Waterworks Company v. Leyton Sewer Authority" (L.R., 6 Q.B., 669), cases decided under the corresponding provisions of the Public Health Act of 1848, as authorities to show that this reservoir ought to be treated as "land covered with water" and rated at one-fourth of its net annual value.

SIR EDWARD CLARKE, Q.C., and Mr. COURTHOPE LUNBROE appeared for the district council, and admitted that there was a difficulty in asking their Lordships to overrule the decisions of the Court of Queen's Bench which had been cited. The matter, however, was an important one, and it was desired to obtain the opinion of the Court of Appeal.

MR. JUSTICE WRIGHT, in giving judgment, said that no doubt the case raised an important question, and it was one on which, if there was no authority, they might possibly take a different view from that taken by the Court of Queen's Bench in the case of "East London Waterworks Company v. Leyton Sewer Authority." Sir Edward Clarke, however, admitted that the present case could not be distinguished from that case. This Court must, therefore, follow it, and the appeal would be allowed, but there would be leave to appeal to the Court of Appeal.

MR. JUSTICE DARLING concurred.

[Solicitors—Lanfear, Tanner, and Lanfear, for the appellants; Kent and Son, for the respondents.]

Court of Appeal (A. L. Smith, }
Chitty, and Collins, L.J.J.) }

1898.
March 19.

WHEELER V. FRADD.*

Contract—Agreement—Construction—Undertaking to repay an advance on company going to allotment.

This was an appeal by the plaintiff from the judgment of Mr. Justice Wills at the trial of the action without a jury. The action was brought to recover £1,000 under the following circumstances:—In November, 1896, the defendant was engaged upon a scheme for the formation of a company to purchase a certain business, and in connexion therewith the plaintiff was introduced to the defendant. The defendant had entered into a contract to purchase the business for £70,000—£1,000 to be paid down as a deposit, which was to be forfeited if the purchase was not completed, and £69,000 to be paid on March 1, 1897. On November 23, 1896, the plaintiff advanced £1,000 to the defendant, and the defendant on the same day signed the following letter addressed to the plaintiff:—"In consideration of your having advanced £1,000 in connexion with the business to be purchased, 'I hereby undertake to repay the same with £1,000 bonus . . . such payment of £2,000 to be made by me to you after allotment as and when I receive

payment from the company." The defendant tried to get the shares in the proposed company underwritten, but the purchase did not come off and the company was never registered, and therefore no allotment of shares was ever made. The plaintiff then sued to recover the £1,000. Mr. Justice Wills gave judgment for the defendant.

Mr. WITT, Q.C., and Mr. J. CORNER appeared for the plaintiff; Mr. DICKENS, Q.C., and Mr. BOXALL who were not called upon, for the defendant.

The COURT yesterday dismissed the appeal.

LORD JUSTICE A. L. SMITH said the letter of November 23, 1896, so far as material, meant that the defendant would repay the £1,000 after allotment if and when he received payment from the company. It was said that there was a contract by the defendant to register the company. His Lordship could not find any such contract. If, however, such a contract was made out, it by no means followed that the plaintiff could recover the £1,000, because it did not follow that the company would ever have gone to allotment. Both parties contemplated that the company would be brought out. All that the defendant undertook was to do his best to bring out this company, to convert this business into a living company, and the learned Judge found as a fact that the defendant did his best to bring out the company, and the evidence showed that he had committed no breach of his contract. The judgment must be affirmed.

LORD JUSTICE CHITTY and LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Bennett and Co., for the plaintiff; A. Puleston, for the defendant.]

Chan. Div. }
(Stirling, J.) }

1898.
March 19.

IN RE STOCKPORT RAGGED, INDUSTRIAL, AND
REFORMATORY SCHOOLS.*

Charity—Commissioners—Jurisdiction—Exemptions from—Charitable Trusts Act, 1883, sec. 62—Charity maintained partly by voluntary contributions and partly by endowment.

This was a petition presented by the trustees of the above-named charity under the provisions of Sir S. Romilly's Act (52 Geo. III., c. 101), asking for the sanction of the Court to a proposed mortgage of part of the property vested in the trustees. The Stockport Industrial Schools were established by a trust deed in 1866, the school buildings being conveyed to trustees upon trust to permit them to be used as a ragged, industrial, and reformatory school under a committee of management. The trustees were empowered to sell the original buildings and apply the proceeds of sale in providing larger schools. The petition stated that the situation of the schools was now unsuitable and the buildings were too small for the purposes of the trust. Notice had been given by the Government inspectors that unless the buildings were enlarged the number of children must be reduced. Under these circumstances the trustees proposed to sell the existing buildings and apply the proceeds, together with other moneys in hand and a further sum to be raised upon mortgage of the new premises, in buying a new site and building larger schools. The petition came before the Court on November 6, 1897, when his Lordship gave the necessary sanction, but at that time the Charity Commissioners had not been served with notice of the petition and did not appear. Subsequently they became aware of the order which had been made, and on

*Reported by W. F. BARRY, Esq., Barrister-at-Law

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

December 1, 1897, they applied to the Judge to stay the drawing up of the same in order that they might have an opportunity of submitting that the presentation of the petition required their sanction under section 17 of the Charitable Trusts Act, 1853. The drawing up of the order was accordingly stayed, and the matter again came before the Court on January 12 last, when the question of the jurisdiction of the Commissioners was fully argued.

Mr. Vaughan Hawkins appeared for the Charity Commissioners; Mr. Ingle Joyce for the Attorney-General; Mr. Grosvenor Woods, Q.C., and Mr. Henry Johnston for the petitioners; and Mr. H. Greenwood for respondents to the petition.

At the conclusion of the arguments judgment was reserved.

MR. JUSTICE STIRLING, in giving judgment said that the sanction of the Charity Commissioners had not been obtained either to the mortgage or the application, the petitioners maintaining that the charity was exempted from the jurisdiction of the Commissioners by section 62 of the Charitable Trusts Act, 1853. The Commissioners disputed this, and, having been served with the petition at the request of the Attorney-General, appeared and opposed the petition in order that the question, which was one of some importance, might be judicially determined. The income of the charity was derived from a Government grant, contributions from School Boards, boards of guardians, and other public authorities, subscriptions from residents in the neighbourhood, and the earnings of the school children in their industrial occupations. From the evidence it appeared that all donations or bequests made to the schools were applicable by the committee of management in aid of the voluntary contributions which constituted their main support, and that every donation or legacy had been so applied. By section 66 of the Charitable Trusts Act, 1853, the expression "endowment" meant and included "all lands and real estate whatsoever of any tenure . . . and all . . . personal estate whatsoever which shall for the time being belong to or be held upon trust for a charity or all or any of the purposes thereof." It was decided by the Court of Appeal in "*In re Clergy Orphan Corporation*" (L.R. [1894], 3 Ch., 145) that those words must receive their natural meaning, and that all property of every description belonging to or held in trust for a charity, whether held upon trusts or conditions which rendered it lawful to apply the capital to the maintenance of the charity, or upon trusts which confined the charitable application to income, was an "endowment" within the meaning of the Act. Section 62 of the Act, however, contained certain exemptions from the jurisdiction and amongst others the following:— "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, or which may legally be applied by the governing or managing body in aid of the voluntary subscriptions, shall be subject to the jurisdiction of the said Board or the powers or provisions of the said Act." It was also held, in the case above referred to, that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of a charity which might be lawfully applied as income consistently with the terms of

the gift were exempt, and that such gifts and the income thereof were not brought within the jurisdiction by being invested by the governing body. That decision, said His Lordship, would govern the present case were it not that section 62 contained the following proviso:—"Provided always that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools." It was contended on behalf of the Charity Commissioners that that proviso excluded all schools from the exemption found in section 62. The trustees, on the other hand, contended that only cathedral, collegiate, and chapter schools and other schools of a similar kind were so excluded. His Lordship had come to the conclusion that the narrower construction ought to prevail. He pointed out that the charities enumerated in section 62 were of an extremely miscellaneous kind; and if the intention was that all such charities should be excluded from the exemption so far as they consisted of schools it would have been easy and more natural to express it by saying simply, "Provided that the said exemption shall not extend to any school whatever." His Lordship added that if the argument on behalf of the Charity Commissioners were well founded, Roman Catholic schools must, down to the passing of the Roman Catholic Charities Act in 1860, have been subject to the jurisdiction of the Commissioners, a result which did not seem to be in accordance with the legislation on the subject of those charities. His Lordship accordingly directed the order, which had already been made, to be drawn up, the Court being of opinion that the school in question was not within the jurisdiction of the Charity Commissioners.

[Solicitors—Andrew, Wood, and Purves, for John W. Johnston, Stockport; Clabon; the Solicitors to the Treasury.]

Q.B. Div. (Wills and)
Darling, JJ.) }

1898.
March 19.

THE QUEEN V. TOWMAN AND OTHERS, JUSTICES.*

Licence—Conditions on granting—Justices—
Jurisdiction—Mandamus.

Application granted for a *mandamus* to justices who had granted licences on condition that the applicants paid certain sums for public purposes.

This was the continuation of the arguments in this case, which were reported in *The Times* of March 14. It was a motion for a *certiorari* and a *mandamus* to justices of South Shields who had granted licences to applicants on condition that they paid certain sums to the magistrates for some public purposes.

Mr. C. A. Russell, Q.C., and Mr. R. V. Banks appeared for the publican, who had paid £1,000 for his licence; Mr. Crump, Q.C., and Mr. Rowsell (Mr. Grain with them) appeared for the justices; Mr. Asquith, Q.C., and Mr. Blacklock appeared in support of the rule for one publican; Mr. R. Cunningham Glen for another publican whose case was to be bound by the decision herein.

Mr. ROWSELL continued his arguments. This was a discretionary writ and would only be granted if (1) the applicant could show he had a legal right to a *mandamus*; (2) if there had been a refusal by the justices to hear, which there was not in this case; and (3) if the *mandamus* could be practically effective. He cited "*R. v. West Riding of Yorkshire Justices*" ([1896] 2 Q.B., 386), and "*R. v. Griffiths*" (5 B. and Ald., 731).

Mr. ASQUITH, in support of the rule, submitted that there had been no serious attempt to justify the course

followed by the justices. In the interval between the two applications the various applicants came to the clerk to the justices and deposited certain sums. In two cases these had been returned and the licence refused. This applicant deposited £1,000. No authority could be cited to support the course taken by the magistrates. In 1758 an authority to the contrary could be found. "*R. v. Athay*" (2 Burrow, 653). It could not be that there was no remedy applicable. In the whole of the licensing legislation there was no definition of the right of objectors to licences. But the fact that notices had to be given to the public pointed to the inference that any one could come before the Court and point out objection. He referred, on the point, to "*Boulter v. Justices of Kent*." As to criminal proceedings, an improper motive was necessary to be shown. It was not alleged here that the justices had any improper motives. Therefore that was no remedy in this case. The case of "*Sharp v. Wakefield*" ([1891] A.C., 473) showed that a judicial discretion must be exercised. How could it be said that the justices who had imposed this illegal condition had heard and determined properly.

The Court then intimated that he had better turn his attention to the question whether his client was interested.

On this he cited "*Boulter v. Justice of Kent*" ([1897] A.C., 556), where at page 569 Lord Herschell said:—"Every member of the local community might object." If he had a right to object and did not receive a proper hearing he had a legal right to apply for a *mandamus*.

The Court discharged the rule as to the *certiorari*, but affirmed the rule for a *mandamus*.

MR. JUSTICE WILLS said the case was one of importance, but of no difficulty as soon as the facts were ascertained. The result was perfectly clear. Any member of the public had a right to be heard to object to the grant of a licence, and he was therefore entitled to be heard according to legal principles. If illegal consideration, having no bearing whatever on the case before the justices, formed a distinct element in their decision against the objector, the objector could not be said to have been heard according to law. The justices had stated that they proposed to grant the licence on conditions which would be announced at the adjourned meeting. These terms turned out to be the surrender of three licences and payment of £1,000. He would express no final opinion on the question whether the condition as to the surrender of the three licences was a proper condition or not. But it was quite possible that that should be perfectly legal. It was germane to the matter under the consideration of the justices. As to the condition for the payment of £1,000, the justices had in fact no more right to demand it for public purposes than they had to ask it for themselves for their own purposes. If such a system as this were allowed in two years all granting of licences would be decided by auction. It would be a system open to the greatest abuses and as objectionable as could be conceived. It was perfectly clear that the condition attached had influenced the decision of the justices in granting the licence. The publican would not have had his licence if he had refused to pay the £1,000. The magistrates thought they were doing a good stroke of business, but it could not be permitted. They could not be said to have given a real hearing. The applicant had a right to be heard by a tribunal which would disengage its mind from considerations such as these. The *mandamus* must therefore go.

MR. JUSTICE DARLING concurred. The justices had done a thing which possibly in a few years they might be by law allowed to do. They had done a thing which had often been suggested as a suitable thing to be done by legislation. But the authority of Parliament had not yet been given to such a course. If it were given there

would be a careful specification of the objects for which the money should be applied. The justices had apparently read theoretical treatises and approached the matter with views on unearned increment which they wished to apply. That could not be done. See the case of "*Reg. v. Adamson and others (Justices of North Shields)*" (1 Q.B.D., 201), where the justices of North Shields had views on the Tichborne case. Then Chief Justice Cockburn said:—"I think it very probable that they thought they were doing what was right, and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction." The justices here had acted not on the ordinary grounds, but on considerations which they ought not to have taken into account. It made no difference that their object might be perfectly laudable. They had not decided on the grounds upon which they ought lawfully to have decided.

[Solicitors—E. Flux and Leadbitter, for W. E. O. Scott, for the publican; Ford and Ford, for Robert Purvis, South Shields, for the Justices.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby, and Vaughan Williams, L.JJ.) } March 21.

IN RE THE WEST LONDON AND GENERAL PERMANENT
BENEFIT BUILDING SOCIETY.*

Building Society—Rules—Construction—
Members withdrawing—Death of members—
Widows and children of deceased members.

This was an appeal of Mrs. Elizabeth Thomson from a decision of Mr. Justice Wright (sitting as an Additional Judge of the Chancery Division), dated November 10 last. The above-named society was established in May, 1866, under the provisions of the Building Societies Act, 1836 (6 and 7 Will. IV., c. 32), for the purpose of carrying on the ordinary operations of a building society. The society was never incorporated under the Building Societies Act, 1874 (37 and 38 Vict., c. 42). Its shares consisted of two classes—namely, deposit or unadvanced shares and anticipated or advanced shares. In September, 1893, the society was ordered to be wound up under the Companies Acts as an unregistered company upon a petition presented by a depositor. In the course of the proceedings a petition was presented to obtain the sanction of the Court to a scheme of arrangement between the creditors and the contributories of the society. The scheme as approved by the Court in 1894 provided that the residue should be divided amongst the unadvanced shareholders. It was not then anticipated that there would be any residue, and no question arose as to the rights and priorities of the members. It afterwards, however, appeared that, when all claims were discharged, there was a surplus of about £2,800 for division amongst the unadvanced shareholders. An application was accordingly made to Mr. Justice Wright, and his Lordship ordered that the surplus assets should be distributed rateably amongst all the unadvanced shareholders other than those that had compromised and released their claims. From that decision Mrs. Thomson now appealed, and the Court of Appeal after hearing arguments came to the conclusion that the surplus assets ought to be distributed according to the legal rights of the shareholders. The decision of Mr. Justice Wright on this point was consequently

*Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.

reversed. The question then arose whether the widows and children of deceased members were entitled to precedence, and, if so, whether they must claim under a nomination. This question turned upon the construction of the following clauses in the society's rules:—
 "22.—Members Withdrawing.—That any member desirous of withdrawing his or her investments, and having been a member one year, shall, by giving one month's notice in writing to the directors, at any monthly meeting, be entitled to receive back his or her net monthly subscriptions, with simple interest at the rate of 5 per cent. per annum, and, in addition thereto, after the second year, such portion of the profits as shall be declared by the directors at the date of withdrawal. That if more than one member shall give notice to withdraw at one time they shall be paid in rotation, according to the priority of notice; provided always that the widows and children of deceased members shall always have the precedence. . . ."
 "25.—Death of Members.—That, in case of a member dying, his or her share or shares and interest shall belong to or be distributed among his or her executors or administrators, or other the person or persons hereinafter mentioned, and such executors or administrators may vote and act in all cases whatsoever as fully as the deceased member whom they represent might have done if living. . . .
 When on the death of any member of this society, without leaving a will, a sum of money not exceeding £50 shall become payable, such sum shall, in default of letters of administration being taken out to the deceased member, be paid by the trustees to any person nominated by the deceased in writing deposited with the secretary (such person being husband, wife, father, mother, child, brother or sister, nephew or niece, of such member), and in case there shall be no such nomination, or the person so nominated shall have died before the deceased member, or in case the member shall have revoked such nomination, then such sum shall be paid to the person who shall appear to the said trustees to be entitled under the statute of distributions to receive the same, without taking out letters of administration in England or Ireland, and without confirmation in Scotland. . . ."

Mr. Bramwell Davis, Q.C., and Mr. Romer were for the appellant; Mr. Macnaghten, Q.C., and Mr. A. R. Ingpen, Mr. Warrington, Q.C., and Mr. W. E. Lloyd, and Mr. Buckley, Q.C., and Mr. Clauson were for the several persons who represented the various classes of shareholders interested; Mr. T. Bateman Napier was for the Official Receiver and liquidator.

The MASTER of the ROLLS, in giving judgment, said that, although the rules were extremely obscure, he thought he saw his way to a tolerably plain conclusion on them. The Court had to deal with the shares of deceased members. It must ascertain who were the persons the society must recognize on the death of members. It came to this—that, according to Rule 25, the society must recognize the executors or administrators of deceased members. If there were neither the society must look further and must recognize any person nominated by the deceased to take the share. If there were neither executors nor administrators, and if the sum of money payable did not exceed £50, and there was no nomination, then the society must recognize the person entitled under the Statute of Distributions to receive the money. What were such persons to take? Mr. Bramwell Davis had said that they could not take anything without having given notice to withdraw. That was a startling proposition, and not warranted. There was nothing requiring notice of withdrawal to be given. Whether a member gave notice to withdraw or not, on his death he ceased to be a member. Rule 22 referred to withdrawing. It did not refer to members who were dead. It contained a

proviso "that the widows and children of deceased members shall always have the precedence." His Lordship had at first thought that that proviso meant widows and children of those members who had given notice to withdraw, but, on consideration, he did not think that that was meant. He came to the conclusion that, whenever there was a competition between persons who had given notice to withdraw, and the widows and children of deceased members, the widows and children should always have precedence. It did not mean those whom the society was not bound to recognize under Rule 25. It meant those the society had to recognize, so that if there was a competition between withdrawing members and widows and children whom the society was bound to recognize under Rule 25, they were to have precedence. That appeared to his Lordship to make the best sense that was possible of these exceedingly ill-drawn rules.

LORD JUSTICE RIGBY delivered judgment to the like effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Grundy, Izod, and Co.; Collyer-Bristow, Russell, Hill, and Co.; Ward, Bowie, and Co.; Riddell, Vaizey, and Smith.]

Court of Appeal (A. L. Smith, } 1898.
 Chitty, and Collins, L.J.J.) } March 21.

IN RE KENT COALFIELDS SYNDICATE (LIMITED) (IN LIQUIDATION).*

Company—Liquidation—Register—Inspection.

Section 32 of the Companies Act, 1862, as to inspection of the register does not apply to a company in liquidation.

This was an appeal from an order of Mr. Justice Grantham at Chambers, upon the application of Mr. William S. Ogle under section 32 of the Companies Act, 1862, directing the Kent Coalfields Syndicate (Limited) (in liquidation) and the liquidator forthwith to produce to the applicant for his inspection the register or registers of the members of the Kent Coalfields Syndicate (Limited). The syndicate was incorporated as a limited company under the Companies Act, 1862, and was now in voluntary liquidation. Subsequently to the voluntary winding-up, Mr. Ogle, who was neither a creditor nor a shareholder of the company, applied at Chambers for an order for inspection of the register, which Mr. Justice Grantham ordered as above. The company and the liquidator appealed. It was admitted for the purpose of this case that the company had ceased to carry on business.

Mr. F. EVANS, for the appellants, contended that section 32, which gave a right of inspecting the register to any member of the company gratis and to any other person on payment of one shilling, did not apply where the company was in voluntary liquidation. That section only applied to a living company, and it imposed a penalty on the company in case of refusal to allow inspection. The section occurred in Part II. of the Act, which did not refer to a winding-up. Part IV. dealt with the winding-up of companies. When a company was being wound up the register was in the possession and custody of the liquidator, and the company ceased to have any control over it. Sections 138 and 156 gave a right to a contributory to inspect the register in the case of a company being voluntarily wound up, and in that case the Judge who had jurisdiction to make an order for inspection was the Judge who had jurisdiction under the Companies

(Winding-up) Act, 1890—namely, Mr. Justice Wright. He referred to "Oakes v. Turquand" (L.R., 2 H. L., at p. 365).

Mr. SWINFEN EADY, Q.C., and Mr. J. R. ATKIN, for the respondent, contended that section 32 did not come to an end with the voluntary winding up. The obligation to keep a registered office under section 39 of the Companies Act, 1862, did not cease upon a voluntary winding up, though the penalty provided by that section for not keeping a registered office only applied as long as the company carried on business. Sections 32 and 33 must apply after a voluntary winding up. It was in many instances necessary that the liquidator should have power to make new entries in the register, and it was very important that the power of inspection given by section 32 should be upheld even after a voluntary winding up. Section 32 was absolute in its terms, and was not confined to going companies. All the reasons for granting inspection existed, though not in the same degree, in the case of a voluntary winding up.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether or not an order could be made, in the case of a company in liquidation and not carrying on business, under section 32 of the Companies Act, 1862, for inspection of the company's register. In his opinion the inspection mentioned in section 32 referred to an inspection in the case of a going company. Take the penalty clause for not allowing inspection, why should a company incur a penalty if it was in liquidation? It seemed to him unreasonable to read the section as applying to a company in liquidation as well as to a going company. In his opinion the learned Judge had no jurisdiction to make the order for inspection under section 32.

LORD JUSTICE CHITTY delivered judgment to the same effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Lake and Lake for the appellants; N. Herbert Smith for the respondent.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.JJ.) } March 22.

HARWARD v. GUARDIANS OF THE POOR OF THE HACKNEY UNION AND FROST, RELIEVING OFFICER.*
Lunacy—Removal of lunatic to workhouse—Relieving officer—Lunacy Act, 1890, sec. 20—Construction—"Satisfied," meaning of.

This was an appeal from the judgment of Mr. Justice Hawkins after the trial of the action with a special jury. The action was brought by Mr. Theodore Bulwer Harward, who formerly practised as a dentist and resided at Clapton, to recover damages from the guardians of the poor of the Hackney Union and their general relieving officer, Julius Bernard Frost, for false imprisonment, in having forcibly removed him from his house to the workhouse infirmary and having detained him there as a dangerous lunatic. The defendants pleaded that whatever steps were taken with regard to the removal of plaintiff to the workhouse infirmary were taken in good faith and in discharge of their duties under the Lunacy Act, 1890. At the trial the learned Judge held that there was no case against the guardians, but the jury returned a verdict for the plaintiff as against Frost for £25, on the ground that Frost did not take reasonable care to satisfy himself that the plaintiff was a dangerous lunatic. After hearing the case on

further consideration the learned Judge said that, inasmuch as the jury had found for the plaintiff, the most convenient course would be to enter a verdict for him, and let formal judgment be entered for him, and to stay execution until after the parties had gone to the Court of Appeal. The case is reported in *The Times* of January 20 and January 24. The defendant Frost appealed.

Mr. HORACE AVORY (with whom was Mr. Rowsell) appeared in support of the appeal, and said that Frost justified his conduct under section 20 of the Lunacy Act, 1890. There was no evidence to support the finding of the jury, neither did the finding itself entitle the plaintiff to judgment. The earlier sections of the Act dealt with the making of reception orders for lunatics. Such orders were made on petition, and the duty was imposed on the judicial authority constituted by the Act to decide whether the alleged lunatic ought to be detained. Section 20 was one of a group of cases dealing with urgency cases, and was as follows:—"If a constable, relieving officer, or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic with regard to whom it is his duty to take any proceeding under this Act, that the alleged lunatic should, before any such proceedings can be taken, be placed under care and control, the constable, relieving officer, or overseer may remove the alleged lunatic to the workhouse of the union in which the alleged lunatic is, and the master of the workhouse shall, unless there is no proper accommodation in the workhouse for the alleged lunatic, receive and relieve and detain the alleged lunatic therein, but no person shall be so detained for more than three days, and before the expiration of that time the constable, relieving officer, or overseer shall take such proceedings with regard to the alleged lunatic as are required by this Act." The learned Judge told the jury that the question for them was whether Frost was honestly satisfied that it was necessary for the public safety or the plaintiff's welfare that he should be removed to the infirmary. It was necessary to draw the distinction between being honestly satisfied and being satisfied on reasonable grounds. The section clearly protected a relieving officer who was honestly satisfied, even though a jury might find that he had not taken reasonable care to satisfy himself. The evidence showed beyond doubt that the plaintiff acted honestly, and in fact it was not seriously alleged that he was actuated by any improper motive. The verdict ought to be disregarded, and judgment entered for the defendant.

Mr. HARRIS, Q.C., and Mr. T. C. JARVIS, for the plaintiff, contended that the verdict and judgment ought to be allowed to stand. In order to justify himself under section 20 the defendant must show that there was an alleged lunatic, a person deemed to be a lunatic, and the defendant must have been judicially satisfied that that person was a dangerous lunatic. Here there was no alleged lunatic, no person deemed to be a lunatic. The wife of the plaintiff never said he was insane, she merely said he was ill. The defendant did not himself go to see the plaintiff, he simply accepted the report of another relieving officer and said he was satisfied. That was not a compliance with the statute.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that in his opinion Mr. Justice Hawkins had taken the correct view of this case, though he had not acted upon it, but had accepted the verdict of the jury and had invited an appeal to this Court. The action was brought against a relieving officer of the Hackney Union for false imprisonment. The plaintiff complained that he had been wrongfully detained for three

*Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

days as a dangerous lunatic in the workhouse infirmary, and the jury returned a verdict in his favour for £25 damages. It was now said on the part of the plaintiff that the defendant was liable to have judgment entered against him by reason of that verdict. The question turned on section 20 of the Lunacy Act, 1890. That section said that if a relieving officer was satisfied that it was necessary for the public safety or the welfare of an alleged lunatic that the alleged lunatic should immediately be placed under control, he might remove the alleged lunatic to the union workhouse. It was argued that there was no evidence that the plaintiff was an alleged lunatic or was deemed to be a lunatic. His Lordship, after referring to the evidence of Mr. Fenton, who was another relieving officer of the Hackney Union, to the written answers given by the plaintiff's wife to questions placed before her by Mr. Fenton, and to the evidence of the defendant himself, said that in his opinion there was ample evidence that the plaintiff was alleged to be a lunatic and was deemed to be a lunatic. Under those circumstances it was the defendant's duty, in pursuance of the section, to remove the plaintiff to the workhouse. The section said nothing about its being the duty of the relieving officer to take reasonable care to satisfy himself that it was necessary to remove the alleged lunatic. It said simply that he was to be satisfied that it was necessary to take that course. To say that he must be honestly satisfied was only another way of saying that he must be in fact satisfied. A dishonest satisfaction would be no satisfaction at all. The learned Judge told the jury over and over again that the question for them was whether the defendant was honestly satisfied. In his opinion, if the jury had found that the defendant was not honestly satisfied, it would have been the duty of the Court to set such verdict aside, because there would have been no evidence to support it. He thought that the verdict which they had returned must be set aside and that judgment must be entered for the defendant.

LORD JUSTICE CHITTY said he was of the same opinion. The case depended on section 20 of the Lunacy Act, 1890. He thought it was impossible to say that this section was curtailed by section 330, or that the requirement of good faith and reasonable care could be imported from section 330 into section 20. Under this section the relieving officer had to act on the spur of the moment, and the only requirement was that he should be satisfied that the alleged lunatic was a dangerous lunatic. The learned Judge had added the word "honestly," and no doubt a sham or dishonest satisfaction would not do. There was abundant evidence here that the defendant was honestly satisfied; in fact there was no real suggestion that he had acted dishonestly. The verdict had been given on a question which was not put to the jury, and it could not be allowed to stand.

LORD JUSTICE COLLINS said he entirely agreed, and, as they were really affirming the view of Mr. Justice Hawkins, he did not think it necessary to add anything.

[Solicitors—Henry Grain, for the plaintiff; Stones, Morris, and Stone, for the defendant.]

Chan. Div. } 1898.
(Stirling, J.) } March 22.
ALLHUSEN V. Baling and South Harrow Railway Company.*

Lands Clauses Acts—Notice to treat—Part of a road—Lands Clauses Consolidation Act. 1845. sec. 92.

Held, that the defendants, who required for their railway a portion of a private road forming the approach to a house and grounds belonging to the plaintiff, could not be compelled to take the whole of the property under sec. 92 of the Lands Clauses Consolidation Act, 1845.

The question in this case was whether the defendants, who desired to purchase, for the purpose of making their railway, a small portion of a private road forming the approach to a house and grounds belonging to the plaintiff, could be compelled to take the whole of his property. The case came on upon a motion by the plaintiff for an injunction to restrain the defendants from proceeding with the purchase of part of the plaintiff's mansion house, known as Twyford Abbey, which was comprised in a certain notice to treat served by the defendants and dated January 21, 1898, without the purchase of the remaining portion of the plaintiff's said mansion house. Twyford Abbey, mentioned in the notice of motion, is a mansion house of considerable size, situated between Baling and Sudbury, and standing in grounds surrounded principally by hedges but partly by a fence. In this fence are entrance gates close to which stands a lodge. Leading from the lodge to a public highway, known as Hanger-lane, is a private road about 620 yards in length, having trees on each side and forming an attractive approach to the house. At the end of the road next to the highway is an outer lodge. Within the grounds of the mansion stands a parochial church or chapel, with a burial ground. This chapel is from time to time, but not regularly, used as a place of public worship, and interments still take place in the burial ground. The mansion and grounds and the private road, together with lands on each side of such road, originally formed part of an estate known as the Twyford Abbey estate, and were formerly the property of a Mr. Willan. By a deed dated November 6, 1890, the devisees under that gentleman's will conveyed to the plaintiff the mansion house and grounds and the site of the private road, together with the advowson of the church or chapel, and all such right and title as the vendors had in or could dispose of in the said church or chapel, subject to a reservation to the vendors and other persons claiming under the will of Mr. Willan of a right of way over and along the private road, and also a right to make and maintain openings into the private road for the purpose of access thereto from any adjoining lands forming part of the Twyford Abbey estate; and also subject to a reservation to the vendors and persons claiming under the will, and generally to all persons lawfully frequenting or going to and from the church and churchyard, of a right of way with horses and carriages from the outer to the inner lodge, and of a right of way on foot from the inner lodge to the church and churchyard. The plaintiff had ever since been, and still was, in occupation of the property so conveyed to him. The defendant railway company was incorporated by an Act of Parliament passed in August, 1894, for the purpose of making a railway between Baling and South Harrow, and with this Act the Lands Clauses Acts and the Railways Clauses Act, 1845, Part I., were incorporated. On January 21, 1898, the defendants served the plaintiff with notice to treat for a portion of the private road (at a point distant from the inner lodge about a quarter of a mile) comprising 2r. 31p., stating that the land in question was required solely to enable the company to construct a bridge for the purposes of their railway over the same, and that the roadway would be lowered 5ft. under the bridge so as to give a headway of 15ft., and that during construction access would be preserved to Twyford Abbey; and they expressed their

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

willingness, instead of purchasing the said lands, to accept and purchase an easement for the purposes aforesaid. On January 29, 1898, the plaintiff gave notice that he required the defendants to purchase and take the whole of the house within the meaning of and pursuant to section 92 of the Lands Clauses Consolidation Act, 1845. On February 7, 1898, the defendants gave notice of their intention to issue a warrant for summoning a jury to determine the value of the plaintiff's interest in the lands described in the notice to treat, and the amount of compensation for the damage to be sustained by the plaintiff by reason of the execution of the works authorized by the Act. Thereupon the present action was brought, and the notice of motion served. The question was whether that portion of the road which the railway company desired to take was part of Twyford Abbey within the meaning of section 92 of the Lands Clauses Consolidation Act, 1845.

Mr. Balfour Browne, Q.C., Mr. Butcher, Q.C., and Mr. Moon appeared for the plaintiff; Mr. Beale, Q.C., and Mr. R. F. Norton for the railway company.

MR. JUSTICE STIRLING, in giving his considered judgment, said that in deciding the question he thought no regard was to be paid to the note annexed to the notice to treat, though it might well be that such works as were there mentioned or other works would have to be executed by the company in order to satisfy the obligations imposed by sections 53 and 63 of the Railways Clauses Consolidation Act, 1845, and to avoid payment of a large sum by way of compensation for injuriously affecting the plaintiff's lands by severance or otherwise. It had been decided by a series of cases that the word "house" in section 92 included whatever would pass under a conveyance of the house by that description. It had also been settled that under the word "house" the curtilage and garden passed, the reason being that those were matters of necessity, and not merely of pleasure, to the house. It was further held in "*Doe v. Collins*" (2 T. R., 498) that a coal pen on the opposite side of a public road passed as part of a house, upon the ground that the coal pen was necessary for the convenient use and occupation of the house. On the other hand, it had been held in "*Pulling v. the London, Chatham, and Dover Railway Company*" (3 D. J. and S., 661) that lands adjoining a house used simply for the purposes of pleasure and for keeping cows did not constitute part of the house. That being the state of the law it seemed to his Lordship that in some cases the soil of a piece of land used as a road might pass under the conveyance of the house. To take, for example, a house standing in the middle of a garden enclosed by a ring fence, and approached by a drive leading from the entrance gate to the front door, there the soil of the drive would be as much part of the garden, and therefore, legally speaking, of the house, as the grass plots or flower beds. The same would be true of a road leading through or along a kitchen-garden to the back of the house, as appeared to have been decided in "*Barnes v. Southsea Railway Company*" (L. R., 27 Ch. D., 536). On the other hand, in "*Pulling v. London, Chatham, and Dover Railway Company*," Lord Justice Turner was clearly of opinion that if a mansion stood in a park, the park would not pass by a conveyance of the mansion, and it seemed to his Lordship that if matters now stood as they did in 1890, before the sale to the plaintiff, a conveyance of this mansion by the devisees of Mr. Willan would not, without more, have passed either the adjoining lands or the soil of the private road, though it might possibly have passed a right to use the road. A way was certainly "of necessity" to a house, but the question was whether the soil of the way was also "of necessity." In no reported case was there any suggestion to that effect.

His Lordship had great difficulty in seeing why it should be. Avenues and roads such as that which formed the approach to Twyford Abbey were by no means of infrequent occurrence in the country, and sometimes extended to the distance of a mile or more; and if the land proposed to be taken by the defendants was part of Twyford Abbey, the same thing must be true of a piece of road situate, it might be, more than a mile from a house. That went far beyond anything which had yet been decided. Even if the plaintiff's property consisted only of a house with garden and outbuildings there would be great difficulty in coming to the conclusion that the soil of this road would pass by a conveyance under the simple description of a "house," though his Lordship thought it highly probable that a right of way over the road would so pass. The plaintiffs' property, however, included an interest in the church and churchyard, which in any view could hardly be part of a "house." It also included a field containing 6a. 2r. 32p. as to which, regard being had to the authorities, it seemed open to great doubt whether it would pass under such a conveyance, and there being substantial property of the plaintiff which would not so pass, the difficulty of holding that the soil of the road affording access to the whole of such property passed under a conveyance of the house would be increased. Seeing that his Lordship was now dealing with the case upon an interlocutory application he thought the motion should be refused.

[Solicitors—Crossman, Pritchard, and Co.; Baxter and Co.]

Chan. Div. }
(Romer, J.) }

1898.
March 22.

HARROP AND OTHERS V. THE MAYOR AND CORPORATION OF OSSETT.*

Nuisance—Hospital—Erection of smallpox hospital—*Quia timet* action dismissed.

The above case (which was reported in *The Times* of March 18 and 21) was a *quia timet* action based on private nuisance. The plaintiffs, who were the trustees of an estate and also the owners of a shoddy warehouse and factory, claimed an injunction restraining the defendants from using a hospital as a smallpox hospital. The hospital was a small one, having room for some eight patients. As yet only one smallpox patient had been received there. The hospital was some 250 yards distant from a valuable mansion belonging to the plaintiffs, 100 yards from the privies of the factory and about the same distance from the warehouse, and about 170 from a dwelling-house, occupied by its owner. A six-foot wall enclosing an open space of 40ft. surrounded the hospital. The plaintiffs raised no objection to the hospital being used for infectious or contagious diseases other than smallpox. Their principal contention was that any smallpox hospital must be necessarily a source of danger to persons in its neighbourhood, because that disease was disseminated, *inter alia*, by air-borne infection or what was called aerial convection. Numerous members of the medical profession were called, who stated their views on this much vexed question. The medical officers of Sheffield, Leicester, and Bradford stated that they had become converts to the theory from their actual experience. The plaintiffs, in their reply, submitted that, whether the theory of aerial convection was sound or not, the evidence showed that a smallpox hospital was in fact undoubtedly a source of danger to its neighbourhood.

*Reported by R. B. SCHOMBURG, Esq., Barrister-at-Law.

Mr. Macmorran, Q.C., and Mr. O. Leigh Clare, appeared for the plaintiffs; and Mr. Cozens-Hardy, Q.C., and Mr. J. G. Wood for the defendants.

MR. JUSTICE ROMER said that the principles applicable to claims for relief in *quia timet* actions were well known. In order to sustain such an action the plaintiff must establish a strongly or extremely probable case that the apprehended mischief must arise. The evidence here was most conflicting, and he did not intend to weigh one side against the other. He could only say that, to his mind, the short result was that the plaintiffs had not established a case entitling them to an injunction. He should give no opinion about the point about which the experts differed so much—namely, the aerial convection of smallpox. All that he should say was that on the balance of testimony a smallpox hospital might be a source of danger if badly conducted, and further he thought that where a smallpox hospital was established there was a tendency for cases to arise in its immediate neighbourhood, especially when the hospital was large and its neighbourhood crowded and ill-ventilated. But he was not satisfied that when such a hospital was well-conducted it was such a substantial source of danger as to constitute it a legal nuisance, and it was certainly not so when the hospital was one like the present, a small one. Taking into consideration the small size of this hospital, its situation, and general nature, he was not satisfied that it would be such a substantial source of danger as would justify the granting of an injunction. Moreover for several years previously there had actually been a smallpox hospital in the immediate neighbourhood and no ill result had ever flowed from it, either to the plaintiffs or others. It was said that the hospital might prove a source of danger when the plaintiffs' land was built upon. It was not necessary to deal with that until the case arose. He was satisfied that, to persons using the land in its present state, there was no substantial source of danger. He also thought there was no source of danger from drainage. All the witnesses, moreover, agreed that vaccination offered complete protection, and he thought that the Court should consider that by taking such reasonable precautions the plaintiffs and others in the neighbourhood could protect themselves. The case, moreover, was not one of public nuisance but of private nuisance. He therefore dismissed the action with costs.

The defendants asked for an order for solicitor and client costs under the Public Authorities Protection Act, 1893.

HIS LORDSHIP, after a full argument, held that under the Act he had no discretion and that the defendants were entitled to solicitor and client costs, and made an order accordingly.

[Solicitors—Chester, Broome, and Griffiths, for Janson and Co., Wakefield; Baker, Lees, and Co., for W. Brook, Town Clerk, Ossett.]

Q.B. Div. (Wright and) 1898.
Darling, J.J.) March 22.

THOMAS V. ROBERTS.*

Bill of Sale—Validity—Date.

A bill of sale is not voided by the omission of the date in the copy filed on registration.

This was an appeal from a decision of Mr. Fitz Roy Cowper, sitting as Deputy Judge at the Marylebone County Court. The question (which arose upon an interpleader issue) was whether a bill of sale is void if

the copy which is filed upon registration omits to state the date of the bill of sale. The bill of sale itself was dated November 10, 1897, but in the copy filed the date was omitted. The Deputy County Court Judge held that the bill of sale was void. The claimant under the bill of sale appealed.

Mr. Turrell appeared for the claimant; Mr. Frank Mellor for the execution creditor.

The Court held that the bill of sale was not voided by the omission of the date in the copy filed. The cases which held that the affidavit filed on the registration of the bill of sale could not be looked at to correct an error in the original bill of sale did not apply to the copy filed upon registration of the bill of sale. Any creditor who looked at the affidavit would find the date accurately given. He could not be misled as there was no inconsistent date in the copy. The appeal must be allowed.

Appeal allowed and case remitted to County Court for evidence to be taken upon certain points not dealt with by the Court.

[Solicitors—J. Howard Smith, for claimant; A. H. D. Nonweiler, for execution creditor.]

Q.B. Div. (Wright and) 1898.
Darling, J.J.) March 22.

HEMMING AND OTHERS V. DAVIES.*

County Court—Remitted action—Bankruptcy of plaintiff—Security for costs.

A County Court Judge has no jurisdiction to order the trustee of bankrupt plaintiffs in an action remitted from the High Court to give security for costs under sec. 94 of the County Courts Act, 1888.

This was an appeal by the plaintiff Sharp, the trustee in bankruptcy of the plaintiffs Hemming and Johnson, from an order of the Judge of the Birmingham County Court ordering the plaintiff Sharp to give security for the costs of the action. In May, 1897, the action, which was for £57 8s. 6d., the price of goods sold and delivered, was commenced in the High Court. On June 5 leave to defend was given and an order made remitting the action to the County Court under section 65 of the County Courts Act, 1888. On August 30 the plaintiffs Hemming and Johnson became bankrupt and on October 7 Sharp was appointed trustee. Upon December 31 an order was made upon Sharp's *ex parte* application under R.S.C., order 17, rules 4 and 5, adding him as a plaintiff. On January 14, 1898, the writ and the order remitting the action were lodged in the County Court, and on January 24, 1898, the County Court Judge made the order for security for costs to be given by Sharp under section 94 of the County Courts Act, 1888. From that order the present appeal was brought.

MR. BOYDELL HOUGHTON appeared for the appellant and submitted that the County Court Judge had no jurisdiction to make the order. The action remained in the High Court till January 14, 1898, the date at which the remitting order was lodged, and the County Court Judge had no jurisdiction to order a trustee appointed by the High Court to give security for costs.

MR. S. HUTTON appeared for the defendant, and submitted that the County Court Judge had jurisdiction to make the order. Sections 65 and 94 of the County Courts Act, 1888, must be read together.

The Court held that the County Court Judge had

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

no jurisdiction to make the order. The action was fully constituted in the High Court, and was not liable to abatement, and the County Court Judge had no jurisdiction to cut it down. The action was never within section 94.

Appeal allowed.

[Solicitors—Belfrage and Co., agents for Reece and Harrik, Birmingham, for the plaintiffs; Morse, Simpson, and Co., for Whitlock, Birmingham, for the defendant.]

Q.B. Div. }
(Bigham, J.) }

1898.
March 22.

THE FIELD STEAMSHIP COMPANY (LIMITED) V. BURR.*
Insurance—Marine—Policy on ship.

Underwriters on an ordinary policy on ship held not liable for expenses incurred by the shipowner in disposing of a cargo damaged in a collision and rejected by the cargo-owners as worthless.

Judgment was delivered in this case, which was tried on the 15th and 16th inst. The action was brought by the owners of the steamship *Elmfield* to recover a partial loss, under a policy of marine insurance upon the steamship, under circumstances which are fully stated in his Lordship's judgment. The question raised was, shortly, whether the underwriters on a ship are liable under a policy in the ordinary form to pay expenses incurred by the shipowner in discharging and disposing of a cargo which has been so damaged in a collision that it has become worthless and has been rejected by the cargo-owners.

Mr. Joseph Walton, Q.C., and Mr. Lewis Noad appeared for the plaintiffs; Mr. Carver, Q.C., and Mr. Scrutton for the defendant.

MR. JUSTICE BIGHAM read the following judgment. —This was an action brought to recover a partial loss alleged to be due by the defendant under a time policy on the plaintiffs' ship *Elmfield*. The policy was "on hull and materials, on machinery and boilers," valued at £10,000, and the perils insured against were, amongst others, "of the seas . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . ship, &c., or any part thereof." During the currency of the policy the vessel was carrying a cargo of cotton seed on a voyage from Alexandria to London under a charterparty made by the plaintiffs with Messrs. Barnett Brothers, acting for the charterers. On December 20, 1896, she arrived in the Thames, when a vessel called the *Derwent* came into collision with her, and caused such serious damage to her hull below the water-line that it became necessary to run her ashore in order to prevent her from sinking in deep water. During the next ten days part of her cargo was put into lighters, and by this means she was sufficiently lightened to enable her to be towed to the Tilbury Dry Dock, where she was temporarily patched. On January 5, 1897, she was towed to Millwall Dock, where it was intended that the remainder of her cargo should be discharged. It was proved, however, that, by the action of the water and mud which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive, and was a nuisance, and thereupon the sanitary authorities, acting under the powers of the Public Health (London) Act, 1891, ordered the ship to abate the nuisance and to remove the cotton seed. In the meantime the owners of the cargo had abandoned the cargo to their underwriters, and neither the cargo-owners nor their underwriters

would pay freight or take delivery, alleging, as the fact was, that the cargo had ceased to be cotton seed and had become worthless. The cargo-owners and their underwriters were justified in taking up this position. See "*Asfar and Co. v. Blundell*" (1 Com. Cas., 71). In these circumstances the plaintiffs made a contract with a firm of Samuel Williams and Sons, who are the owners of a pier at Dagenham, near the mouth of the river, to discharge the cargo and to spread it out on some land at a short distance from the pier at a charge of 5s. per ton, and so to get rid of it. The ship accordingly left the Millwall Dock for Dagenham Pier, and was there discharged by Messrs. Samuel Williams and Sons. The claim against the defendant and his co-underwriters on the hull was a very large one, amounting to many thousands of pounds, but all disputes in connexion with it have been settled between the parties, except as to items amounting in the aggregate to £1,046 12s. 10d. These items may be divided into two classes—(1) the charges incurred in dealing with the cargo between the date of the casualty and its arrival at Dagenham, amounting to £237 2s. 10d., and (2) the charges of Messrs. Williams and Sons amounting to £759 10s. for discharging and disposing of the cargo at Dagenham. The question is whether the defendant and his co-underwriters are under any liability to recoup the plaintiffs any and, if so, what part of this expenditure. The matter in the first instance passed into the hands of Messrs. Robert Lindley, Sons, and Davison, a firm of average adjusters of great experience, who were of opinion that the charges in question ought not to fall on the underwriters on ship, but ought to be paid by the Indemnity Club, in which the plaintiffs' ship was entered. After some correspondence they appear, however, to have modified their view, and to have suggested that perhaps the underwriters on ship should be held liable for what the average adjusters called the "bare cost of removing the damaged cargo from the ship." This suggestion did not satisfy either the Indemnity Club or the underwriters on ship, and thereupon this action was brought in the name of the shipowners to get the dispute settled. Mr. Joseph Walton, who represented the plaintiffs, contended that the expenditure in question was recoverable as having been caused by perils, which had come to the hurt, detriment, or damage of the ship, within the meaning of the policy. He admitted that, as between the shipowner and the cargo-owner, it would have been the duty of the former, had the cargo arrived as cotton seed, to put it out of the ship, and to have borne the cost of doing so; but he said that when, as in this case, that duty did not arise, by reason of the cargo-owner being relieved from the correlative duty of receiving the cargo, the ship in the circumstances of this case became injured or damaged by the presence of a large mass of useless matter due to the incursion of the water and its action on the cargo, and that the cost of dealing with it and disposing of it in accordance with the law was as much part of his clients' loss by the perils insured against as the cost of repairing the hole in the ship's bottom. He further suggested that the repairs to the bottom of the ship could not be executed until the cargo was put out, and that therefore he was entitled to the cost of discharging the cargo; and finally he said that, in any event, he was entitled to the difference, which he alleged was considerable, between what it would have cost to discharge cotton seed and the actual cost of discharging the putrid mass in the ship. His argument went so far as to suggest that, even if the structure of the ship had not been injured at all, his clients would have been entitled to recover; as, for instance, if the sea water had got to the cargo through the hatches, and had brought about consequences similar to those

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

which had in fact happened in this case. I think his contentions were not well founded. There are cases in which the underwriters on a policy such as this may be liable, although the vessel suffers no physical injury, as, for instance, where part of the cargo is jettisoned and it becomes necessary to make good the loss in general average, or perhaps, where money has been spent under the suing and labouring clauses. But these are cases which depend upon different considerations. I think that, where the insurance is upon the hull, materials, and machinery of a ship, it is essential before any claim at all can be made against the underwriters, either that the shipowner should be deprived of his ship, or of the use of her, or that physical damage should happen to it by the direct action of one of the perils insured against. It is not enough for the shipowner to say, "The perils of the sea have caused loss to me." He must go further, and show that they have caused the loss of, or damage to, his ship. Take an instance:—The perils of the sea, storms and adverse winds, may delay a ship on her voyage causing her to occupy twice the time she otherwise would do. This is a grievous loss to the shipowner, but it is clear he gets no compensation from his underwriter, either for the cost of keeping the ship during the delay or for the extra wear and tear she undergoes; and the reason is because the underwriter only promises to indemnify him against loss or damage to the thing insured which may happen from the perils included in the policy, amongst which are not those ordinary incidents of a voyage which a ship must encounter when she sails the ocean. Neither the wages, nor the provisions, nor the damages arising from the long user of the ship form any part of the thing insured; and I think the cases show, and I am satisfied that the practice in business points the same way, that, even when the ship suffers actual physical damage from the perils insured against, the underwriter's liability is to be limited to what may reasonably be regarded as the cost of making good the particular damage in question. Consequential damage which the shipowner may suffer the underwriter is not responsible for. (His Lordship referred to the cases of "Robertson v. Ewer" (1 T.R., 127) and "De Vaux v. Salvador" (4 A. and E., 420) as being in point, and also to Park on Marine Insurance, 8th ed., p. 115, Arnold, 6th ed., pp. 727-730, 800, and Benecke, p. 462.) Now, applying the law as laid down in those authorities to the present case, I come to the conclusion that the cost of dealing with and unloading and disposing of the cargo, or, as Mr. Walters calls it, the filthy mass into which the cargo has been changed, is not a loss which has happened to the thing insured by any of the perils insured against. Sea perils or no sea perils, the shipowner has to empty his ship if he ever intends to use her again, and therefore the cost of doing it cannot be said to be rendered necessary by reason of the perils insured against; it has to be incurred any way, and the fact that in the one case the shipowner would, by discharging the cargo, become entitled to his freight, whereas in the other case he cannot get his freight, seems to me not to concern the underwriters on ship at all; and if he is not entitled to the cost of discharging it follows *a fortiori* that he is not entitled to the cost of dealing with or disposing of the cargo. As to the contention that the plaintiffs are entitled to be paid the difference between what would be the cost of discharging the cotton seed and the actual cost of discharging the material which was in the ship, I think that also is too remote. It constantly happens that cargo arrives so damaged by sea-water as to make it more difficult and expensive to handle in the discharge than it otherwise would be. But who has ever heard of a claim against the underwriter on hull for such a loss as that? The claims are,

in my opinion, too remote and cannot fairly be regarded as forming part of the cost of repairs. I find, as a fact, that the plaintiffs have been fully paid by the underwriters for all that can properly be called the cost of repairing. They have, as it seems to me, incurred further consequential loss, but it is a loss for which the defendant is not in any way liable.

Judgment for the defendant with costs.

[Solicitors—W. A. Cramp and Sons, for the plaintiffs; Waltons, Johnson, Bubbs, and Whatton.]

Q.B. Div. } 1898.
(Bigham, J.) } March 22.

J. LODDEN AND CO. V. CHARLES CALDER AND CO.*

Ship—Bill of lading—Quantity shipped—Short delivery—Estoppel.

Shipowners held not precluded by the terms of the bill of lading from showing that part of the goods were not shipped.

This was an action brought to recover a balance of freight due on the carriage of a cargo of sleepers on board the plaintiffs' vessel from Riga to West Hartlepool. The claim was admitted subject to a counter-claim for short delivery. It was admitted that there was in fact a short delivery, the question being whether under the terms of the charterparty and bills of lading the plaintiffs were liable for the short delivery. The charterparty which was entered into between the plaintiffs and the defendants provided that the cargo was "to be brought to and taken from alongside ship at merchant's risk and expense," and that "the bills of lading should be conclusive evidence against the owners of the quantity shipped on board as stated therein." The usual perils were excepted. The bill of lading for one parcel upon which the question arose stated in the body of the bill of lading that 5,300 whole sleepers and 1,062 half-sleepers had been received on board, and there was the following entry in the margin:—"Hereof about 1,000 half pieces and about 400 whole pieces lost through weather as per protest dated Riga, 5-17 Nov., 1897." The sleepers were made into rafts, in accordance with the usual practice at Riga, some distance from the vessel, and then rafted down and left alongside. It appeared from the protest referred to in the bill of lading that a large number of the sleepers had been lost, by reason of a storm, before shipment on board.

Mr. Lawson Walton, Q.C., and Mr. H. F. Manisty appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. T. E. Scrutton for the defendants.

Mr. JOSEPH WALTON contended that the shipowners were bound by the figures in the body of the bill of lading ("Fisher, Renwick, and Co. v. Calder," 1 Com. Cas., 450). The note in the margin in the present case only stated what was admitted to be the fact in that case. He also referred to "Lishman v. Christie" (19 Q.B.D., 333).

HIS LORDSHIP, in giving judgment, said that, looking at the whole of the bill of lading, he could not say it amounted to an estoppel. It did not amount to such a clear statement of the quantity taken on board as to justify him in holding that the owners of the ship were precluded from showing that part of the goods were not shipped on board the vessel. The bill of lading referred to the protest, which must therefore be looked at, and from that document it appeared that part of the goods mentioned in the bill of lading were never shipped on board the vessel. There must be judgment for the plaintiffs.

*Reported by R. H. BALLOCK, Esq., Barrister-at-Law.

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } March 23.

MANNERS V. S. PEARSON AND SON.*

Account—Action for—Moneys payable under a contract in Mexican dollars—Depreciation in Mexican dollar.

Moneys were payable to M. from time to time in Mexican dollars, under a contract with defendants. M. died, and no one became his legal personal representative till two years afterwards, when the plaintiff took out letters of administration.

In an action by plaintiff for an account, held that such account should be taken on the relative values of the English and foreign currencies at the date of taking the account, and not at the dates when the moneys became payable (Vaughan Williams, L.J., dissenting).

This was an appeal from a decision by Mr. Justice Kekewich. The action was brought for an account of what was due from the defendants to the plaintiff as the legal personal representative of a Mr. Morison under a contract entered into between him and the defendants. By that contract certain sums of money in Mexican dollars had to be paid by the defendants to Morison, and the question at issue was how the account ought to be taken in this country and at what times the sums payable in Mexican dollars ought to be reckoned in English money, and how the equivalent sums in English money ought to be calculated. The contract was dated October 6, 1891. It was in the English language, and was made between Morison, described as of the City of Mexico, of the one part, and the defendants, described as of 10, Victoria-street, Westminster, and thereafter called the contractors, of the other part, and by it the defendants agreed to pay Morison (1) £595 17s. 6d. in English money on the execution of the agreement; (2) 1c. in Mexican currency for every cubic metre of certain excavation works mentioned in the agreement. This money was payable from time to time as and when the same should be received by the defendants from the junta or committee of management of the drainage works of the city and valley of Mexico. The contract also provided as follows:—"3. The contractors shall within one month from the date of this agreement, and monthly thereafter, make and furnish to the said A. D. Morison a statement in writing of the total number of cubic metres of excavation which shall have been done by the contractors and paid for by the junta to them as aforesaid up to the date of such account and of the amount then payable to the said A. D. Morison at the rate of 1c. per cubic metre, and the contractors shall be entitled to take credit for and deduct therefrom all sums paid by them to the said A. D. Morison on account thereof as per statement attached, and they shall immediately thereafter pay the balance appearing by such account to be due to him. 4. Subsequent payments shall be made by the contractors to the said A. D. Morison as and when the contractors shall from time to time receive from the junta payment for excavation done by them" as therein mentioned. The £595 17s. 6d. was duly paid, and so long as Morison lived the defendants paid him all that became due to him under the contract. He died in June, 1894, and no one became his legal personal representative until May, 1896, when the plaintiff took out letters of administration to his estate. In June, 1896, the plaintiff brought this action

for an account. It came on for trial on November 4, 1897, and the Court then declared, *inter alia*, that the plaintiff was entitled to have an account taken of what was due and payable to him as Morison's legal personal representative under and by virtue of the above agreement, and in taking such an account the defendants were to be credited with a certain sum of £327, as to which no question arose. The defendants had always kept proper accounts of the sums payable to Morison's estate in Mexican dollars, and the plaintiff accepted these accounts as correct. According to them a balance of \$19,366 was due from the defendants to the plaintiff. On the accounts two questions arose. First, the plaintiff contended that the dollars ought to be turned into English money whenever any dollars ought to have been paid by the defendants; whilst the defendants contended that the ultimate balance only ought to be turned into English money; secondly, the plaintiff contended that even if the defendants were right in their first contention, this balance ought to be turned into English money on August 31, 1896, when the excavating work was finished and paid for by the Spanish Government. At that date Mexican dollars were worth 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on November 13, 1897, when the amount due was first ascertained and when the dollar was worth only 22½d. In these circumstances the plaintiff served the defendants with a notice of motion to give effect to his views. The learned Judge refused the motion with costs. The plaintiff appealed. The case was argued on March 2 and 3, when judgment was reserved.

Mr. H. Terrell, Q.C., and Mr. Cecil Walsh were for the plaintiff; Mr. Renshaw, Q.C., Mr. Bardswell, and Mr. Tanner were for the defendants.

The Court dismissed the appeal, Lord Justice Vaughan Williams dissenting.

The MASTER of the ROLLS, after stating the facts as above, continued as follows:—Before considering the questions raised by this appeal it is necessary to ascertain the grounds on which any judgment or order for payment in English money can be properly made in a case where the plaintiff sues upon a contract to pay in the currency of a foreign country. The terms of the contract confer no right to payment in English money. If the defendants had tendered to their creditors either in Mexico or wherever they demanded payment the amounts due from them in Mexican dollars at the proper times they would have offered to perform their obligations in strict accordance with their contract. The necessity for considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and speaking generally the Courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution. Whether before the Debtors Act an order in Chancery for the payment of so many Mexican dollars could have been made and could have been enforced by attachment I do not pause to inquire. With this possible exception the above statement is correct and affords the true explanation of the necessity for considering how much money in English currency the defendants ought to pay the plaintiff. If the defendants were within the jurisdiction of any other civilized State and were sued there, as they might be, the Courts of that State would have to deal with precisely the same problem, and to

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

express in the currency of that State the amount payable by the defendants instead of expressing it in Mexican dollars. If this be the true explanation of the necessity for expressing in English money what the defendants ought to pay, it follows that such necessity does not arise until the Court orders payment. But it does not follow that the sum to be inserted in the order is the equivalent at that time of the moneys payable by the terms of the contract, for the defendants may be liable, not only to pay those sums, but also damages in the shape of interest or otherwise for not having paid them at the proper time. The obligations, if any, of the defendants in this respect must be determined before the amount for which they are liable can be calculated and expressed in any order for payment. The foregoing considerations furnish the principles on which the present case must be decided; and that principle was clearly expressed by Lord Eldon in "*Cash v. Kennion*" (11 Ves., 314). At page 316 he said:—"I cannot bring myself to doubt that where a man agrees to pay £100 in London on January 1 he ought to have that sum there on that day. If he fails in that contract, wherever the creditor sues him the law of that country ought to give him just as much as he would have had if the contract had been performed." The application of this principle to various circumstances is illustrated by other decisions (*e.g.*, "*Cockerell v. Barber*," 16 Ves., 461; "*Scott v. Bevan*," 2 B. and Ad., 78; "*Bertram v. Duhamel*," 2 Moo., P.C., 212); but it is unnecessary to refer to them at length, and I pass to the facts of the present case. It must be borne in mind that for two years after Morison's death he had no legal personal representative to whom the defendants could pay anything. During all that time the defendants did not break their contract in not making the payments which they had agreed to make, and, there being no breach of contract, damages for non-payment during that time are out of the question. Moreover, there is no evidence that interest is payable by the law of Mexico on debts in respect of which there is no contract to pay interest, as is the case here. When in May, 1896, the plaintiff became Morison's administrator he became entitled to demand from the defendants—first, payment at once in Mexican dollars of all arrears due under the contract; secondly, payment in future, in Mexican dollars and at the stipulated times, of the amounts which should thereafter become due under the contract. Failure by the defendants to make these payments would be breaches by them of their contract, and would expose them to claims for damages in some shape or other. How these damages would have to be ascertained by an English Court if it became necessary to assess them is a question of some difficulty, as will be seen by turning to Story's *Conflict of Laws* (§§ 308 *et seq.*) and Sedgewick on *Damages* (3rd ed., p. 250). But, for reasons which I proceed to state, I am of opinion that no claim by the plaintiff to damages in any shape can be supported in the present case. The order of November 4, 1897, was the judgment on the trial of the action, and it limits the right of the plaintiff to an account of what is due to him from the defendants under their agreement with Morison. This judgment excludes all claim to damages for non-payment of particular sums charged against the defendants in taking the account. If the plaintiff wanted to charge the defendants with damages in taking the account he should have obtained some declaration or inquiry entitling him to such damages. Before the *Judicature Acts* no one ever heard of investigating damages in taking an account in Chancery of money due under a contract. Since the *Judicature Acts* damages can be given in the Chancery Division where they could not have been given before; but even now a judgment or order for an account of what is due under a contract does not involve an inquiry

as to damages in taking the account. The absence from the judgment of November 4, 1897, of any declaration or inquiry as to damages is easily explained by the long delay in obtaining letters of administration to Morison's estate, during which time no damages could be payable by the defendants; but even as to damages since the plaintiff obtained letters of administration the judgment pronounced is fatal to the plaintiff's first contention, that he is entitled to have all sums payable by the defendants turned into English money at the times when those sums became payable according to the terms of the contract. Such a contention can only be supported on the theory that the defendants are liable for damages for default in payment. To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter. Even as regards the balance of 19,600 dollars found due to the plaintiff, I see no grounds for awarding him damages for the non-payment of that sum before it was ascertained. The plaintiff urges that it now appears that this sum ought to have been paid on August 31, 1896; but how could it have been paid then when no one then knew what the amount payable was? The sum in question is the balance due on taking the whole account. Under the judgment of November 4, 1897, the defendants are not chargeable with damages for delay in accounting, any more than they are chargeable with damages for not punctually paying sums properly placed to their debit in taking the account. Moreover, no undue delay in accounting was proved so far as we know. As soon as the balance was ascertained the defendants offered to pay it to the plaintiff either in Mexican dollars or in English currency equal to their then value, as the plaintiff might prefer. This offer the plaintiff declined. In my opinion the defendants have been in the right throughout in this particular controversy, having regard as we must to the terms of the contract and to the judgment of November 4, 1897, which is not appealed against. The appeal in my opinion fails and ought to be dismissed with costs.

LORD JUSTICE RIGBY gave judgment to the like effect.

LORD JUSTICE VAUGHAN WILLIAMS differed. He said,—The only question argued before us in this case has been as to what is the proper mode of taking the account ordered in an action brought in this country by a creditor to have an account taken of moneys payable abroad by the defendant in foreign currency, whether such account should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as of the dates when the debts became payable, or as of some other and what date or dates. It was not questioned on either side but that the total debt ordered to be paid after taking the account must be expressed in English currency and that the amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchasable commodity—*i.e.*, in practice, according to the rate of exchange existing at the particular time between the currencies. The only question has been as to what that particular time was. Now I will first consider the question irrespective of the form of action. It seems clear that, in an action in whatever form in the English Courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute or some authority binding the English Courts or by the agreement of the litigants, the amount of the English judgment or order must be based on the

quantity of English sterling which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency delivered at the appointed place of payment—i.e., the amount payable according to the rate of exchange. After referring to “*Scott v. Bevan*” (2 B. and Ad., 78) and “*Suse and Pompe*” (8 C.B., N.S. 538), his Lordship continued,—It seems plain that this mode of computing the value of foreign currency in English sterling and that converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment. If this is the general rule in actions for the recovery in English Courts of sums payable abroad in foreign currency, I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account. It may be that in the present case it might have been troublesome to ascertain the dates at which the various sums payable as commission in dollars became payable, but this would not in my judgment have been a sufficient reason for fixing the amount of the result of the account in English sterling according to the value of the dollars at the date of the completion of the taking of the account. This difficulty, however, does not arise in the present case, because the plaintiff is willing that the value shall be taken of the dollars as on August 31, 1896, the date as of which the defendants in fact rendered their account, including all the sums now claimed by the plaintiff. His Lordship then discussed the authorities on the subject and concluded as follows:—I think that the order of Mr. Justice Kekewich ought to be amended by declaring that the plaintiff is entitled to have the amount of Mexican dollars found to be due by the account of August 31, 1896, converted into English money sterling at the rate of exchange prevailing between the said currencies on that day. It seems to me that to hold otherwise would make the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure and according as he brings his action in the Queen's Bench Division or in the Chancery Division.

[Solicitors—Angove and Bromwich; Jaques and Co., for Samuel Wright and Co., Bradford.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } March 23.
IN RE HANNAN'S KING (BROWNING) GOLD MINING
COMPANY (LIMITED).*

Company—Share register—Rectification—Refusal to register transfer—Companies Act, 1862, sec. 35.

Where directors refuse to register a transfer, an applicant for rectification under sec. 35 of the Companies Act, 1862, must show that there is no just cause for such refusal.

This was an appeal from the refusal of Mr. Justice Stirling to rectify the register of shareholders of the above-named company by removing the name of the applicant Mr. Clayton and inserting the name of the applicant Mr. Irvine as the holder of 50 fully-paid shares of the company. Mr. Clayton was the transferor and Mr. Irvine was the transferee of these shares. The transfer was executed in July, 1897. The directors refused to pass the transfer and declined

to give any reason for their refusal. They based their case upon clause 27 of the articles of association, which provided as follows:—“The directors may, without assigning any reason, decline to register any transfer of shares, fully paid or partly paid, made to any person not approved by them, or made by any member jointly or alone indebted or under any liability to the company, or any transfer of shares, whether fully paid up or not, made to an infant or a person of unsound mind.” The company was formed in March, 1896, for the purpose of acquiring certain mining properties. The capital was £100,000 in shares of £1 each, of which 20,000 were issued as fully paid up and 80,000 with 17s. only paid up. The case made by the applicants was that the refusal to register the transfer was due to the fact that the persons having the management of the company's affairs held a large number of the partially paid up shares and were desirous of preventing the fully paid up shares from being put upon the market. It appeared that the whole of the fully paid up shares came into the hands of two gentlemen named Cookson and Burge, and on January 14, 1897, Mr. Cookson issued to the shareholders a circular purporting to come from the Stock Exchange Agency, whereby fully paid up shares were offered to the shareholders at 10s. per share. On January 19, 1897, the secretary issued a circular to the shareholders in reply to Mr. Cookson's circular, in which he stated that the fully paid up shares were not the ones usually dealt in, which were paid up to the extent of 17s. per share, and that it was only these latter shares that were marketable and able to be negotiated on the Stock Exchange. Mr. Cookson complained of this circular and objected further that there had been a refusal by the company to register transfers of fully paid up shares, and he threatened to take legal proceedings in respect of this latter ground of complaint. In reply the directors stated that no transfer of fully paid up shares had recently been refused, and it appeared from the evidence that a considerable number of transfers which had been laid before the company for approval since the commencement of the year 1897 had been passed, and that only a small proportion had been postponed or refused. Mr. Justice Stirling, from whose judgment these facts are taken, came to the conclusion that there was no sufficient evidence to justify the application, and the motion was refused with costs. The applicants appealed.

Mr. Butcher, Q.C., and Mr. Austen Cartmell were for the applicants; Mr. Buckley, Q.C., and Mr. Vernon were for the company.

The COURT dismissed the appeal.

The MASTER of the ROLLS, after referring to section 35 of the Companies Act, 1862, and to article 27, said that it was incumbent on the applicants to prove that the name of the transferor had been continued on the register and the name of the transferee kept off the register without just cause. An attempt had been made to shift the onus on to the directors and to say that it was for them to prove that the reason of their refusal was that the transferee was a person not approved by them, but, in his Lordship's opinion, this was contrary to “*Ex parte Penney*” (8 Ch., 446) and to every principle of fairness between man and man. Their Lordships did not sit there as a Court of honour; the question was whether the applicants had made out that the transferee was being improperly kept off the register. There was no evidence of that beyond such as might be inferred from some squabble which took place between the different classes of shareholders six months before the transfer was executed. It was suggested that there was a determination on the part of the directors not to sanction the transfer of any fully paid up shares, but

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

that suggestion was not supported by the evidence. The Court ought, as a matter of honesty between man and man, to presume that the directors were acting within their powers unless the contrary was proved; but that was not proved by casting unfounded aspersions upon them. The appeal should be dismissed with costs.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

[Solicitors—Longbourne, Stevens, and Co.; John Vernon, Son, and Stephen.]

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.JJ.) March 24.

PAGET V. PAGET.*

Married Woman—Separate estate—Restraint on anticipation—Husband's debts—Exoneration—Indemnity against husband—Conveyancing and Law of Property Act, 1881, sec. 39.

Action for a declaration of indemnity dismissed, affirming decision of Kekewich, J. ([1898] 1 Ch., 47).

This was an appeal by the plaintiff, Mrs. Paget, from a decision of Mr. Justice Kekewich dated November 16 last. The action was brought by the plaintiff, suing in respect of her separate estate, against the defendant, her husband, claiming a declaration that he was liable to indemnify her against two mortgages under which she had, with the sanction of the Court, charged her life interest under the will of her grandfather. At the date of her marriage, which took place in January, 1877, the plaintiff was entitled under that will to receive during her life for her sole and separate use, and without power of anticipation, the net residue of the annual income of a moiety of certain warehouse property situated in Manchester, and of a sum of £100,000. Under a settlement made on the marriage the defendant was entitled to an annual income of £2,000. By two orders dated respectively June 28, 1882, and August 11, 1887, and made under section 39 of the Conveyancing and Law of Property Act, 1881, it was ordered that the life interest of the plaintiff under her grandfather's will should be charged for the purpose of raising two sums of £23,000 and £22,000. These sums were to be expended in payment of the debts and liabilities of the defendant. Since May, 1893, the plaintiff and the defendant had been living apart. It was decided by Mr. Justice Kekewich that it could never have been intended by the plaintiff or by the Court that she should have a remedy against her husband not reserved by the orders. The action was accordingly dismissed, but without costs. From that decision the plaintiff appealed.

Mr. Renshaw, Q.C., and Mr. A. à Beckett Terrell were for the appellant; Mr. Cozens Hardy, Q.C., and Mr. John Henderson were for the respondent.

At the conclusion of the arguments on the 1st inst. their Lordships reserved judgment, which was delivered affirming the decision of Mr. Justice Kekewich and dismissing the appeal with costs.

The MASTER of the ROLLS read the following judgment of the Court:—This is an appeal by the plaintiff, Mrs. Paget, against a judgment of Mr. Justice Kekewich dismissing an action brought by her against the defendant, her husband. The object of the action was to obtain a declaration that the plaintiff's husband was liable to indemnify her against two charges for £23,000 and £22,000 created by her on her separate property for the payment of his debts. The case is reported in

[1898] 1 Ch., 47. The material facts are there set out, and it is unnecessary to repeat them at length here. It is sufficient to state that Mr. and Mrs. Paget were married in January, 1877. The husband was entitled to some reversionary property. His interest in this property was settled on the marriage, but this property produced no income to him. The wife was a lady of fortune and the bulk of her property was settled on her for her life for her separate use with power of anticipation. The sum of £2,000 a year derived from her property was, however, settled on her husband for life, but so that if he attempted to alienate it, or if he became bankrupt this annuity became payable to his wife. The other provisions of the settlement need not be referred to. The husband and wife moved in good society and, large as their income was, they lived far beyond it. So recklessly extravagant were they that five years after their marriage £23,000 was sorely needed to relieve them from the pressure of debts for which the husband was legally liable; but which debts had been contracted to defray the expenses of the extravagant mode of living which they both apparently enjoyed. It is impossible, in our opinion, to read the evidence in the case without coming to the above conclusion. The affidavits filed in support of the plaintiff's application in June, 1882, for the order to which we will refer presently leave no doubt, in our minds, that these debts had been contracted not for purposes of the husband with which the wife had little to do, but in order to enable them both to live in the style they both thought suitable and perhaps necessary to enable them to maintain and enjoy that high social position which they both so greatly desired. We attach more importance to what the wife said in these affidavits than we do to what she said some 15 years later when examined in this action and when she was endeavouring to support her present claim. In the affidavits sworn by her and her solicitor in 1882 there is nothing to lead to the inference that any of the debts which then had to be met were incurred by her husband for purposes of his own as distinguished from the purposes of himself and his wife as already stated. In her affidavit of June, 1882, the plaintiff referred to the debts as contracted by her husband and herself as "our debts." It is true she said that until 1880 her attention was not called to the fact that she and her husband were getting into difficulties; but her affidavit shows that after she knew of those difficulties all that she really cared about was to increase the net income of herself and her husband, and to maintain their position in society. Her solicitor's affidavit leads to the same conclusion. On June 28, 1882, the plaintiff applied for and obtained an order under section 39 of the Conveyancing Act, 1881, enabling her to mortgage her life interest to secure £23,000 and interest and the premiums of a policy on her life. We do not think it necessary to refer in detail to the arrangements made for raising this sum nor to its application when raised. It is sufficient to say that the money was raised as authorized by the order, and except as to £3,600 was applied in paying the debts intended to be paid off by its means. The £3,600 not so applied was misappropriated by the solicitor who raised the money. Five years afterwards another sum of £22,000 was wanted for similar purposes. Another application was made to the Court, supported by further affidavits by the plaintiff and her then solicitor, and on August 11, 1887, another order was made enabling the plaintiff to mortgage her life interest for £22,000 and interest and for the premiums on another policy. This sum was accordingly raised and applied as authorized by the order. The plaintiff's affidavit filed on this occasion, July 28, 1897, referred to what had been done in 1882 and to the misappropriation of £3,600, and to the fact that debts had been contracted to pay off the creditors

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

who ought to have been paid off with that sum, and to the impossibility of avoiding bankruptcy and loss of social position if the arrangements then contemplated were not carried out. The plaintiff stated her desire to raise this sum of £22,000, and she spoke of the debts as "our debts" as she had done in 1882. She represented the debts to be hers quite as much as her husband's, and she treated his income and hers as one which it was desirable to maintain as far as possible. These transactions of 1882 and 1887 having been completed, the question arises whether Mrs. Paget is entitled to be indemnified by her husband against these sums of £23,000 and £22,000 when called in and in the meantime against the interest and premiums charged on her life interest by the above orders. The fact that the plaintiff and her husband were separated in 1893 explains how this controversy has arisen, but does not, in our opinion, affect the question of law which has to be considered. The plaintiff's rights, whatever they are, were not created in 1893, but arose in 1882 and 1887, although she might not care to enforce them whilst she and her husband lived happily together. What, then, were her rights in 1882 and 1887? In this action she has given evidence and has stated that nothing was ever said about her giving anything to her husband, that he managed all her affairs and she did not understand them and did not want to do so; that in making her former affidavit in 1882 she ought not to have used such expressions as "our debts" and "my debts"; that she herself was not living beyond her income; that some of the debts which had to be paid were not for money spent for her and her husband's joint benefit. But when pressed on this point it seems tolerably plain that there is no reason for saying that the statement contained in her affidavit of 1882 did not disclose the true state of things and ought not now to be believed, although she evidently wishes to minimize the effect of it. What she now says, however, is that all she knew was that her husband was in danger of being made bankrupt and that she wished to save him from such a disaster. Her attempt to dissociate herself from her husband's racing debts was not successful. As regards the transaction of 1887, she admitted that the financial situation which needed treatment then was very much the same as in 1882 and arose from the same cause. She also stated that in 1887 her husband was in America and that Mr. Justice Chitty, who made both orders, saw her in his private room and was told by her how these new difficulties had arisen, what the debts were, what the money was wanted for, and so on. The learned Judge was, no doubt, greatly influenced on both occasions by her own statements as to her own indebtedness. Bearing in mind this evidence we have to consider the effect in equity of the transactions in 1882 and 1887, to which we have alluded. The authorities bearing on the subject, beginning with "Huntingdon v. Huntingdon" (2 Wb. and Tnd., 6th Edit., p. 1,147), and coming down to "Hudson v. Carmichael" (Kay, 613), show that if a married woman charges her property with money for the purpose of paying her husband's debts and the money raised by her is so applied, she is *prima facie* regarded in equity, and as between herself and him, as lending him and not giving him the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created. This doctrine is purely equitable, and the authorities which establish it show that it is based on an inference to be drawn from the circumstances of each particular case: the *prima facie* inference being in such a case as that supposed that both parties intended that the wife's assistance should be limited to the necessity of the case and should not go beyond such necessity. But even where the wife charges her property with money

to pay her husband's debts incurred without reference to her there may be circumstances which prevent any inference from arising in her favour. Thus, if a settlement is made by the husband on his wife at the time she charges her estate he is regarded as purchasing her assistance; and the inference that the parties intended that the wife's property should be exonerated by the husband does not arise (see "Lewis v. Nangle," Amb., 150). "Clinton v. Hooper" (1 Ves. J., 173, and 3 Bro. C.C., 201) is the leading authority to show that the doctrine in question is based on an inference to be drawn in each case from all the facts of that particular case. It was long ago settled that, although under the old law a husband became liable for the ante-nuptial debts of the wife, she had no right in equity to compel him to exonerate property of hers charged with those debts, even although he had expressly covenanted to pay them; see "Lewis v. Nangle" (Amb., 150), and "Earl of Kinnoull v. Money" (3 Swan., 202n.). This shows the importance of not confounding the wife's debts with the husband's debts when considering such cases as those to which I am alluding. To say that in all such cases there is a presumption in favour of the wife, and that it is for the husband to rebut it, is, in our opinion, to go too far and to use language calculated to mislead. The circumstances of each case must all be weighed in order to see what inference ought to be drawn; and until an inference in favour of the wife arises there is no presumption for the husband to rebut. If this is forgotten, error may creep in. The circumstances here we take to be those disclosed by the plaintiff in her affidavits, especially her representations of her own indebtedness, as well as of her husband's; and we will add to these her recent statement that nothing was ever said about giving anything to her husband. Neither was anything said about lending him anything. She had a large income, and, although restrained from anticipation, she might have accrued income in respect of which she could contract debts. There is no reason to suppose that she had no debts and could contract none. She represented herself as pressed by her creditors, and we see no reason to doubt the truth of her statements. The plaintiff was as extravagant and reckless as her husband, and was quite as desirous as he of maintaining her position in society. This object, so dear to both of them, might have been entirely frustrated if she had the right against him which she now asserts. That right would, in point of law, have been her separate estate, and she might under pressure have assigned it and her assignee might have enforced it against her husband whether she liked it or not. She had plenty of debts enforceable against any separate estate she had or might have, besides income which she could not anticipate. Those circumstances, and the peculiar position of her husband with respect to his £2,000 a year, lead us to the conclusion that no inference ought in this case to be drawn in her favour of any right to be indemnified by her husband. This conclusion is arrived at apart from the orders of the Court to which Mr. Justice Kekewich attached so much importance, and the effect of which we will now consider. They are based on section 39 of the Conveyancing Act, 1881. [His Lordship read it, and continued.] Unless the wording of the section is attended to, there is danger of regarding the section as merely authorizing the Court to remove the restraint against alienation which is so frequently imposed on married women when property is settled on them for their separate use. But it is to be observed that what binds the estate of a married woman is not what she does when the restraint is removed, but the order made by the Court. The language of the section is that the Court may—by judgment or order—bind her

interest. The Court is empowered to do this where it appears to the Court for her benefit so to do, and with her consent. A question at once arises whether the doctrine which is applicable to charges created by a wife to pay her husband's debts is to be applied to charges created not by her, but by an order of the Court. The learned Judge in the Court below has held that the doctrine in question has no application to such a case, and that where orders are obtained under that section charging her property with money to be applied in paying her husband's debts the order should show on the face of it that her husband is to be liable to indemnify her if he is to be under any such liability. It certainly might be convenient if such orders were so drawn as to show what was intended in this respect. But these orders are usually made without hearing the husband, and we are not prepared to say, as a matter of law, that an order silent as to the wife's rights against her husband is fatal to the existence of such rights. The circumstances under which the order was made might show that a right on her part to be indemnified by her husband ought to be inferred although the order did not allude to it. The absence of all allusion to such right is, however, a circumstance to be considered, and in this particular case the form of the orders of 1882 and 1887 tells against the plaintiff when regard is had to the statements made by her in order to obtain them. It was urged that it could not be for her benefit that she should be deprived of her right to indemnity, but the force of this observation depends on the tacit assumption that she had the right. The question comes back to the proper inference to be drawn from all the facts, including the orders themselves. And bearing in mind that the plaintiff's paramount object was to save her and her husband's joint income, and thus, as far as possible, to preserve her and his position in society, and that this object might have been defeated if she reserved a right to be indemnified by him, the proper inference to be drawn is, in our opinion, adverse to the evidence of such right. In our opinion, therefore, the appeal fails and must be dismissed with costs.

On the application of the respondent's counsel, their Lordships made an order under section 2 of the Married Women's Property Act, 1893, that the cost of the appeal should be paid out of the property of the appellant although subject to a restraint on anticipation.

[Solicitors—Leman and Co.; Dawes and Sons.]

Chan. Div. }
(Stirling, J.) }

1898.
March 24.

IN RE GIBBS.*

Revenue—Estate duty—Apportionment—Settled estate duty—Incidence—Duty borne by the general residue—Finance Acts, 1894 and 1896—Construction.

A somewhat curious point arose in this case as to the incidence of the settlement estate duty upon a legacy of £150,000 settled by the will of the testator, who died in May, 1896. The question turned upon certain provisions contained in the Finance Acts of 1894 and 1896. The settlement estate duty was imposed by the Act of 1894, and in 1896 it was decided by Mr. Justice North in the case of "*In re Webber*" (L.R. [1896], 1 Ch., 914) that when pecuniary legacies or shares of the residue of a testator's personal estate are settled by his will no part of either the estate duty or the settlement estate duty imposed by the Finance Act, 1894, is to be borne by the settled legacies or shares, but the whole

of those duties must be borne by the general residue. That rule, however, was altered by the Act of 1896, which provided, by section 19, that "the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contained an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate." Section 24 provided that Part IV. of the Act (embracing sections 14-24) should come into operation on July 1, 1896; and the same section further provided that "the expression 'the deceased person' means a person dying after the commencement of this part of the Act"; so that, if the expressions "the deceased" used in section 19, and the "deceased person," which was interpreted by section 24, were taken to be equivalent the one to the other, then section 19 would not apply to the will in the present case. But it was contended on behalf of persons interested in the residue that the two expressions must have different interpretations put upon them in consequence of other provisions contained in the Acts. It was pointed out that section 39 of the Act of 1896 provides that Part IV. of that Act shall be construed together with Part I. of the Act of 1894; and that by section 22, which occurred in that part of the Act of 1894, it is declared that the expressions "deceased person" and "the deceased" mean a person dying after the commencement of that part of the Act—viz., August 1, 1894. So that, reading the two Acts together, the result would be that the will of the testator in the present case was brought within the operation of the Act of 1896, and duty instead of being borne by the residue would fall upon the settled legacy.

Mr. Buckley, Q.C., and Mr. Medd appeared for the trustees; Mr. Upjohn, Q.C., Mr. Rashleigh, Mr. Grosvenor Woods, Q.C., and Mr. E. J. Parker for persons interested in the settled legacy; and Sir R. Webster (Attorney-General) and Mr. Ingle Joyce for the residuary legatees, some of whom were charities.

MR. JUSTICE STIRLING said that, looking at the Act of 1896, if that had to be interpreted alone no one would suppose that the Legislature had intended to make a distinction between the expressions "the deceased" and "the deceased person." By the Act of 1894 the Legislature had no doubt given an interpretation to be placed on both expressions, but no distinction was drawn between them. Why, then, if the Act of 1896 was to be read as part of that of 1894 was any such distinction to be drawn? His Lordship failed to see, and consequently he held that the Act of 1896 did not apply, and accordingly that the interpretation of the 1894 Act as settled by the case of "*In re Webber*" applied, and the duty must in the present case be borne by the residue.

Chan. Div. }
(Byrne, J.) }

1898.
March 24.

ANDERSON V. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY—MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY V. ANDERSON.*

Railway Company—Statutory powers—Demised premises—Purchase of reversion—Covenant for quiet enjoyment.

A railway company, acting under statutory powers, purchased the reversion of premises let on a lease containing a covenant for quiet enjoyment; held that they could not be sued for a breach of the covenant.

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

*Reported by F. EVANS, Esq., Barrister-at-Law.

In the first of these actions the plaintiff claimed an injunction to restrain the defendant company from interfering with the support of a certain passage or otherwise with the peaceable enjoyment by the plaintiff of his right of user of such passage, and he claimed damages in respect of that matter as well as in respect of the injury done by the company in excavating the ground adjoining the plaintiff's premises, whereby, as he alleged, they had caused the walls and ceilings of his premises to crack. The plaintiff was the lessee and occupier of No. 1, Goldhurst-terrace, Hampstead, under a lease dated April 7, 1894, and made between James Findlay of the one part and the plaintiff of the other part, whereby the premises in question, together with a right of way in common with all other parties then entitled or thereafter to be entitled to a like right over the passage above mentioned at the side of the premises, were demised to the plaintiff for a term of 21 years from March 25, 1894, determinable at the option of the tenant at the end of seven or 14 years, at a yearly rent rising from £180 to £250 and subject to the covenants and condition contained in the lease. The lease contained a covenant on the part of the lessor that the lessee, on paying the rent reserved and performing the covenants, might peaceably hold and enjoy the demised premises without any interruption by the lessor or any person claiming through him. By the Manchester, Sheffield, and Lincolnshire Railway (Extension to London) Act, 1893, the defendant company were authorized to make and maintain a certain railway, and for that purpose were empowered to enter upon, take and use the property demised by the lease, but that property did not form any portion of the actual site of the railway as constructed. The company, however, acquired by agreement the reversionary interest of the plaintiff's lessor in the demised premises, and by an arrangement made in October, 1895, the lessor assigned the property to the company subject to the plaintiff's lease. The company proceeded with the construction of their railway in pursuance of its statutory powers, and in the course of such construction it to some extent injured the structure of the plaintiff's premises, but, as was admitted, without negligence on the company's part. The plaintiff claimed to be entitled to damages for such injury on the ground that the company, by taking an assignment of the reversion, had rendered itself liable under the covenant for quiet enjoyment. The second action was brought by the company against Anderson for rent due under his lease, and in this action the defendant set up the covenant for quiet enjoyment as a defence, and counter-claimed for damages for its breach.

Mr. Witt, Q.C., and Mr. Arnold Statham were for the plaintiff, Mr. Anderson; and Mr. Eve, Q.C., the Hon. E. C. Macnaghten, Q.C., and Mr. S. A. Sampson for the railway company.

MR. JUSTICE BYRNE delivered judgment to the effect following:—The plaintiff does not dispute that but for the covenant for quiet enjoyment he would not be entitled to sue for damages in respect of the injury, but would be relegated to such remedy as he might have under section 6 of the Railway Clauses Act, 1845, and section 68 of the Lands Clauses Act, 1845; but he says that the company, having neglected to acquire his interest in the property, and having put itself into the position of an assignee of the reversion, is liable by reason of the existence of the covenant. Had the plaintiff's land been required for the actual construction of the railway the question would not have arisen, because the railway company could not have constructed their works without acquiring the plaintiff's interest in the property. The land in which he had an interest is, however, land which the company was entitled to take compulsorily, and, although it has

acquired the reversion by agreement, I do not think that any distinction can be drawn on this ground having regard to the authorities bearing on the matter. The precise point that I have to determine is, so far as I am aware, new, but there are authorities which it is necessary to consider in order to arrive at a proper conclusion. His Lordship then discussed the cases of "Kirby v. School Board for Harrogate" (L.R. [1896], 1 Ch., 437), "Clark v. School Board for London" (L.R., 9 Ch., 120), and "Baily v. De Crespigny" (L.R., 4 Q.B., 180), and proceeded as follows:—In each of the cases to which I have referred the point now raised is not precisely involved, because what has happened is not that the covenantor has sold to the railway company adjoining land in respect of which he has entered into restrictive covenants, but that he has sold his reversion in the same land included in the lease containing the covenant for quiet enjoyment; and a distinction is also pointed out in that, in the present case, the lease was granted to the plaintiff and the assignment to the company was executed after the passing of the Act under which the company has done the acts complained of. In my judgment, if the lease had been granted to the plaintiff prior to the passing of the Act the principle of the cases to which I have referred would have been clearly applicable to the present case, although the assignment had been made subsequently to that date, but I have to consider the other question—viz., What is the effect of a covenant for quiet enjoyment contained in a lease granted after the passing of an Act of Parliament authorizing, but not requiring, the taking of the land demised? Lessor and lessee must both be deemed to know when they enter into the contract that the land may or may not be taken by the railway company and that the interest of either of them may be so taken without the interest of the other being also acquired. Lessor and lessee also know that their respective interests may be injuriously affected by the railway company in carrying out its statutory obligations and acting strictly within its statutory powers, and both parties know that, should their or either of their interests be injuriously affected, there are statutory provisions providing for compensation being paid. First, as between lessor and lessee, What is the true meaning of a covenant for quiet enjoyment in the terms of the covenant in the present case? Under such circumstances, do the parties mean and intend that the lessor is to be liable in the event of disturbance by the company in the legitimate exercise of its Parliamentary powers, or do they mean that, subject to such exercise of the statutory power, the covenant is to apply? I think that the true intent and meaning of the covenant is that the covenantor will be answerable for his own acts and for the acts of his assignees, but not that he will be answerable for the acts of the railway company in the exercise of its statutory powers, the company not being in the true sense his voluntary assignee at all, although he conveys to the company and it is not put to the actual exercise of its compulsory power. If then the lessor would not be liable, how can his assignee, the railway company, be liable in the absence of a fresh bargain on its part to be liable? It is reasonably clear that the company cannot be liable. But, although I have expressed this view as to the liability of the lessor, it is not in my judgment necessary for the decision, because in the present case it is not the lessor but the railway company against whom relief is sought, and I am of opinion that, even if the plaintiff were entitled to sue the lessor upon his covenant, he is not entitled to sue the railway company, the lessor's compulsory assignee. I think that a railway company taking lands under statutory powers, and constructing works within such powers without negligence, is entitled to take the

interest of any person having an interest in land without incurring liability in respect of any existing covenant entered into by the owner, whose interest the company acquires, so far as the enforcement of such covenant would impose a burden upon the company in derogation of its statutory rights and obligations. It is not necessary to say or decide that the covenant is gone for all purposes. On the other hand, I think that for some purposes it still exists. Nor is it necessary to consider how far the acts done by the railway company, if amounting to a destruction of the subject-matter of the lease, might or might not afford a good answer to an action for rent or in respect of other covenants of the lease. It has been urged on behalf of the plaintiff that it seems anomalous and unfair that the company can take the interest of a lessor with all such lessor's rights, and at the same time be free from the obligations imposed by the lease upon the lessor. The question can only arise in rare instances. If the land is really required for the purpose of the undertaking it is, of course, as necessary, if not more necessary, in most cases to take the interest of the lessee than that of the lessor, but it may happen that the interest of one or other of the parties interested in the land may be *bona fide* taken by the company before it discovers that it does not require the land. There has been a suggestion in the present case that the plaintiff took his lease with a view to the profit he might make upon the land being taken by the company. I am bound to say that I see no justification upon the evidence for the suggestion; on the other hand the plaintiff has rather endeavoured to hold up the railway company as oppressive, declining to take his property from sinister motives. I have nothing to do with these matters, but have only to consider the legal position. I think the company has acted within its legal rights, and that the plaintiff must look to his statutory right to compensation for such remedy as he is entitled to. This involves the dismissal of the plaintiff's action so far as his claim in respect of injury done to the structure of his house is concerned, and it also disposes of the counter-claim in the second action, and both must be dismissed with costs, except as to the costs of the first action down to the time of the amendment, which I allowed at the trial; those costs, I consider, ought to be borne by the railway company.

His LORDSHIP gave judgment for the company for the rent claimed, but stayed execution on the terms of an appeal being promptly brought.

[Solicitors—Ford, Lloyd, Bartlett, and Michelmores; Cunliffes and Davenport, for R. Lingard Monk, Manchester.]

Q.B. Div. } 1898.
(Bruce, J.) } March 24.

M'GUFFIE V. BURLEIGH.*

Limitations, Statute of—Acknowledgment—
Letters—Parol evidence admitted to connect
two letters.

In this action, Mr. John Knight M'Guffie claimed from Mr. Sampson Burleigh £1,838 6s., the balance of an account for money lent and interest thereon. The defence relied on was the Statute of Limitations (21 Jac. I., c. 16). The plaintiff said that the defendant had given a written acknowledgment which under Lord Tenterden's Act, 1828, was sufficient to take the case out of the statute.

Mr. P. Rose-Innes appeared for the plaintiff; Mr. Dickens, Q.C., and Mr. Gore Browne for the defendant.

The action came on for trial before the learned Judge and a common jury. It appeared from the evidence for the plaintiff that on October 25, 1891, he wrote to the defendant, saying, "If you can spare money to travel about, surely you can try to liquidate your debt, even by small payments. . . . If I do not hear from you within a week or ten days, to do what you have promised—to meet me in town and arrange a settlement at my lawyer's, I shall let the law take its course." The letter was addressed to "Dear Sam," and was signed "M'G." On November 3, 1891, the defendant wrote to the plaintiff:—"Dear M'Guffie,—I shall be in London on Friday and will meet you at Bodega, Mark-lane, at 1 o'clock, and go with you to your lawyer's and settle matters to your satisfaction. In great haste, yours ever, S. BURLEIGH."

At the close of the plaintiff's case, Mr. DICKENS submitted that the letter of November 3, did not give an unconditional acknowledgment from which there could be inferred an unconditional promise to pay. The letter might have reference to any kind of transaction. There was no reference in it to any other letter, and therefore this was the only letter that the Court could consider. Even if the two letters were taken together there was not a sufficient acknowledgment, but the first letter not being referred to in the second was not incorporated therewith, and therefore could not be looked at. A document not under the defendant's hand could not be a memorandum in writing within the statute. The general terms of defendant's letter did not show any acknowledgment of a debt. If the letter might refer to several things the Court had no right to infer that it referred to a debt.

Mr. ROSE-INNES, for the plaintiff, said that the Court might take into consideration oral evidence connecting the two letters. There was evidence that the second letter was a reply to the first. He referred to "*In re* Buskin, *ex parte* Farlow" (15 R., 117). This case came within that decision. There was evidence to go to the jury that there had been an acknowledgment of the debt.

Mr. DICKENS, in reply, said that in the case cited by his friend the writing referred to "the debt."

Mr. ROSE-INNES referred to "*Firth v. Slingsby*" (58 L.T., 481), and "*Green v. Humphreys*" (26 C.D., 474).

In answer to his LORDSHIP, Mr. DICKENS said that he would rest his case on the point he had argued.

Mr. JUSTICE BRUCE.—There is no question for the jury then.

Mr. ROSE-INNES said that it was a question for the jury whether or not there had been an acknowledgment. He cited "*Morrell v. Frith*" (3 M. and W., 402). If there were extrinsic facts throwing light on the document, its construction was for the jury.

Mr. JUSTICE BRUCE said that that was a question of law, and there was therefore nothing for the jury. In delivering judgment, his Lordship said that the question raised was whether there was a sufficient acknowledgment in writing to take the case out of the Statute of Limitations. [His Lordship then read the two letters referred to above.] If these two letters were read together they were a sufficient acknowledgment. The defendant did not in terms refer in the second letter to the previous one, and it was said on his behalf that the two letters could not be read together and that parol evidence was inadmissible to connect them. There was parol evidence showing that the second letter was written in reply to the other one. The sole point, therefore, was whether parol evidence was admissible to connect the two letters. He was of opinion that it was. [His Lordship then referred to the words of Lord Tenterden's Act.] "*Hartley v. Wharton*" (11 A. and E., 934) showed that parol

evidence could be admitted to supply deficiencies in the writing. "*Spickernell v. Hotham*" (Kay, 669) was an authority to the same effect. Having cited "*Edmunds v. Downes*" (2 C. and M., 459), the learned Judge said that he had come to the conclusion on these authorities that parol evidence was admissible to connect the letters. During the argument reference was made to the decisions under the Statute of Frauds that parol evidence was not admissible to connect two documents so as to constitute a memorandum within the statute. He did not think that the decisions under the Statute of Frauds were applicable to Lord Tenterden's Act. He therefore gave judgment for the plaintiff for £1,586 16s. 8d., being the amount claimed less certain deductions. The costs would follow the event.

[Solicitors—Cattarns, Jehu, and Co., for the plaintiff; Goldberg and Co., for the defendant.]

Court of Appeal (Lord Halsbury, L.C., } 1898.
A. L. Smith and Collins, L.J.) } March 25.

BRYANT V. HANCOCK AND CO.*

Landlord and Tenant—Lease—Covenant—Construction.

This was an appeal from the judgment of Mr. Justice Lawrence in an action to recover damages for breach of a covenant contained in a lease, dated October 16, 1874, of the Princess Royal Hotel, at Grangemouth, Cardiff. The lease was for 21 years and was granted by the plaintiff to John Biggs, who in March, 1890, assigned it to the defendants. The covenant was that the lessee, his executors, administrators, and assigns would conduct the business of the hotel in a proper and orderly manner so as to afford no ground or pretence for discontinuing the licences thereof; and would not wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed publichouses or be a reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer, ale, wine, and spirituous liquors therein; and would from time to time apply for and do or cause to be done all and whatsoever should be requisite for obtaining the renewal of such licences, and would at the end of the term deliver up the licences. It appeared that on one occasion some cases of drunkenness had occurred on the premises while they were in the occupation of a monthly tenant of the defendants, and that the justices at Brewster sessions had refused to renew the licence for the house on the application of the tenant. The applicant appealed to the quarter sessions, and, on their refusal to hear the appeal on the ground that the notices were not in proper order, obtained a *mandamus* for them to hear and determine it. After they had heard it the applicant again applied for a *mandamus*, and, on failing to obtain it in the Queen's Bench Division, appealed unsuccessfully to the Court of Appeal and the House of Lords. At the trial a verdict and judgment were entered for the plaintiff for £5,300. The defendants appealed, on the ground that there was no evidence of any breach of the covenant. It was contended on their behalf that their tenant had not forfeited any existing licence, nor done any act which was a ground of forfeiture, and that he had done all that he possibly could do for obtaining a renewal of the licence.

Mr. B. F. Williams, Q.C., Mr. Arthur Lewis, and Mr. S. T. Evans appeared for the defendants; Mr. Abel Thomas, Q.C., and Mr. Tudor Howell for the plaintiff.

The COURT, having taken time to consider, delivered judgment to-day allowing the appeal.

LORD JUSTICE A. L. SMITH read the judgment of the Court as follows:—In this case the plaintiff sues the defendants for breach of covenant, and has recovered damages to the amount of £5,300. The defendants appeal upon the ground that upon the true construction of the covenant sued on, when applied to the proved facts of the case, no breach thereof has been committed by them. The material facts are these. By lease dated October 16, 1874, the plaintiff demised to John Biggs and his assigns the Princess Royal Hotel, at Grangemouth, near Cardiff, for a term of 21 years. Upon March 31, 1890, Biggs assigned to the defendants the residue of the term granted by the lease of October 16, 1874, and it is not disputed that the defendants as assignees became liable to the covenant sued on by the plaintiff. After the defendants had entered into possession of the hotel as such assignees, they let the same to a Mrs. Evans as tenant for a short part of the term vested in them. Mrs. Evans thus became under-tenant to the defendants, and in our opinion it cannot be said that she became an assign of either Biggs or the defendants within the meaning of the covenant sued on. It has been held that an assurance for a period less than the whole term is an underlease and not an assignment—"*Cottee v. Richardson*" (7 Exch., 143); though an assurance purporting to be an underlease, but which comprises the whole term, may be an assignment—"*Langford v. Selmes*" (4 K. and J., 220), "*Beardman v. Wilson*" (L.R., 4 U.P. 57). It has also been held that a covenant not to assign is not broken by the granting of an underlease—"*Crusoe v. Bugby*" (3 Wils., 284). In the case of "*Taite v. Gosling*" (11 Ch. D., 273) Mr. Justice Fry held that a lessee for a term of 99 years could take advantage as an assign of mutual covenants where the assignees of a covenant were to have the same benefit as the covenantees had. This is a very special case upon the particular meaning of the word "assign" in the particular covenant, and does not trench upon the well-known distinction between an under-lessee and an assignee. Mrs. Evans whilst tenant to the defendants as above-mentioned upon one occasion permitted drunkenness to take place upon the premises. It is not in our judgment necessary to go through the many steps in the litigation which then took place; it is sufficient to say that it is clear that the defendants took all possible steps to obtain a renewal of the licence, which the justices refused to renew at the next general annual licensing meeting, their ground for refusal being that Mrs. Evans had upon one occasion permitted drunkenness upon the premises upon the occasion above-mentioned. It was thus that the licences of the Princess Royal Hotel were lost. In these circumstances the defendants are sued as being assignees of Biggs for the residue of the term contained in the lease of October 16, 1874, and it is upon the true construction of the covenant therein contained that this case depends. Whether the covenant sued on is one covenant or different covenants is not material, for it is clear that there are three separate and distinct parts of the covenant, under each of which a different obligation is undertaken by the covenantor. The first part commences, "And further that he the said John Biggs," and ends with the words "for discontinuing the licences thereof." In our opinion this part of the covenant relates to the forfeiting of the licence when existing as distinguished from the renewal thereof, which is dealt with in the second part of the covenant. It would be wholly unreasonable to hold that both the first and second parts of the covenant referred to the same thing, so that both an absolute and qualified covenant

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

existed as to the same thing. This first part in our judgment is an absolute covenant by the covenantor, his executors, administrators, and assigns against the forfeiture of an existing licence of the Princess Royal Hotel, and does not embrace the question of renewal of such licence. The second part of the covenant is a limited covenant, and is confined to the covenantor, his executors, administrators, and assigns wilfully doing or suffering anything which should be a reasonable ground for withdrawing or withholding the licences—i.e., which should afford a reasonable ground for the justices refusing to renew. This is clearly not an absolute covenant. And the third part of the covenant is a covenant by the covenantor, his executors, administrators, and assigns to apply for and do all that shall be reasonably requisite for the renewal of the licence, and that when renewed he will deliver up the same at the determination of the term. This is not an absolute covenant. Now, as regards the first part of the covenant, no liability attaches to the defendants, for the simple reason that the then existing licences have not been forfeited. As regards the second part, the covenantor or his assigns have not wilfully done or suffered anything which should be a reasonable ground for the justices refusing to renew the licence. If the covenantor or his assigns are to be liable for a tenant of an assignee causing the licence not to be renewed, it seems to us there should either be a clear and absolute covenant that they would be so liable, or a covenant that such tenant would do nothing to jeopardize a renewal. We give no opinion upon whether Mrs. Evans's act was such as to afford reasonable ground for the justices refusing to renew. As regards the third part of the covenant the facts show that the defendants have done all in their power to obtain a renewal, but without avail. For these reasons we are of opinion that when the covenant sued on is correctly read no breach has been established against the defendants, and that this appeal therefore must be allowed and judgment entered for the defendants, with costs here and below.

[Solicitors—Bower, Cotton, and Bower, agents for Stephens, David, and Co., Cardiff, for the plaintiff; Riddell, Vaizey, and Smith, agents for J. H. Jones, Cardiff, for the defendants.]

Chan. Div. }
(Byrne, J.) }

1898.
March 25.

WARD V. PORTSMOUTH CORPORATION.*

Burial Ground—Burial Act, 1863, sec. 6—“New burial ground”—Approval of Secretary of State.

In this case the plaintiff, Mr. William Ward, being then the owner of certain land in the parish of Portsea, in August, 1889, agreed with the burial board for the parish of Portsmouth for the purchase of the land for £6,270, of which £100 was to be (and, in fact, was) paid at the time, and the balance on completion of the purchase on June 24, 1896. Before the agreement was entered into the consent of the Portsmouth Vestry was obtained, as required by section 26 of the Burial Act, 1852. In January, 1895, the Corporation of Portsmouth, as the urban sanitary authority, passed a resolution under section 62 of the Local Government Act, 1894, in pursuance of which the corporation became the statutory successors of the burial board on June 11, 1896. The corporation intimated to the plaintiff, Mr. Ward, that it did not intend to complete the contract.

The land had been agreed to be bought for the purpose of enlarging the then existing cemetery for the parish of Portsmouth, but the Home Secretary had refused to give to the corporation the approval required by the Burial Act, 1863. The plaintiff contended that this refusal did not justify the corporation in refusing to complete their contract to purchase, and brought the present action for specific performance of the contract, or, alternatively, for damages.

Mr. Warrington, Q.C., Mr. Astbury, Q.C., and Mr. Methold were for the plaintiff; and Mr. Eve, Q.C., and Mr. George Williamson for the corporation.

MR. JUSTICE BYRNE, in delivering judgment, said the object for which the land was wanted was to use it as burial ground. The board had already a burial ground, and this land was adjacent to it and was required as an addition to it. The contract was not to be completed for some years, and in the meantime the plaintiff was to be entitled to make some use of the land. The corporation had succeeded the board, and was now to be considered as the contractor with the plaintiff. The real question arose in the following manner:—Section 25 of the Burial Act, 1852, required every burial board with all convenient speed to provide a burial ground for the parish, and also provided that “no ground not already used as or appropriated for a cemetery shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act, nearer than 200 yards to any dwelling-house, without the consent in writing of the owner, lessee, and occupier of such dwelling-house.” The proviso had since been repealed; but it was legitimate to refer to it to see whether other statutory provisions related to the acquisition of property wanted, as in this case, as an addition to an existing burial ground. The first part of the proviso referred to an existing burial ground, and the second to an addition thereto. Section 26 of the same Act said that, for the providing such burial ground, it should be lawful for the board, with the approval of the vestry, “to contract for and purchase any lands for the purpose of forming a burial ground, or for making additions to any burial ground . . . as such board may think fit.” The section also empowered the board to purchase existing cemeteries for providing burial grounds, and the rest of the section was immaterial. By section 28 the board was empowered, with the approval of the vestry, to sell lands purchased under the Act in which no interment had taken place, and which it appeared to the board might be properly sold. Having regard to these sections, it appeared that section 25 required burial ground to be provided which might or might not be new ground, for the board might acquire an old burial ground and add new ground to it, or might provide fresh land only. The repealed part of the section was for the protection of adjoining owners, and referred to grounds not already used or appropriated as burial ground which were not without such owners' consents to be within a certain distance from their houses. The Act of 1852 was not dealing with cases where the Secretary of State might interfere. The approval of the vestry was only a safeguard, and this had been obtained. By section 6 of the Burial Act, 1863, where by any such Order in Council as was mentioned in the Act it was ordered that no new burial ground should be opened within the limits therein mentioned without the previous approval of the Secretary of State, no “new burial ground or cemetery” should be “provided and used” within such limits without such previous approval. On one side it was said that, notwithstanding there was such an Order in Council, as there was an existing burial ground, and it was only desired to get an addition thereto, it was unnecessary to obtain the Secretary of State's approval before entering into the contract.

*Reported by F. EVANS, Esq., Barrister-at-Law

But what was meant was that, when once an Order in Council had been made, no new burial ground—meaning ground to be used either alone or in addition to an old burial ground—was to be provided and used without the previous approval of the Secretary of State. Section 6, in his Lordship's judgment, applied to an addition to a pre-existing burial ground as well as to a burial ground which was entirely new. The action must therefore be dismissed with costs.

[Solicitors—Rowell, Rawle, and Co., for Cousins and Burbidge, Portsmouth; Williamson, Hill, and Co., for Alexander Hellard, Portsmouth,]

Chan. Div. }
(North, J.) }

1898.
March 25.

THE ATTORNEY-GENERAL V. THE MAYOR OF SWANSEA.*

Municipal Corporation—Borough fund—Action to restrain application—Opposing Bill in Parliament—Borough Funds Act, 1872—Injunction granted.

This was a motion on the part of the Swansea Gas Company, the relators in this action, and who were suing as ratepayers, for an interlocutory injunction to restrain the defendant corporation from applying the borough funds in opposing a Bill, promoted by the relators in Parliament, without having first obtained the consent of the owners and ratepayers of their district and the sanction of the Local Government Board to such expenditure, in accordance with the provisions of the Borough Funds Act, 1872. The motion was opened on Friday of last week and continued on Saturday after the unopposed business, but not heard out, and accordingly stood over till yesterday; the Bill was first in the list for consideration by a committee of the House of Lords which sat on Monday. The Bill came before the committee, and the corporation opposed, on the ground that several clauses were not proper and other provisions ought to be inserted. Certain amendments, proposed by the corporation, were accepted by the promoters, for instance, the insertion of an auction clause applicable to issue of capital and loan capital, the dropping of a sliding scale, the prevention of an increase in the reserve fund by reason of conversion of capital limited to 15 per cent. dividend into double the amount limited to 5 per cent. dividend, and a provision extending to the existing area of the borough a price below that charged to consumers outside the limits of the borough; and the corporation gave up opposition on certain points—four points of opposition only were gone into on committee—namely, (1) as to the additional capital; (2) as to a place for testing gas away from the works; (3) as to having an independent auditor; and (4) as to a clause generally saving the rights of the corporation. These were all decided by the committee against the corporation, and the Bill as amended was approved. The question was whether the expenditure objected to was such as would have been allowed previously to the Borough Funds Act, 1872—an Act which enables local authorities to apply their funds in opposing or promoting Bills in Parliament provided the previous consent of owners and ratepayers and the sanction of the Local Government Board has been obtained; or whether the proposed Bill did not affect the rights or property of the corporation so that it was only by virtue of that Act that the opposition in Parliament by means of the corporation funds was legal. The principal justification by the corporation was that the Bill contained before it went into committee various

provisions affecting the price of gas, and therefore their right and duty as to public lighting.

Mr. Swinfen Eady, Q.C., Mr. Macmorran, and Mr. E. Knowles Corrie were for the gas company; Mr. Vernon Smith, Q.C., and Mr. R. J. Parker for the corporation.

Mr. JUSTICE NORTH, in giving judgment, said that the only objection to the Bill on which it was now said that the corporation had an absolute right to oppose the Bill out of the borough fund was that there were clauses in it which might alter the price they had to pay for the gas they consumed for the purpose of lighting the streets and their offices and other premises, which was regulated under the Gas Clauses Act, 1871 (section 24), by reference to the charges made to private consumers. The case of "The Queen v. Corporation of Sheffield" (L.R., 6 Q.B., 652) was a strong authority against their having any such right by reason of its being a purpose of the corporation on which expenditure was authorized by section 92 of the Municipal Corporations Act, 1835, and the corresponding provision of the Act of 1882 now in force. That was a case decided in 1871, which led to the passing of the Borough Funds Act, 1872, in the following year, an Act which enabled a corporation to apply its funds to opposing Bills in Parliament provided the consent of the owners and ratepayers and the sanction of the Local Government Board had been obtained. These formalities had not been observed; the question, therefore, was whether the case came within the exception of section 8 of the Borough Funds Act, 1872, reserving the previous rights and powers of the corporation. Upon this part of the case his Lordship, without dwelling on the particular circumstances involved in the case of "The Attorney-General v. the Mayor of Brecon" (10 Ch. D., 204), read extracts from the judgment of Sir George Jessel in that case dealing with principle, and referred specially to a passage where Sir George Jessel laid it down that, whether he took the view that under the words "expenses necessarily incurred" authorized by the Municipal Corporations Act then in force, or whether he took the view that a corporation occupied the position of "trustees" (to which position they had been reduced by the Municipal Corporations Act) defending their property and privileges, "in either way, if there is an attack by proposed private legislation on the rights, privileges, and duties of a corporation, that corporation is entitled to defend itself before Parliament." It seemed, his Lordship said, to him ridiculous to say that a Bill proposing to alter the general scale of charges for gas, but leaving untouched the mode of ascertaining the special charge to the corporation by reference to the charge made to all the consumers alike, was one that affected the "rights, privileges, or duties" of the corporation, and he granted the injunction.

[Solicitors—R. W. Cooper and Sons; Sharpe, Parkers, and Co.]

Q.B. Div. }
(Bigham, J.) }

1898.
March 25.

NEDERLANDSCHE CACAOFABRIK V. DAVID CHALLEN (LIMITED).*

Contract—Sale of goods—Construction—Breach of agreement to take and pay for certain quantities per month.

This was an action brought to recover damages for breach of an agreement made between the plaintiffs and the defendants for the sale of certain quantities of

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

Helm cocoa manufactured by the plaintiffs. The plaintiffs commenced to make this cocoa in Holland in 1894. The cocoa had a considerable sale on the Continent, and in 1896 the plaintiffs, being anxious to introduce it to the English market, entered into negotiations with the defendants which resulted in an agreement made between the plaintiffs and the defendants dated July 30, 1896, whereby the defendants were appointed sole and only agents for the sale of Helm cocoa in Great Britain and Ireland for the space of five years from the date of the agreement. Provision was made for the payment of £2,700 by the plaintiffs to the defendants in certain instalments, to be expended in advertising. The defendants undertook to take delivery of 40,000lb. of Helm cocoa in a period of 18 months at the price of 2s. 3d. per lb. There was no provision as to instalments. On January 27, 1897, this agreement was modified in certain particulars; the plaintiffs undertook to make largely-increased payments for the purpose of advertising, the defendants agreeing to take 100,000lb. of cocoa in a period of two years, 40,000lb. in the first year and 60,000 in the second year and not less than one-twelfth of the yearly quantity to be taken per month. On April 14, 1897, the agreement was again altered, an agreement being made "that, from and after April 1, 1897, in consideration of the plaintiffs advancing on May 1, June 1, and July 1, 1897, £1,000 each respectively, a total of £3,000, for the purpose of further pushing the sale of Helm cocoa, the defendants should take and pay for an average of 6,000lb. weight of Helm cocoa per month as from April 1, 1897, to April 1, 1899." The plaintiffs advanced to the defendants for the purposes of advertisement £7,700 in all. The defendants, as from April 1, 1897, took delivery of very much less than 6,000lb. per month, and in February of 1898, when the action was commenced, they had only taken 24,012lb. in ten months. The managing-director of the plaintiff company stated that the price charged to the defendants gave a profit to the plaintiffs of 1s. per lb., making no allowance for the cost of advertising. The plaintiffs claimed £1,800 damages. The defendants contended, on the construction of the contract, that there had been no breach and denied the damages.

Mr. Joseph Walton, Q.C., and Mr. F. W. Hollams appeared for the plaintiffs; Mr. A. T. Lawrence, Q.C., and Mr. P. Rose-Innes for the defendants.

HIS LORDSHIP, in giving judgment, said that there was not much doubt about the meaning of the agreement, although the grammar used in it left something to be desired. It appeared that the plaintiffs had for a considerable time been supplying the defendants with their Helm cocoa under their contract in small quantities, daily, weekly, and monthly; they desired in the early part of the year 1897 to change their contract, and the question arose between the parties whether the increased deliveries should be increased as to daily, weekly, or monthly quantities, and a long correspondence passed between them on the matter. The result of the discussion was the written agreement of April 16, 1897, altering the original contract. What was the meaning of that agreement? His Lordship read the words set out above, and continued,—In his opinion those words meant that the defendants were to take monthly deliveries; that was the first point. Secondly, those monthly deliveries were not to be rigidly fixed at 6,000lb. each, they might be something more or something less, but still something that might be fairly and reasonably described as "an average of 6,000lb." If the defendants did not take delivery of a quantity that in a fair and reasonable and commercial sense could be described as "an average of 6,000lb. per month" they committed a breach of their contract. They had, in fact, taken in the

ten months in question about 36,000lb. less than 6,000lb. per month. On the view of the contract taken by him (the learned Judge) that was a clear breach of the contract. That was a breach that could not be healed by taking larger quantities in succeeding months. The plaintiffs were therefore entitled to recover damages. Calculating the loss of profit at 9d. per lb., and making a deduction of £100 on the ground that the defendants were only bound to take, in these particular months, something less than 6,000lb. a month, the damages they had suffered came to £1,250.

Judgment for the plaintiffs for £1,250, with costs.

[Solicitors—Hollams, Sons, Coward, and Hawksley, for the plaintiffs; R. E. Campbell, for the defendants.]

Q.B. Div. (Wright
and Darling, JJ.)

1898.
March 25.

COPPEN V. MOORE.*

Merchandise Marks Act, 1887—False trade description—"Scotch" ham—Invoice.

This was a special case stated by magistrates of the borough of Richmond, Surrey, on a question arising out of a conviction by them under the Merchandise Marks Act, 1887 (50 and 51 Vic., c. 28).

Mr. Bonsey appeared for the appellant; Mr. Buszard, Q.C., and Mr. A. J. David for the respondent.

The appellant is a grocer trading as the London Supply Stores at 42, George-street, Richmond, and other places. He was charged with selling in the shop at Richmond a ham to which a false trade description was applied. The facts were that the respondent, an inspector of the Bacon Curers' Association of Great Britain, went to the appellant's shop and asked for an English ham. An assistant outside the shop pointed out a shelf with some hams on, and said, "Those are Scotch hams." The respondent said he would have one. Thereupon the assistant passed the ham through the open window and called out to another in the shop, "Weigh up Scotch ham 8½d." The price was 6s. 5½d. On the invoice, which was made at the request of the inspector, there was no description given of the ham. The respondent did not take it, but asked the assistant to put the word "Scotch" on it as he had bought it as such. This was done. The respondent then paid for it. The ham was proved to be an American ham. For the defence it was shown that a notice had been sent to the manager expressly prohibiting these particular hams from being called or described as anything but "breakfast" hams. The assistants in question admitted having seen this notice. The justices convicted. They held that the appellant had not taken all reasonable precautions against committing an offence against the Act.

Mr. BONSEY contended that no offence had been committed, because the word "Scotch" was not applied as a false trade description within the Act. He distinguished between this case and that of "Budd v. Lucas" ([1891] 1 Q.B., 408), which was a case of delivery of an invoice with a cask. That case only decided that an invoice might be a trade description. What happened here was that the purchase was over, and that it was at the request of the purchaser that the description was written. Further, section 5 showed that a false description must be in writing. Section 2 affirmed this view. The circumstances of this case might come within the Sale of Food and Drugs Act. That being so, the severity of the penalty under the Merchandise Marks Act should be considered. Before convicting justices must find either that the defendant

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

knew or connived at the false description. Here he had done all he could to prevent it. A master was not liable criminally for his servants' acts in a case such as this.

Mr. BUSZARD argued that a mere verbal description was within the Act. It was within the policy of the Act. The words were very wide. At any rate, here there was the written description of "Scotch" on the invoice before the payment was made. As to reasonable precautions, the justices had found as a fact that the appellant had not taken them. A man who kept a number of shops must take his chance.

The COURT were of opinion that the question of the liability of the master was of such importance that it ought to be determined by a special Court. No decision, therefore, was given on that head on the present occasion.

MR. JUSTICE WRIGHT, dealing with the other questions, said that in his opinion the Act did not apply to verbal descriptions only. The whole Act, except section 20, was apparently intended to apply to visible descriptions of articles. There was no authority suggested to the contrary. The question then arose whether this was a case of a verbal order. In his opinion it was more, for the word added to the invoice amounted to a trade description. The case of "Budd v. Lucas" was an authority that an invoice might be a false trade description. This was an invoice of that nature. It was not open to the Court, on the point whether all reasonable precautions had been taken, to disturb the finding of the justices.

MR. JUSTICE DARLING concurred.

[Solicitors—Neve and Beck, for the appellant; W. Moseley, for Weekes and Co., Birmingham, for the respondent.]

Chan. Div. }
(Kekewich, J.) }

1898.
March 26.

IN RE BROOKE AND FREMLIN.*

Married Woman—Mortgagee—Conveyance to purchaser.

A married woman, who is a mortgagee of real estate, can execute a conveyance thereof without the concurrence of her husband.

In this case a question of considerable interest and importance, both to conveyancers and generally, as to the power of a married woman to convey land under the provisions of the Married Women's Property Act, 1882 (45 and 46 Vict., c. 75), came before the Court on a summons under the Vendor and Purchaser Act, 1874. It appeared that a contract had been entered into for the sale of land by Mr. Brooke to Mr. Fremlin for £550. Upon the investigation of the title to the property it appeared that it was subject to a mortgage made on November 28, 1895, in the usual form, by Brooke to a married lady, to whom the mortgage moneys belonged absolutely as part of her separate estate. The purchaser required that the conveyance to him should be acknowledged by this lady under the Fines and Recoveries Act, and that her husband should concur in the deed, notwithstanding the provisions of the Married Women's Property Act, 1882, it being contended that the case was governed by the decision of Mr. Justice North in "*In re Harkness and Allsopp's Contract*" ([1896] 2 Ch., 358), to the effect that the Act of 1882 does not enable a woman who is a trustee of real estate to convey to a purchaser except with the concurrence of her husband, and by deed acknowledged. Thereupon the vendor took out this summons, asking

for a declaration that such acknowledgment and concurrence were not necessary, it being contended, on his behalf, that the decision of Mr. Justice North did not apply to the case of a married woman who was a mortgagee, and not a trustee.

Mr. Warrington, Q.C., and Mr. Harry Greenwood appeared for the applicant; and Mr. Ashton Cross for the respondent.

MR. JUSTICE KEKEWICH said that it must be borne in mind the Married Women's Property Act, 1882, was intended, not merely for the alteration, but for the simplification of the law. The point raised was a new one, but in truth the only question to be decided was whether the decision of Mr. Justice North in "*In re Harkness*" was applicable. His Lordship loyally accepted that decision, and, without criticizing it in any way, would merely say that the Act might more conveniently have been interpreted in a different way. That decision, however, dealt solely with the case of a married woman who was in the position of a trustee, and the question was whether a married lady, entitled to a mortgage of real estate as her separate property, was a trustee within the meaning of that decision. There was no doubt that on receiving payment of principal, interest, and costs she would become a bare trustee. In that case no difficulty could arise, because under section 16 of the Trustee Act, 1893 (56 and 57 Vict., c. 53), a married woman who was a bare trustee could convey as if she were a *feme sole*. But could she, as a mortgagee, convey, notwithstanding the decision in "*In re Harkness*"? In order to create a trust three things were requisite—a person in the character of trustee, a person in the character of *cestui que trust*, and property which the one person might hold on trust for the other. There was no difficulty in a case of this kind in finding a possible trustee and a possible *cestui que trust*—namely, the mortgagee and the mortgagor. But what property did the mortgagee hold in trust for the mortgagor? There could be only one answer to that question, and that answer was in favour of the purchaser. A mortgagee is not a trustee of the mortgaged property for the mortgagor until the mortgagee has been paid his principal, interest, and costs, and then, being denuded of any beneficial interest, he becomes a bare trustee for the mortgagor. Until then the mortgagee holds the mortgaged property and estate for his own benefit only to secure to him his principal, interest, and costs, and subject to redemption on payment. The result was that the decision of Mr. Justice North was not applicable and that this lady, to whom this mortgage of real estate was made after the commencement of the Act of 1882, was by virtue of that Act competent to deal with the security, including the legal estate in the land, as if she were a *feme sole*, and the purchaser would get a good title without the concurrence of her husband or acknowledgment of the deed of conveyance by her.

[Solicitors—William Webb and Co.; E. C. Rawlings and Butt.]

Q.B. Div. (Wright and)
Darling, J.J. }

1898.
March 26.

GAGE V. BREALEY.*

Metropolis—Metropolitan Streets Act, 1867, sec. 9—Carriage of "advertisements."

This was a case stated by an alderman of the City of London on an information laid against James Gage, for that he on November 11, in Throgmorton-street, did unlawfully distribute certain prints, to wit handbills, by way of advertisement.

*Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

*Reported by H. BUSSELL, Esq., Barrister-at-Law.

Mr. Danckwerts (Mr. Spenceley with him) appeared for the appellant; Mr. Leycester for the respondent.

By the Metropolitan Streets Act, 1867 (30 and 31 Vic., c. 134), section 9, it is provided as follows:—
“No picture, print, board, placard, or notice, except in such form and manner as may be approved of by the Commissioner of Police, shall, by way of advertisement, be carried or distributed in any street within the general limits of this Act. . . This section shall not apply to the sale of newspapers.” The facts were these:—The appellant is a lad in the employ of the proprietors of the *Financial Times*, and on November 11 he distributed gratuitously in Throgmorton-street the following print:—

“Special. The *Financial Times*, November 11, 1897. The following cablegrams were received after to-day's issue had gone to press:—

‘From our own Correspondent.

‘Johannesburg, Nov. 10, 1897.

‘A motion was carried in the Raad to-day by a majority of three accepting the committee's recommendation reducing railway tariffs on mining commodities by two hundred thousand pounds annually.’”

The paragraph went on dealing with the same subject and was followed by another headed “Later.” The whole print was about 30 lines in length and on a small piece of paper. No leave had been given by the Commissioner of Police for the distribution. The alderman convicted and fined the appellant 10s., holding, as a fact, that the print was not a newspaper and that the object of the said distribution was to advertise the *Financial Times*. The contention for the appellant was that this was not a “print” or anything else within the section, and that there was no evidence that it was an advertisement. No offence had therefore been committed.

MR. LEYCESTER said the permission of the police had not been given nor even applied for. The section prohibited advertisements. It was clear that this leaflet was handed about to make known the *Financial Times*, and was an advertisement. The proviso excepted the sale of newspapers. But this was not a newspaper; and if it were, there was no sale, as the prints were given away gratuitously.

MR. JUSTICE WRIGHT said he would hesitate long before saying the leaflet was not a print. He could, however, say at once it was not a newspaper.

After some further argument, the COURT allowed the appeal.

MR. JUSTICE WRIGHT said that the magistrate had not found that this was an advertisement. There was no evidence that it was. It was in itself a publication of news. It would be wrong to hold that because the object of distributing these papers was the obtaining of notoriety they must therefore be advertisements. The section was directed against things which in themselves were advertisements, not against the way of doing a thing which obtained the consequences of an advertisement.

MR. JUSTICE DARLING concurred.

[Solicitors—J. E. Lickfield; H. H. Crawford, for the respondent.]

Court of Appeal (A. L. Smith) 1898.
and Collins, L.J.J.) March 28.

REG. V. LEIGH RURAL DISTRICT COUNCIL.*
Rate—Retrospective rate—Power to levy—Mandamus granted.

This was an appeal from an order of a Divisional Court, consisting of Mr. Justice Day and Mr. Justice

Lawrance, making absolute a rule for a writ of *mandamus*. In January, 1893, an agreement was entered into between the Tyldesley Urban District Council and the Leigh Rural District Council, by which the Tyldesley District Council was to supply the Leigh District Council with water at a fixed *minimum* quantity per annum at a specified rate of payment. The Leigh District Council was to be at liberty to take a greater quantity of water on paying an extra charge. The Tyldesley District Council was to put up a water meter and keep it in repair. A supply of water was provided, and was continued till May 6, 1895. It was then discovered that, in consequence of some default in the working of the meter, a very much larger quantity of water had been supplied than had been registered. The Tyldesley District Council demanded payment for the extra water, in excess of the fixed *minimum* quantity, which had in fact passed through the meter. The Leigh District Council declined to make this payment on the ground that the mistake had arisen from the wrong working of the meter, which the Tyldesley District Council was bound to keep in repair. A correspondence ensued between the two councils, which occupied a considerable time, and in March, 1897, the Tyldesley District Council commenced an action against the Leigh District Council to recover the sum of £92 which was alleged to be due. The defendants counter-claimed for breach of agreement to keep the meter in repair, and ultimately, on May 15, 1897, judgment was entered for the plaintiffs for £63 13s. 5d. The Tyldesley District Council then obtained a rule *nisi* for a writ of *mandamus* directed to the Leigh District Council commanding them to issue their precepts to the overseers to levy a rate to pay the judgment debt. The Leigh District Council contended that they had no power to levy a retrospective rate. The Divisional Court made the rule absolute. The Leigh District Council appealed.

Mr. Macmorran, Q.C., and Mr. Tindal Atkinson appeared for the Leigh District Council; Mr. McCall, Q.C., and Mr. Horridge for the Tyldesley District Council.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question in this case was whether, where a just debt was due from a rural district council, and the council had no funds and would not levy a rate to pay the debt justly due, it was necessary that a *mandamus* should be moved for within the rating year, or otherwise the creditor would have to go without his debt. It seemed to him that it would be, he would not say monstrous, but wrong, if the law was such that the answer to that question must be yes. He thought that the true answer was no. The appellants said that the *mandamus* called upon them to make a retrospective rate for the purpose of paying a debt which became due on May 6, 1895. But a debt was not due till it was ascertained, and this debt was not ascertained till May 15, 1897. The *mandamus* was moved for in October, 1897; it was therefore moved for well within the rating year. But in his opinion there was no hard-and-fast rule preventing the granting of a *mandamus* in a case where the rating year had expired. He thought that in such a case excuses might be given explaining the delay which had occurred, and in the present case there was ample excuse for the delay which had occurred before the action was brought. The *mandamus*, therefore, had been rightly granted, and the appeal must be dismissed.

LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Robbins, Billing, and Co., agents for Marsh, Son, and Calvert, Leigh, for the Leigh District Council; C. W. Saffell, agent, for W. Holland Owen, Liverpool, for the Tyldesley District Council.]

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Q.B. Div. (Lord Russell of Kil-
lowen, C.J., Mathew, J.)

1898.
March 28.

THE QUEEN V. ROBINSON AND ANOTHER, JUSTICES, AND
KIRKHAM—EX PARTE CORBISHLEY.*

**Bastardy—Affiliation order—Application for sum-
mons—Time within which it must be made—
Former application dismissed.**

This was a motion for a *certiorari* to justices of Staffordshire to quash an affiliation order of December 29, 1897. The motion raised a question whether a woman by applying to several justices within the year could take out successive summonses for an affiliation order more than 12 months after the birth of the child.

Mr. Hume Williams appeared to show cause against the rule on the part of the mother; Mr. Montague Lush appeared in support of the rule. The justices put in an affidavit which was read out.

The facts and dates are these. On October 10, 1896, Annie Kirkham, a single woman, residing at Stanley, in Staffordshire, who had been delivered of an illegitimate child on September 9, 1896, laid an information against H. Corbishley to show cause why he should not contribute towards the support of the child. A summons was granted by Mr. Nicholson, a justice of the division, returnable on October 21, 1896. On that day the sessions considered that service had not been properly effected on the alleged father, and accordingly no order was made. On the same day the mother laid three fresh informations before three different magistrates, Messrs. Robinson, Phillips, and Brierly. No summons was then issued on either of them, as it appeared that service could not then be effected. The object of this was that the woman might be able to get a summons even if one of the justices had died or was unavailable when the defendant could be served. On July 28, 1897, the woman applied for a fresh summons based on the old application to Mr. Brierly. The summons was granted by him, and ultimately came on upon November 3, the summons having been personally served on the alleged father in the interval. On this hearing the justices disagreed and no order was made. The chairman stated that the summons was not dismissed on its merits, and if the applicant could bring fresh evidence she was told she could apply again. On November 10 a further summons, returnable on November 17, was granted by Mr. Robinson. On that day, no proof of service having been given, the case could not be gone into. On the same day a fresh summons was issued by Mr. Robinson. It recited that it was granted in pursuance of the application of October 21, 1896. The summons came on on December 1. After hearing evidence the case was adjourned till December 29. When it came on the defendant was represented by a solicitor, who raised the point that it was too late, inasmuch as the old application was exhausted by the hearing on November 3. The magistrates, however, made an order for 3s. a week. It was that order which was now impugned.

Mr. HUME WILLIAMS appeared for the mother and urged the hearing of November 3 was not an exhaustion of the application. He cited "Reg. v. Lancashire Justices" ([1874] 38 J.P., 215). As the hearing did not exhaust the application a new summons might issue. At any rate a new summons might be taken out on one of the after applications which had not been exhausted. That had been done, and it was the determination thereon which was now attacked. He relied on "Reg. v. Gaunt" (L.R., 2 Q.B., 466).

Mr. MONTAGUE LUSH said, if this order was good,

the limit imposed by the statute would be altogether destroyed. The woman might make a dozen applications and then keep on getting summonses on the strength of the unexhausted applications, whatever length of time might have elapsed. If any one application were exhausted the others, which were merely duplicates, were also exhausted. The only reason why three applications could properly be made was lest one of the justices should be dead or abroad. The statute required that the justice to whom the application was made should be the justice to grant the summons. He referred to "Potts v. Cumridge" (27 L.J., M.C., 62) and "Reg. v. Thomas" ([1863] 8 L.T., N.S., 460), which was a case of one application to one magistrate, which was held to be exhausted. "Reg. v. Chugg" ([1870] 34 J.P., 469, 22 L.T., 556); "Staples v. Staples" ([1879] 41 L.T., 347).

The COURT made the rule absolute.

The LORD CHIEF JUSTICE said he should have been very glad if he could have supported the order of the justices, because it looked much as if the defendant had kept purposely out of the way, and thereby prevented the applicant from making out her claim. But he could not do so. The case was put in two ways—it was first said that the determination of the justices on November 3, 1897, was not a hearing of the application, and that therefore the case came within the principle of "Reg. v. the Justices of Lancashire" (38 J.P., 215). What the justices did say was that they had not sufficient evidence, and that the mother might come again. However, that was not a matter which depended on the will of the magistrates. Without their consent, if she was within the period of 12 months she had a right to come again. The learned Lord Chief Justice felt bound by the cases of "Reg. v. Thomas" and "Staples v. Staples." When a distinction was drawn between the case where there had been a hearing and where there had only been a dismissal on a preliminary point, "Staples v. Staples" governed this case. It did not come within the principle of "Reg. v. Lancashire Justices," where justices who might have amended the information for a wrong recital had instead dismissed it and that dismissal was held not to be a hearing exhausting the original application. The last summons in this case taken out must be treated as a fresh summons. The facts were that the birth took place on September 9. The three applications were made to three different magistrates on October 21, 1896, on November 10, and again on November 17, 1897, a summons was granted by Mr. Robinson and on that summons the order now in question was made. On July 28, 1897, Mr. Brierly had granted a summons, which came on on November 3, 1897, and had been dismissed. If those three applications of October 21 had been one it must have been held that it had been exhausted by the decision of November 3 on Mr. Brierly's summons. In the opinion of the learned Judge they were to be treated as one, except that the effect of having made three applications to different magistrates gave the applicant an opportunity of making a choice to which magistrate she would apply. These summonses were really duplicates. If one was used up they were all three exhausted. It would be straining the law to hold otherwise.

MR. JUSTICE MATHEW concurred. He had hoped that the terms on which the summons had been dismissed would have enabled the Court to say that it had not been exhausted. But what appeared to have been intended was that a fresh summons could be issued. He hoped that in doubtful cases magistrates would adjourn and not dismiss.

[Solicitors—Everett and Hodgkinson, to show cause; Chester and Co., in support of rule.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Prob., Divorce, and Adm. Div. (The)
Right Hon. the President, Sir Francis } 1898.
Jeune } March 28.

IN THE GOODS OF JOHN STEVENS, DECEASED.*

Probate — Administration — Grant — Widow of deceased missing—Grant of administration to deceased's son without citing the widow.

This was a motion for a grant of administration to the deceased's son without citing the widow.

Mr. LIPSCOMB said that the deceased died intestate on March 9 last, leaving issue one child, the applicant, William Alfred Stevens, who is of full age and the only next of kin and heir-at-law. The deceased had, 36 years ago, married Louisa Morhen, but she had contracted habits of intemperance, and after 20 years of marriage she left her husband and eloped with another man.

The PRESIDENT.—If you could prove that the wife had eloped that would be one thing; but I do not well see how the Court can deal with that matter unless the widow is cited.

Mr. LIPSCOMB.—I should like to call your Lordship's attention to the case of "*In re Boddan*" (28 *L.T.*, 368), when Sir James Hannen passed over the widow and made a grant to the son, the facts proved being that the husband had separated from his wife some time before his death, and she had been subsequently convicted of felony, and was at the date of the motion leading a life of prostitution.

The PRESIDENT.—Yes; but there every effort had been made to find the widow, though without success.

Mr. LIPSCOMB.—Again in an earlier case of "*In re Anderson*" (3 *S. and T.*, 489) (which was cited in "*In re Boddan*"), Sir J. P. Wilde, in granting a similar application, said:—"It has been always held that the widow upon good cause may be set aside." In the present case the property was a very small one, and if the widow was cited practically the whole estate would go in law costs. The son did not even know if the widow was alive, and it would be a great hardship to compel him to cite her. He was quite prepared to set aside her share (one-third) of the estate until it was ascertained what had become of her.

The PRESIDENT, in giving judgment, said.—I feel some doubt about the matter, but the Court has no doubt gone a long way in the case of "*In re Anderson*," and having regard to the evidence of the deceased's wife having eloped, and to the length of time she left her husband, I think that in the special circumstances of this case the widow may be passed over and that the grant may go to the son. There must, however, be justifying security as to the widow's share (one-third) of the estate.

[Solicitor—C. Hamilton White.]

Court of Appeal (A. L. Smith,)
Chitty, and Collins, L.J.J. } 1898.
March 29.

IN RE GOETZ, JONAS, AND CO.—EX PARTE THE TRUSTEE +
Bankruptcy—Order and disposition—Debts—Re-
puted ownership.

This was an appeal by the trustee from an order of a Divisional Court (Mr. Justice Wright and Mr. Justice Bruce) reversing an order of the County Court Judge of Manchester sitting in bankruptcy. The facts and arguments are stated in the judgment hereunder.

Mr. E. Sutton and Mr. F. Mote appeared for the trustee; Mr. J. Lawson Walton, Q.C., and Mr. Muir

Mackenzie appeared for the respondents, Messrs. Armstrong and Co.

The COURT, having taken time to consider, allowed the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—Upon May 13, 1896, Messrs. Goetz, Jonas, and Co., who then carried on the business of general shippers at Manchester, were adjudicated bankrupts upon their own petition, they having called their creditors together upon the 7th of that month. At this date certain Spanish customers to whom Messrs. Goetz, Jonas, and Co. had sold and consigned goods were indebted to them in sums amounting in all to £1,936, which sums were payable to Goetz, Jonas, and Co. at different dates, according to the times at which the respective credits expired. The question is whether these debts were upon May 7, 1896, in the order and disposition of the bankrupts with the consent of the true owners thereof within the meaning of section 44 subsection 2 (iii.) of the Bankruptcy Act, 1883, so as to be divisible amongst the creditors of the bankrupts, or whether they belonged to Messrs. Armstrong and Co., bankers in London, who had financed the bankrupts as hereinafter mentioned. The course of business between Messrs. Goetz, Jonas, and Co. and their Spanish customers, as appears from the evidence, was this. Messrs. Goetz, Jonas, and Co. purchased goods from the manufacturers in England and then sold and consigned them to, amongst others, customers in Spain. The terms of credit were as follows:—The Spanish customers had six months' credit from the date of invoice, and for the first three months from that date were under no obligation to accept any draft for the goods purchased. They had what has been called an open credit for these first three months, though if they liked they might remit in cash during that period. It is said that they sometimes did so. Why, I do not understand, nor has the learned counsel been able to explain why they should do so, but such appears on occasions to have been done. Upon the expiration of the first three months from the date of invoice the customers were bound to come under acceptance for the price of the goods purchased and to accept the draft of Messrs. Goetz, Jonas, and Co. upon them at three months. Contemporaneously with this course of business between Goetz, Jonas, and Co. and their Spanish customers the former sought financial aid from Messrs. Armstrong and Co., who are bankers in London, the terms agreed upon between them being as follows:—Messrs. Goetz, Jonas, and Co. drew a draft upon their Spanish customer at six months from date of invoice, and then handed this draft to Messrs. Armstrong, together with a copy invoice and duplicate bill of lading. Upon receipt of this draft at six months Messrs. Armstrong handed to Messrs. Goetz, Jonas, and Co. their acceptance at three months for something less than the invoice price, which draft Messrs. Goetz, Jonas, and Co. were at liberty to discount and thus place themselves in funds. When three months from the date of invoice arrived, Messrs. Goetz, Jonas, and Co. then drew a bill at three months upon their Spanish customer for the value of the goods sold and consigned to him, and handed it to Messrs. Armstrong for them to get it accepted by the Spanish customer, who returned it accepted to them, and when met Messrs. Armstrong handed back the unaccepted draft at six months to Messrs. Goetz, Jonas, and Co., its function having then been exhausted. It will be seen that during the first three months, whilst the six months' draft was running, Messrs. Armstrong could not call upon the Spanish customer to accept this six months' draft, nor any other bill, and this six months' draft was but a security to the bankers for the due performance by Messrs. Goetz, Jonas, and Co. of their

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

†Reported by W. F. BARRY, Esq., Barrister-at-Law.

engagement with them—that is, at the termination of the first three months to draw at three months upon their Spanish customer and hand the bill so drawn to them (the bankers) in order that they might get it accepted by the Spanish customer and at maturity obtain the proceeds thereof. At the date of the bankruptcy the position of Messrs. Armstrong and Co. was this. Their acceptances which they had given to Messrs. Goetz, Jonas, and Co. had been discounted by them, and Messrs. Armstrong and Co. were either under cash advances, or were liable upon their acceptances. They held the six months' draft of Messrs. Goetz, Jonas, and Co. unaccepted by and unrepresented to the Spanish customers, copy invoices, and duplicate, but not the original, bills of lading. In these circumstances the question arises, were the debts owing by the Spanish customers to Goetz, Jonas, and Co. at the date of the bankruptcy in the order and disposition of the bankrupts? That they were "debts due or growing due to the bankrupts in the course of their trade or business" is clear. For these debts the Spanish customers had accepted no bills and unquestionably they were debts for which Messrs. Goetz, Jonas, and Co. could give the Spanish customers valid discharges, and I do not doubt that they were in the order and disposition of the bankrupts at the date of the bankruptcy. But it is said that although this might be so they were not debts in the order or disposition of the bankrupts in their trade and business by the consent and permission of the true owners under such circumstances that they (the bankrupts) were the reputed owners thereof. It is not suggested that the bankers gave notice to the debtors of the assignment of the debts to them by means of the six months' drafts handed as they were by Messrs. Goetz, Jonas, and Co. to them, but it is said that this was not necessary because these six months' drafts were negotiable instruments and consequently no notice of the assignment need be given. It is not disputed that absence of notice to a debtor by the assignee of a debt leaves a debt within the order and disposition and reputed ownership section of the Bankruptcy Act, but it is said that if the assignment of the debt be by a bill of exchange it is otherwise because of the negotiability of the instrument. If the six months' drafts had been accepted before bankruptcy by the Spanish debtors for their debts owing to the bankrupts, this would be so, and, as it appears to me, the reason why notice of such an assignment is not required is that by accepting the bills the debtor has notice of the assignment, and what is more, if more be necessary, he has agreed to pay the debt not to the original creditor, but to the assignee, that is, to the holder of the bill. Cases have been cited as to bills accepted by the debtor constituting an assignment of a debt, so as to take the case out of the order and disposition section; but none have been cited to show that an unaccepted draft without notice to the debtor completes an assignment so as to take the debt of such debtor out of the order and disposition of the bankrupt. Assignment coupled with notice to the debtor is equivalent to taking possession of the debt by an assignee, and this takes the debt out of the reputed ownership section, but there has been no notice to the debtors in the present case. It was further argued for the bankers that the debts owing by the Spanish creditors were not within the reputed ownership section; because reputation of ownership may be excluded by a well-known custom of trade, such for instance as in a wine merchant's trade, whereby it is well known to all that wine the property of another is constantly left with the wine merchant, so that a bankrupt wine merchant in such a case is not the reputed owner of the wine left in his possession—"In re Conston, ex parte Watkins" (L.R., 8 Ch. 520). There

are many cases based upon notorious customs applicable to other trades. It is argued that the reputation of ownership by the bankrupts of the debts in question was excluded by a custom in the Spanish trade. The analogy is certainly ingenious, if not far-fetched, but I think Mr. Sutton for the trustee pointed out one fallacy lurking in the suggestion which is a sufficient answer to this point. In the case put the custom is notorious to all the world, whereas in the present case the custom spoken to by Praga and Strong is known only to those who deal in a particular market, and it appears to me that such a limited custom cannot affect persons who know nothing of the custom, and do not deal in the particular market. There is no evidence that the manufacturers, who sold their goods to the bankrupts and who through the trustee in bankruptcy are now seeking to get the £1,936 in question to part pay them for their goods sold to the bankrupts, knew to what part of the world or to what markets the bankrupts were about to consign the goods, nor that they were going to Spain, nor knew anything whatever of the particular custom. The usual course of retaining the bills of lading until the drafts of the sellers are accepted by the purchasers has not been followed in this case by the bankers. If this had been done, all would have gone well, but as it was not, these debts were in the order and disposition of the bankrupts upon May 7, 1896, and in my opinion the trustee's title is superior to that of the bankers, and that the learned County Court Judge was right when he so held, and that this appeal from the Queen's Bench Division must therefore be allowed with costs here and below.

LORD JUSTICE CHITTY read a judgment agreeing with the above.

LORD JUSTICE COLLINS concurred.

[Solicitors—R. Page, for the appellant; H. Clarkson and Sons, for the respondents.]

Q.B. Div. (Lord Russell of Kil-
lowen, C.J., and Mathew, J.) } 1898.
March 29.

BROWNSCOMBE V. JOHNSON—KRUSE V. SAME.*

Local Government—By-law—Validity.

This was a case stated by justices for Kent raising a question as to the validity of a by-law made by the Kent County Council in restraint of music and singing on the highway.

Mr. Robson, Q.C. (Mr. Hohler with him), appeared for the appellant; Mr. Dickens, Q.C., and Mr. A. Gill for the respondent.

The superintendent of police, the respondent, preferred an information against the appellant, Walter Brownscombe, for that he on Sunday, October 17, 1897, at Leeds, in Kent, did sing in a certain highway within 50 yards of a dwelling-house, after being required by a constable of the said county to desist, contrary to a by-law made by the Kent County Council under section 16 of the Local Government Act, 1888. The justices convicted the appellant and fined him 40s. The by-law in question was No. 4:—
"No person shall sound or play upon any musical or noisy instrument, or sing in any public place or highway, within 50 yards of any dwelling-houses, after being required by any constable or by an inmate of such house personally or by his or her servant to desist." The appellant was conducting an open-air religious service at about 5.45 p.m., and did with others congregate within 50 yards of a dwelling-house, and commenced to sing a hymn, in which those with him joined. After singing two or three lines of the hymn he was

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

requested by a constable to desist, but he continued singing. It was proved that the singing was an annoyance to the occupier of the house, but he had not personally requested the appellant to desist, although he had complained to the police about it. It was contended that the by-law was invalid on these grounds:—
(a) That it was unreasonable; (b) that it was not limited to cases of persons playing or singing to the annoyance of residents; (c) that it creates a new offence and is repugnant to the general law of the land. The by-laws were made under section 23 of the Municipal Corporations Act, 1882, which was made applicable to counties by the Local Government Act, 1888. That section allowed by-laws for the "good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner."

Mr. ROBSON contended that the by-law was too wide. It did not allege that the act prohibited was one done to the annoyance of inmates, or occupiers, or any one else. It simply gave a constable a right to remove any one singing or playing in the street. A by-law ought not to leave to the discretion or caprice of a particular official to enforce the law. He cited "*Everett v. Grapes*" ([1861] 3 L.T., N. S., 669), a case about a by-law as to keeping swine. He said that no cases before 1882 were of much value because the Act of 1882 was the foundation of all by-laws of this sort. He also cited "*Johnson v. Mayor of Croydon*" (16 Q.B.D., 708), "*Munro v. Watson*" ([1887] 51 J.P., 660), "*Strickland v. Hayes*" ([1896] 1 Q.B., 290), "*Burnett v. Berry*" ([1896] 1 Q.B., 641), and "*Teale v. Harris*" (60 J.P., 744). The local law was not to be allowed to override the general principles of the general law. Any prohibition ought to explain that it was a nuisance that was prohibited. As to by-laws against betting, the Legislature considered a betting business carried on on a large scale as a nuisance. Therefore, by-laws against the practice were placed on a somewhat different footing from others.

Mr. DICKENS urged that the by-law was good. The offence was the continuing to play or sing after a request to desist. It was not merely singing that constituted the offence. He cited some observations from the judgment of the Lord Chief Justice in "*Walker v. Stretton*" ([1896] 60 J.P., 313). It was inconsistent with the primary purpose of a highway that people should stand about and sing and play thereon. It was a reasonable restriction to prohibit it after a request to desist. The words "after being required to desist" were equivalent to saying "to the annoyance of" the person so requesting. The word annoyance was not necessary to a by-law. "*Wanstead Local Board v. Wooster*" ([1873] 37 J.P., 403).

In the result the COURT disagreed; the conviction and the by-law, therefore, for the present stand affirmed. It was arranged, however, after the judgment had been delivered that the second case, "*Kruse v. Johnson*," in which the facts were the same, should be heard by a special Court, to consist of more than two members.

The LORD CHIEF JUSTICE delivered judgment at considerable length in support of the by-law. He said he could not but distrust his judgment in favour of the validity of the by-law, because he knew that his learned brother disagreed with him, and that there was in the cases cited, which were, however, distinguishable on their facts, a current of opinion which would seem to point to a different conclusion from his own. Yet, having arrived at a clear conclusion himself, he felt bound to express it, and that all the more because, as there was no appeal in these matters, there had been no opportunity of having the judgments tested by the Court of Appeal. The question here was whether the by-law

was valid or not. What was a by-law? It was an ordinance by some authority under statutory powers. It necessarily involved the prohibition of acts but for it legal—in other words, a restriction on the otherwise legal liberty of action by individuals. If a by-law was validly made, it acquired the force of law within the sphere which it affected. This by-law was made by a representative body under the combined effect of the Municipal Corporation Act, 1882, and the Local Government Act, 1888. He then dealt with the sections, and referred to the various safeguards in the manner of confirming or allowing the by-laws. The by-law in this case was one made by the County Council of Kent. Parliament, in the extension of the powers of self-government in 1888, had thought it right to give to the popular representative body, the council for the county, the power of exercising its own judgment as to the orders and rules which concerned the good government of the county. The cases cited on by-laws were for the most part cases of by-laws made by private companies. In such cases the exercise of their powers in making by-laws should be carefully scrutinized. But a by-law made by a representative body such as a county council should be approached from a different point of view to that, and should be supported if it were possible to do so. The object of this legislation was to give the people who elected their representatives a wide discretion through their representatives to make regulations for their better government. It was difficult to see what better attributes the Judges of this Court had to enable them to say what was a reasonable by-law than the county council themselves had. The Court would interpose if a by-law was such a gratuitous interference with private rights that it could not commend itself to the minds of reasonable men, or if it were a partial by-law not affecting all equally. But this by-law did not come within that description. His Lordship read the by-law. The first criticism on it by those assailing it was that it might apply to a person singing who was not creating an annoyance, and that the by-law ought to express that the act was done to the annoyance of some one. If so, the question arose, Who was to decide whether an annoyance had in fact or could have taken place? Would it depend on the varying opinion of a magistrate, or of a policeman, or of the man said to be annoyed? These things were matters of taste. A second criticism was that, under this by-law, power was given to a policeman to say whether singing should be allowed or not. Fancy sketches had been given of the conduct of capricious policemen driving away persons making melody of a desirable character appreciated by persons in the neighbourhood; but that did not impress him much. A policeman was not a person acting without any control, and if he disturbed music contrary to the wishes of the residents in the locality he would probably hear of it from his superiors. The facts of this case were a useful illustration of the practical working of the by-law. The facts were that the appellant and others began to sing a hymn and continued so to do, notwithstanding a request by a constable that he should desist. The occupier proved that, though he had not complained on the day in question, the singing was an annoyance to him, and that he had on a previous occasion complained of it to the police. The policeman, therefore, did not act capriciously or vexatiously. His Lordship then referred to the case of "*Slattery v. Naylor*" (13 App. Ca. [1888], 446) and said that the general reasoning as to by-laws in the judgment applied to this case and corroborated his views. The Court would interfere if the by-law was such a one as reasonable men could not make in good faith, but would not interfere simply because the by-law was not in the best terms which could be conceived.

MR. JUSTICE MATHEW read a judgment holding

that the by-law was invalid, though, as the Lord Chief Justice took a different view, he did so with diffidence. He agreed that a large confidence ought to be felt in the local authorities, on the ground that they were likely to behave reasonably. But the question here was whether the particular by-law was reasonable. The question whether it was made in the reasonable exercise of the powers of the authority was for the Court to decide. The Court could not share its responsibility with any local authority. The cases cited indicated that by-laws for "good government" of a locality ought to state that the act prohibited was one which might be an annoyance. From the by-law in this case the condition of annoyance was excluded. It would seem to create a new offence—namely, the disregard of a request to desist from singing or playing. Any constable was made a judge of the time when a person could be requested to stop singing. It was admitted in the course of the arguments that an offence against the by-law would be committed if a man disregarded an admittedly unreasonable request. That was really, in his opinion, an end of the case. He would be loth to sanction this by-law in its present terms. It ought to be amended. He referred to "*Strickland v. Hayes*" ([1896] 1 Q.B., 290).

Solicitors—Hoar, Howlett, and Tatham, Maidstone, for the respondent; A. J. Ellis, Maidstone, for the appellant.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } March 30.
RUABON STEAMSHIP COMPANY (LIMITED) V. THE
LONDON ASSURANCE CORPORATION.*

Insurance—Marine—Repairs in dock—Dock dues
—Reclassification—Apportionment of dock dues.

A vessel having been docked to repair sea damage was surveyed on the owner's behalf with a view to reclassification.

Held (A. L. Smith, L.J., dissenting), that the principle of "*The Vancouver*" (11 Ap. Cas., 573) applied, and that the dock dues should be apportioned between underwriters and owners.

Decision of Mathew, J. (13 *The Times* L.R., 574, and [1897] 2 Q.B., 456), affirmed.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Mathew, reported in 13 *The Times* Law Reports, 574; [1897] 2 Q.B., 456. The action was brought against the defendants as underwriters to recover the expenses of docking the plaintiffs' steamship Ruabon in connexion with the repair of damage to that vessel caused by perils of the sea insured against. The items of the expenses are set out in the judgment of Lord Justice Chitty. The defendants contended that the expenses in question should be apportioned between the plaintiffs and the defendants. It appeared that the vessel stranded and sustained considerable damage. She was taken to Cardiff, and in order to make the repairs it was necessary to place her in dry dock. After the vessel had been opened up for the purpose of effecting the repairs, the owners thought it advisable to have her surveyed by Lloyd's surveyor for the purpose of retaining her classification, though the time for the renewal of her classification had not arrived, the owners being entitled under Lloyd's rules to anticipate the time. She was accordingly surveyed and her class renewed. No repairs were necessary for the purpose of the renewal of the

classification. The plaintiffs claimed from the defendant the whole of the docking expenses as a necessary part of the cost of repair. The defendants contended that the plaintiffs were bound to contribute to this expense as an outlay from which the plaintiffs had derived material benefit. It was admitted that the vessel did not go into dock for the purpose of the survey, but when she was in dock the opportunity was taken to examine her bottom to see if reclassification repairs were necessary, and that docking was necessary for the vessel to pass such survey. Mr. Justice Mathew held that the case was covered by the decision of the House of Lords in "*The Vancouver*" (11 App. Cas., 573), and gave judgment for the defendants.

Mr. Cohen, Q.C., and Mr. Montague Lush appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Lauriston Batten appeared for the defendants.

The Court, having taken time to consider, delivered judgment dismissing the appeal, Lord Justice A. L. Smith dissenting.

LORD JUSTICE A. L. SMITH read a judgment in which he said that the real and important point which it was desired to have determined in this case was whether, when a ship put into dry dock (in the present case into a wet dock with a pontoon therein) in order to repair damage occasioned by a sea peril for which underwriters alone were liable, the cost of piloting, towing, and other expenses necessary for getting the ship into dock for repair and of getting her out again when repaired were to be borne by the underwriters, or whether these expenses were to be shared between the shipowner and the underwriters of the ship, after the ship was in dock and the shipowner took advantage of her being there to get her surveyed so as to enable her to keep her class or for any other purpose of his own. It was said on behalf of the underwriters that the principles laid down by this Court and affirmed in the House of Lords in "*The Vancouver*" (11 App. Cas., 573) showed that these expenses were to be shared. It became, therefore, necessary to ascertain the principles laid down in that case, because unless they covered this case he had no doubt that these expenses would fall wholly on the underwriters. In his view the question of sharing the pilotage, towage, and other expenses necessary to take the ship into and out of dock was not under consideration in that case. The only question argued and determined was the sharing of the dock dues after the ship had arrived therein, which dues were incurred during that portion of time when the concurrent operations of the shipowner and underwriters on the ship were going on. "*The Vancouver*," therefore, was no authority upon the question of the pilotage, towage, and other expenses of getting the ship into dock. It was said that the principles underlying the decision covered the point now raised. The decision in "*The Vancouver*," was that where a ship was insured against perils of the sea and was placed in dry dock in order to carry out repairs which the shipowner for his own purposes desired to execute (i.e., scraping and painting the ship's bottom), which expenses the shipowner alone had to bear, yet if, when the ship got into dry dock, it was discovered that by reason of a peril insured against damage had been occasioned to the ship which had to be repaired at the expense of the underwriters alone, the dock dues incurred during those concurrent operations for the respective purposes of shipowner and underwriters must be shared between them. It was said by the plaintiffs that the Ruabon put into dock solely to repair damage for which the underwriters were alone liable and not for any purpose of the shipowner's, and that the pilotage, towage, and other expenses were incurred solely on the underwriters'

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

account. It was said by the underwriters that if these expenses had not been incurred the ship would not have been in dock and the shipowner would not have had the benefit of her being there to get her surveyed for her class. But "The Vancouver" did not lay down that whenever a person incidentally obtained a benefit he must necessarily share expenses which had not been incurred on his account. As regarded the dock dues, he agreed that these must be shared, for they had been incurred by reason of the common user of the dock for the purpose of the two. If the £25 claimed in this case were for dock dues, then "The Vancouver" case covered them, but the pilotage, towage, and other expenses were outside the decision and principles laid down in "The Vancouver." The underwriters now for the first time, so far as he knew, set up that where there was an expenditure solely on their own behalf, this expenditure was nevertheless to be divided or otherwise shared between them and the shipowner. His Lordship did not agree with that contention. The principle upon which "The Vancouver" was decided was that, if there be an employment for two purposes and expenses for these two purposes were incurred in common, then each person who utilized the occasion must bear his share of the expenses incurred; but if the employment was only for one purpose, then the old principle, that he for whom the employment took place must pay the cost, was left untouched. What he had said as to taking the ship into dock applied to taking her out. If all or any part of the £25 were for dock dues whilst the common user was going on, those, as before stated, would come within the decision in "The Vancouver," but that was not the real point the parties wished to have decided. He differed with regret from Mr. Justice Mathew and the other members of this Court, but in his opinion the appeal should be allowed.

LORD JUSTICE CHITTY read a judgment in which he said that the amount in controversy was small, but the question was one of importance to shipowners and underwriters. It was whether the expenses of taking the steamship Ruahon into and out of the pontoon dock and placing her there, and the dock dues whilst she was there, ought to be apportioned between the owners and the underwriters in the circumstances of this case. The particulars of expenses, amounting to £55, consisted of boat hire to and from the pontoon and Roath basin, piloting the vessel on and off the pontoon, towing the vessel on and off the pontoon, labour taking the vessel from the east dock to the pontoon and taking her from the pontoon to the Roath basin, and docking and undocking, including tide on and tide off and use of patent shoring. This last item (£25) was paid to the Cardiff Pontoon Company, and appeared to be for dock dues. The other items were paid to other persons. It was admitted that all the items were necessarily incurred in connexion with the docking. The shipowners contended that the whole of these expenses fell on the underwriters. If they ought to be apportioned it was conceded that the apportionment should be in equal shares. The ship was taken to and placed on the pontoon for the purpose of repairs, the burden of which fell on the underwriters. While the ship was on the pontoon and after she had been opened out the owners availed themselves of the opportunity of having her surveyed for the purpose of maintaining her classification, and they obtained the required certificate. The time had arrived when they were entitled according to Lloyd's rules to have her examined for classification, though there still remained some months to run before she would have lost her classification if not resurveyed. It was admitted that docking was necessary for the vessel to pass her survey. In the Vancouver case the ship was taken into dock by the owner for the purpose of repairs,

the expense of which fell on the owner alone. While there it was discovered that she had sustained injury while at sea to her stern-post. The burden of these repairs fell on the underwriters exclusively. There were three common days while the ship was in dock during which both sets of repairs were being done simultaneously. Neither set of repairs interfered with or delayed the execution of the other. Each set required the whole of the three days. This Court and the House of Lords held that, inasmuch as the dock was in fact being used for both purposes during the three days, the dock dues for those three days had to be borne by the owner and the underwriters in equal shares. The question here was whether this case was governed by the Vancouver case. It was argued in this Court for the appellants that, whatever the decision might be as to the pontoon dues (£25), no part of the expenses of taking the ship to and from the pontoon should be thrown on the shipowners. The Court were informed that in the Vancouver case the expenses of taking the ship into and out of the dock were not in controversy in the action, and that the cost of docking and undocking had before the action been apportioned in the average statement. It appeared to him that the present case was not distinguishable from the Vancouver case. The pontoon dues fell within the actual decision. He understood that decision to be that on the question of actual user of the dock, while the dock was being used simultaneously for shipowners' and underwriters' purposes, it was immaterial for whose purposes the ship was first brought into dock. That did not touch the question as to the expenses of taking her in and out. In his opinion, the principle of the decision covered those expenses. Those expenses were necessarily incurred in connexion with the docking. They were strictly incidental to the operation of docking. They seemed to him to be mere accessories which ought to follow the principal. They were not in any way occasioned by the condition of the vessel or by reason of her having been disabled by sea damage for which the underwriters were liable. Had they been made more onerous in the whole or in part by reason of the ship's disability arising from sea damage, the case would have stood differently, and they would have fallen, in the whole or in part, as the case might be, on the underwriters exclusively. He agreed that, if a ship were disabled at sea at a distance from a port and required the assistance of a tug to tow her, the expenses of any such towage would undoubtedly fall upon the underwriters. He excluded anything of the nature of a voyage, and any expense arising from the disability of the ship within the policy. In his opinion it made no difference whether the necessary expenses of getting the ship in and out were paid to the dock company or to some other person. His Lordship concluded by saying that he differed, though with reluctance, in some respects from the judgment of Lord Justice A. L. Smith. For the above reasons, in his opinion, the appeal ought to be dismissed.

LORD JUSTICE COLLINS read a judgment concurring with that delivered by Lord Justice Chitty.

[Solicitors—Botterell and Roche, for Vaughan and Hornby, Cardiff, for the plaintiffs; Waltons, Johnson, Bubb, and Whatton, for the defendants.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.J.J.) } March 31.
THE LONDON AND NORTH-WESTERN RAILWAY COMPANY
V. THE RURAL DISTRICT COUNCIL OF RUNCORN.*

Local Government—Sewers—Vesting in local authority—Exceptions—"Sewers made under

*Reported by E. SCHOTTERLEY, Esq., Barrister-at-Law.

local or private Act"—Public Health Act, 1875 (38 and 39 Vict., c. 55), sec. 13 (2).
Decision of Stirling, J. (*ante*, p. 63), affirmed.

This was an appeal by the defendants from a decision of Mr. Justice Stirling dated November 23 last, and reported in *The Times* of the following day, also *ante*, p. 63. The plaintiffs were the London and North-Western Railway and the Great Western Railway Companies, and they claimed an injunction to restrain the defendants from connecting certain new sewers of the defendants' in the township of Helsby and parish of Frodsham, in the county of Chester, with certain land drains and ditches belonging to the plaintiffs, and from causing or permitting sewage or water to flow from the said new sewers into the said land drains and ditches of the plaintiffs'. The question at issue in the case was whether the land drains and ditches, which had been constructed by the plaintiffs or their predecessors in title on their own lands, were now vested in the plaintiffs, or, as the defendants alleged, had under the provisions of the Public Health Act, 1875, become vested in them as the rural sanitary authority of the district. Section 13 of the Public Health Act, 1875, enacts that all existing and future sewers within the district of a local authority, except (*inter alia*), by subsection 2, "sewers made and used for the purpose of draining, preserving, or improving land under any local or private Act of Parliament, or for the purpose of irrigating land," shall vest in and be under the control of such local authority. The plaintiffs were the successors of a railway company constituted by a local or private Act of 1846 (with which was incorporated the Railways Clauses Act of 1845) for the purpose of making a railway from the Chester and Birkenhead Railway to the Manchester and Birmingham Railway. This railway was made about the year 1850, and subsequently by an Act of 1861 was, together with all the rights and obligations of the original company, transferred to the plaintiffs. At the trial the defendants' case was rested on the alleged user of the ditches in question for the purpose of carrying off the sewage from certain houses near the line. This sewage, it was alleged, passed from the ditches into a system of pipes and drains which had been constructed by the plaintiffs for the purpose of land drainage, and consequently it was contended that these had become "sewers" within the meaning of the Public Health Act, 1875, and were now vested in the defendants under section 13 (2). It was decided by Mr. Justice Stirling that the pipes and drains were made under the local or private Act, and in the result, therefore, his Lordship gave judgment for the plaintiffs.

Mr. BUCKLEY, Q.C., and Mr. E. P. HEWITT argued in support of the appeal.

Mr. Cripps, Q.C., and Mr. Montague Shearman appeared for the respondents.

Their LORDSHIPS, without calling upon the respondents' counsel to argue, affirmed the decision of Mr. Justice Stirling and dismissed the appeal.

The MASTER of the ROLLS, in delivering judgment, said that he could not bring himself to doubt that the judgment appealed from was right, and it appeared to his Lordship that the argument on behalf of the appellants entirely failed. It was plain that the defendants had no right to turn sewage into the land drains and ditches of the plaintiffs unless the same were sewers vested in the defendants. That they were "sewers" within the definition clause of the Public Health Act, 1875, was plain. Every drain was a sewer except that which was plainly defined to be a "drain" within the meaning of that Act. Here the drains and ditches did not come within the definition of a

"drain." They were "sewers." Section 13 of the Public Health Act, 1875, contained certain exceptions, the second of which, in his Lordship's judgment, applied to the present case. The question argued was whether these drains and ditches did or did not come within that second exception. (His Lordship stated the history of the drains and continued.) Were they made under any "local or private Act of Parliament"? The appellants' counsel had argued that the drains and ditches were made under a public statute—namely, the Railways Clauses Act, 1845. (His Lordship referred to the material sections of that Act and continued.) In his Lordship's opinion the drains and ditches were made under the local or private Act. If so, what became of the defendants' contention? It seemed to his Lordship perfectly plain that these particular sewers had not vested in the defendants. The second exception in section 13 seemed to apply, turn it about as you would. The decision of Mr. Justice Stirling was therefore right, and the appeal must be dismissed.

LORD JUSTICE RIGBY gave judgment to the like effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Preston, Stow, and Preston, agents for J. Ashton, Runcorn; C. H. Mason.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Collins, L.J.J.) } March 31.

IN RE WILLIAM ROBERT DAVIES, A SOLICITOR.*

Solicitor—Misconduct—Acquittal by Law Society
—Conviction by the Court—Assisting persons
to secrete a will—Allowing a client to swear a
false affidavit.

Decision of Divisional Court (*ante*, p. 161)
affirmed.

This was an appeal by Mr. William Robert Davies, a solicitor, of Dolgelly, from an order of a Divisional Court, consisting of Mr. Justice Wright and Mr. Justice Darling. A complaint having been made against Mr. Davies to the Incorporated Law Society, the matter was referred in the usual way to their statutory committee. The committee held an inquiry into the matter of the complaint, and found that though the conduct of the solicitor was extremely reprehensible they were able to receive his explanation, and they did not find him guilty of professional misconduct. An application was then made to the Queen's Bench Division to strike the solicitor's name off the rolls. The Divisional Court ordered that the solicitor should be suspended from practice for two years. The case is reported in *The Times* of January 15 and *ante*, p. 161, where the facts are stated at length.

Mr. Asquith, Q.C., and Mr. J. E. Banks appeared for the solicitor; Mr. Carson, Q.C., and Mr. Foote, Q.C., for the complainant, Mr. Meyrick Meredith Williams.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, where, under the present practice, a report had to be made by the committee of the Incorporated Law Society, such report was made in the same way in which a report by a Master used to be made under the old practice, when a solicitor was called upon to answer the matters in an affidavit. It was always open to those who appeared on behalf of the solicitor to challenge before the Court *in banc* the findings of the Master on the evidence given before him. He thought that the same rule applied to a report of the statutory

committee. Although no doubt the greatest weight ought to be attached to the findings contained in such a report, it was competent to the Court to go into the facts for itself and to decide whether or not it agreed with those findings. The complainant in this case was Mr. Meyrick Meredith Williams, and what he alleged was this—that if the will of Ann Hartley, which was dated November 19, 1868 (she dying in February, 1886), had been produced, he would have come into possession of a moiety of a valuable estate on March 18, 1891, on the death of his brother, Thomas Humphrey Williams, who was tenant for life of that moiety under the will. But by reason of that will being suppressed, he knew nothing of its existence till 1896. He alleged that Robert Nanney Williams and Sarah Williams secreted the will, and that the solicitor from July, 1893, aided and abetted them in so secreting it by taking active measures to prevent the knowledge of its existence coming to persons interested in its production. That was the substance of the charge. The complaint as laid before the committee contained a charge of fraud and conspiracy. The committee held that such charge was not made out, and he quite agreed with that. But the charge of assisting his clients to secrete the will and so keep persons out of property to which they were entitled remained. The question now was whether this charge was made out. The solicitor had bought the business of another solicitor who had died, and through his widow he became possessed of a parcel of papers, among which was Ann Hartley's will. He first saw the will in July, 1893, and from that time he knew that, if the will was a good one, his clients were not entitled to the whole of the estate of which they were in possession, but that the complainant was entitled to a moiety of it. He showed the will to his clients, Robert Nanney Williams and Sarah Williams, and also to the trustees of Thomas Humphrey Williams, but at the instance of his clients he refrained from communicating it to any one else. It was said on his behalf that his clients forbade him to disclose the will. If he had done nothing but keep the will in a box, his conduct would not have been so much to blame. But the facts showed that, having information that his clients were not rightfully entitled to the estate of which they were in possession, he actively assisted them in keeping out persons who were rightfully entitled to it. From 1893 to 1896 he was actively engaged in taking steps which had for their object the suppression of this will. With regard to the sale of a piece of land for an intermediate school, the correspondence showed that the solicitor was purporting to sell to the school authority land which he knew did not belong to Robert Nanney Williams, but to the complainant. He required the purchaser to assume that Thomas Humphrey Williams was at his death seized in fee simple of the property sold, which he knew not to be the fact. It was suggested that he had done this in order to deter purchasers, but his Lordship could not accept that suggestion. Then there was the lease from Robert Nanney Williams to Mrs. Jones for 21 years. That was a completed transaction, and the solicitor knew perfectly well that Robert Nanney Williams could not grant such a lease. That was comparatively a small matter, but there remained a very serious one. The solicitor was a party to allowing Sarah Williams in an administration action in Chancery to swear an affidavit which she and he knew to be untrue. He warned her that the affidavit would be untrue unless reference was made to Ann Hartley's will. She, however, insisted on swearing it without such reference, and he allowed her to do so. It was impossible for the Court to say that in so acting he had not been guilty of professional misconduct. The committee found that his conduct was

reprehensible, but expressed the belief that he had acted *bona fide*. He himself could not understand how a solicitor could possibly be said to have acted *bona fide* in knowingly allowing a client to swear a false affidavit. He could not admit that the solicitor was bound in the interests of his clients to act as he did. When he saw that his clients were going to insist on suppressing the will his duty clearly was to withdraw from the matter and say he would have no more to do with it. Even when he was advised by counsel that this was his duty he continued to secrete the will, and the complainant was kept in ignorance of it until Robert Nanney Williams on his deathbed determined to disclose it. He could not agree with the report of the committee, and he thought that this was a case for suspension, and that two years was not too long. The appeal must therefore be dismissed.

LORD JUSTICE CHITTY delivered judgment to the same effect.

LORD JUSTICE COLLINS also concurred.

Q.B. Div. }
(Bigham, J.) }

1898.
March 31.

MARTEN V. THE NIPPON SEA AND LAND INSURANCE COMPANY (LIMITED).*

Insurance—Marine—Reinsurance—Incorporation of clauses of original policy—Loss occurring after termination of risk.

The plaintiff's claim in this case was upon a policy of reinsurance on goods per Adonis from Liverpool to any ports on the west coast of South America. The policy of reinsurance was expressed to be subject to the same clauses and conditions as the original policy and to pay as might be paid thereon. The commencement and termination of the risk were defined as follows in the reinsurance policy:—"From and immediately after the loading thereof on board the said ship or vessel and so to continue and endure until the same shall be discharged and safely landed at the aforesaid port." The original policy contained the following clause:—"Including all risks whatsoever by land and water and (or) inland conveyances and (or) of transshipment from the place whence despatched whilst waiting shipment and until safely delivered to consignees." The Adonis sailed on the voyage mentioned in the policy with the goods in question, and arrived at Guayaquil, a port on the west coast of South America, and completed her discharge on September 19, 1896. The goods, being dutiable goods, were placed in the customs warehouses, where they were held by the customs authorities in the name of the consignees and to their order subject to payment by them of the duties and storage and other charges and subject to compliance with the custom-house formalities. Various formalities have to be gone through at the Guayaquil Custom-house before consignees can get delivery of their goods, and, owing to a block of business consequent on a civil war in Ecuador which had only just terminated, affairs in the custom-house were in arrears. On October 6, 1896, the goods while in the customs warehouse were totally destroyed by fire. At the time of the fire the consignee of these goods had not been able to get possession of them, although he had done all that he could in that direction. The plaintiff paid a total loss under the original policy. The defendants contended that the "warehouse to warehouse" clause in the original policy was a clause

*Reported by F. O. ROBINSON, Esq., Barrister at Law.

of such an unusual character that it could not be read into the reinsurance policy unless disclosed at the time of effecting the reinsurance, which had not been done. On this point evidence was given on both sides. Further it was contended that even if the "warehouse to warehouse" clause applied, the risk had terminated at the time when the fire took place.

Mr. Joseph Walton, Q.C., and Mr. J. A. Hamilton appeared for the plaintiff; Mr. Carver, Q.C., and Mr. B. A. Cohen for the defendants.

MR. JUSTICE BIGHAM said that he must give judgment for the defendants. The first question was whether the warehouse to warehouse clause was to be read into the policy of reinsurance. His Lordship found as a fact that, at all events at Lloyd's, it was customary to have in a policy of this kind this particular clause. In his Lordship's opinion the clause was incorporated into the policy of reinsurance, because it was such a common clause that the defendants ought to have known that it was in the original policy. The second point raised by the defendants was that even if this clause was incorporated, nevertheless the defendants were not liable on the ground that the loss occurred after the risk insured had terminated. Now, under the warehouse to warehouse clause the risk attached until the goods were delivered into the warehouse of the consignee. These goods arrived at Guayaquil, and in accordance with the practice there the first thing that happened to them was that they got into the hands of the custom-house authorities, by whom the goods were placed in a warehouse and there held to the order and disposition of the consignees. His Lordship found as a fact (if it was a question of fact) that as soon as that happened the transit of the goods was over. Owing to delay in the working of the custom-house, the consignees had not, at the time of the fire, obtained actual physical possession of the goods, but in his Lordship's opinion the underwriter's risk was not to be extended beyond the end of the transit by occurrences of that kind. The goods were in the customs warehouse as a warehouse for the purpose of keeping the goods for the consignees in exactly the same way as if it was the consignees' own warehouse, and his Lordship found as a fact that for the purpose of the custody of the goods the warehouse was the warehouse of the consignees. Therefore, the risk had come to an end before the fire took place, and there must be judgment for the defendants with costs.

[Solicitors—Waltons, Johnson, Bubb, and Whatton, for the plaintiff; Simpson, Cullingford, Partington, and Holland, for the defendants.]

Q.B. Div. }
(Bigham, J.) }

1898.
March 31.

THE INSURANCE COMPANY OF NORTH AMERICA v.
THE NORTH CHINA INSURANCE COMPANY.*

Insurance—Marine—Reinsurance policy—Attachment of risk.

Judgment was delivered in this case, which was heard before his Lordship on March 29 and 30.

The action was brought to recover a loss under a marine contract of reinsurance on goods, the question raised in the case being whether or not the contract of reinsurance attached to goods which were being carried on board the steamship *Harden* from the Black Sea to London. The facts and arguments appear from the judgment of the learned Judge.

Mr. Cohen, Q.C., and Mr. Carver, Q.C., appeared

for the plaintiffs; Mr. Joseph Walton, Q.C., and Lord Robert Cecil for the defendants.

HIS LORDSHIP, in giving judgment, said:—On February 5, 1894, the plaintiffs granted an open policy of marine insurance to Carl Grubnau of New York to cover goods which might be consigned to him; this policy continued in force until April 1, 1897. On January 1, 1897, the plaintiffs effected an open cover with the defendants by way of reinsurance. In December, 1896, some shippers at Novo Rossiisk, a port in the Black Sea, were desirous of making a consignment of wool to Grubnau, and in order to carry this out they agreed with one Scaramanga, of that place, that he should undertake the carriage of the goods at a through rate of freight of 45s. per ton from Novo Rossiisk to New York, *via* London. Scaramanga had at this time an arrangement with the Wilson Furness Leyland Company, an English company running a line of steamers from London to New York, by which that company undertook to carry goods for Scaramanga from London to New York at a fixed rate. Scaramanga had, however, no arrangement with any shipowner for the carriage of goods from Novo Rossiisk to London, and he was therefore compelled to look for a vessel to carry the goods over that part of the journey. He found at Novo Rossiisk a steamer called the *Harden*, and he shipped the goods in her for carriage to London. The *Harden* was a general ship on the berth for London, seeking freight, a "tramp steamer." When the goods were shipped on board the *Harden*, Scaramanga signed and gave to the correspondents of Grubnau a through bill of lading from Novo Rossiisk to New York, and himself took from the master of the *Harden* a bill of lading (which has been called in this case the local bill of lading) for the carriage of the goods to London. This latter bill of lading Scaramanga forwarded to his agents in London so that on the arrival there of the *Harden* they might obtain the delivery of the goods and tranship them into whichever vessel of the Wilson Line might then be ready to take them. As I understand, the Wilson Company were not interested in any of these arrangements, except under their contract with Scaramanga for the carriage from London to New York, and whatever profit there might be after payment of freight to the *Harden* and cost of transshipment in London and freight to the Wilson Company belonged to Scaramanga. On January 2, 1897, the *Harden* sailed, and on January 4, 1897, Grubnau declared his interest in the shipment to the plaintiffs, who thus came on risk in respect of the same. If the *Harden* had completed her voyage she would have arrived in London about January 22, 1897, and the goods would then have been transhipped into the *Cambrian*, a steamer of the Wilson Line bound for New York. The *Harden*, however, was with her cargo totally lost off the coast of Sicily on or about January 8, 1897. The plaintiffs paid Grubnau the amount of his insurance, and the question now is whether, under the reinsurance cover of January 1, 1897, the defendants are liable to indemnify the plaintiffs. The answer depends on the construction which is to be put on the cover note. The contention of the plaintiffs is that the goods were on risk while on board the *Harden*; the defendants on the other hand contend that the risk never attached at all. Now the cover note in the first place specifies the time during which it is to be current, "to take all sailings on and after January 1, 1897, and on or before December 31, 1897." No difficulty arises as to that. It next proceeds to describe the voyages contemplated. They are "at and from ports in the United Kingdom and (or) the Continent of Europe (including the Mediterranean), and (or) the Baltic, and (or) the Black Sea to ports on the Atlantic seaboard." It then fixes the pecuniary limit of the risk—*viz.*, "to take \$30,000

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

excess of \$30,000," and, finally, it mentions the steamers in which the goods at risk are to be carried, per steamers of National Line, Arrow Line, and other lines "excluding (certain lines of which the Wilson Furness Line was not one)." The reason why the latter lines were excluded was that the defendants had already issued other covering notes to the plaintiffs in respect of those lines. It was said on the part of the plaintiffs, and I agree with them, that there are no lines of steamers trading between the Black Sea and the Atlantic seaboard. It was then argued that that being so the only possible way in which a voyage described in the cover note as from the Black Sea to the American seaboard could be performed was by means of a vessel such as the Harden, which should carry the goods from the Black Sea to some port, such as London, from which liners sailed, and that therefore carriage by such means was contemplated and covered by the insurance. It was further said that the reference in the cover note to the National and other lines was only introduced for the purpose of indicating that the excess over \$30,000 was to be ascertained by reference to the total value in the vessel which might perform the part of the voyage across the Atlantic. I do not agree with this view. The general words describing the voyage, although they do not apply to the existing state of business, because, in fact, there is at present no line running from the Black Sea to the American seaboard, would apply if, at any time, such a line came into existence, and it is therefore not true to say that they are meaningless unless they can be applied to the facts of the present case; and as to the reference to the National Line, I think that was introduced in order to define the character of the ships in which the goods should be carried—a most important matter in considering the risk and the wisdom of undertaking it. So far as the intention of the defendants is evidenced by the cover note before me, I am of opinion that they never contemplated or meant to take a risk by such a vessel as the Harden. Their risks were intended to be confined to the vessels of regular trading lines, and were not to extend to vessels which could not in any sense be so described. The view I take is strongly confirmed by the words of one of the clauses attached to the cover-note, which is in these terms:—

"It is agreed that in the event of any claim arising on interest in craft or on shore prior to shipment or on board the vessel before completion of loading, the excess shall be ascertained by taking into account the whole of the interest shipped or intended to be shipped by the vessel declared, and the loss shall be settled *pro rata*."

That passage in my opinion clearly shows that no risk is undertaken in addition to risk on the liners themselves except (1) risk on shore prior to shipment; (2) risk in lighters (craft) during shipment; (3) risk on the liner before completion of shipment.

Judgment for the defendants.

[Solicitors—Stokes and Stokes, for the plaintiffs; Walton, Johnson, Bubb, and Whatten, for the defendants.]

House of Lords (Lord Halsbury, L.C., } 1898.
 Lords Watson, Morris, and Shand) } April 1.

CORMULY and JEFFERY MANUFACTURING COMPANY
 v. NORTH BRITISH RUBBER COMPANY and ANOTHER.*

Patent—Infringement—Bicycle tire—Attachment of tire to wheel rim.

Decision of the Court of Appeal (13 *The Times* L.R., 217) affirmed.

The arguments in this appeal were heard by a House constituted as above on December 6, 7, and 13 and February 10 last, and the hearing by the Court of Appeal is reported 13 *The Times* Law Reports, 217; 14 Rep. Pat. Cas., 283. The action was by the respondents against the appellants to restrain the infringement of a patent, and Mr. Justice North found that the letters patent of the respondents were valid and that the appellants had infringed them. The main interest in the case consists in the Lord Chancellor's observations in moving the dismissal of the appeal. The following brief statement of the patent and of the appellants' infringing article is taken from the judgment of Lord Watson:—

The patented invention relates to the tire or felloe of wheels which may be used for cycles or other vehicles. It is described by the patentee in connexion with, or in its application to, tires which are composed of these three units—(1°) a circular metal rim or plate which is rigidly connected to the spokes of the wheel; (2°) an outer circular cover of gutta-percha, that part of the cover which comes into contact with the soil over which the wheel travels when in motion, being generally made of hard gutta-percha; and (3°) an inner pneumatic tube interposed between the metal rim and the outer cover and fitted with a device for inflating it with air. The leading and in this question the only important claim made by the patentee is for "the combination of a grooved rim or metal tire, and an arched tire of indiarubber or other flexible material held in the groove by the pressure of an inflated tube within the area which forces its edges against the sides of the groove, substantially as described."

The construction of the tire manufactured by the appellant company, of which the respondents complain, differs in certain respects from the construction of the tire shown in the specification as illustrating the application of the invention. These *differences* consist—first, in the manner in which the edges of the metal rim are bent and adjusted for the purpose of holding the ends of the outer cover; and, secondly, in the use of an inner pneumatic tube of pure indiarubber without any admixture of cloth or threads to limit its expansibility. The edges of the metal rim are not merely bent in the direction of the outer cover until they stand at an angle to the inner surface of the rim, but are bent over until the inner parts of them are nearly parallel to the inner surface of the rim. Each edge of the rim, when so treated, presents approximately the form of a hook. In the appellants' tire the pneumatic tube of pure rubber, in so far as concerns the holding in position of the outer cover, performs a function precisely similar to that which is fulfilled by the cloth and indiarubber tube in a tire constructed in conformity with the description given in the specification. It presses these ends against and into the interior of the hook, and when the ends are prolonged or terminate in a pad or lug it presses them against that part of the inside of the metal rim which is between the hooks.

Mr. Cripps, Q.C., Mr. Swinfen Eady, Q.C., and Mr. J. C. Graham were for the appellants; Mr. Moulton, Q.C., Mr. Bousfield, Q.C., Mr. Roger Wallace, Q.C., and Mr. A. J. Walter for the respondents.

The LORD CHANCELLOR.—In this case I have had an opportunity of considering the judgment prepared by my noble and learned friend Lord Watson, and, as I entirely concur in every word of that judgment, it does not appear to me to be material that I should add anything myself. At the same time, I am desirous of expressing my great regret that a case which apparently turned, as may be seen from the judgment of the Court below, in a great measure upon two or three sentences in the specification should have taken the period of time which it has taken, both in the original Court and in the Court of Appeal, to have a question which.

*Reported by J. ERIC THOMPSON, Esq., Barrister-at-Law.

as I say, turns upon five or six lines determined. Having regard to the extravagant and extraordinary consumption of time which was involved in the determination of this case, witnesses of great eminence being called on both sides and evidence given which amounts in the book which I hold in my hand to 500 printed quarto pages, it is no wonder that, if a case so simple in its character is so protracted, there is what is called a "block" in the Courts of law. My lords, I can only say for myself that I regret very much that, while complaints are reaching me constantly of the difficulties of suitors in ordinary litigation in having their cases determined, it should be thought necessary in cases of this kind to waste so much time as was wasted in this case. I think it is worthy of the consideration of those engaged in such cases to remember that the Legislature has provided a tribunal for protracted scientific investigations, to which cases of this sort will have to be remitted if this case is to be taken as an example. The question to be determined in this case by a Court of law is comparatively a short one, but if professors on every subject under Heaven are to be brought to confront each other and give evidence on questions of this sort it is quite manifest that the ordinary principles which guide Courts of justice cannot be adhered to, and what is called the scientific part of the case will have to be remitted to a totally different tribunal. I throw this out for the consideration of those who are engaged in something which is called litigation whether what I have suggested renders it possible to continue to try patent cases in the ordinary course of law. Every one knows it is most satisfactory that they should be so determined, but if it becomes impossible by the ordinary process because the Courts of Chancery and Courts of common law are blocked up by cases of this sort it is manifest that such a system cannot be permitted to continue. My Lords, for the reasons about to be given by my noble and learned friend Lord Watson I think this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON, after detailed description and criticism of the rival inventions, concluded as follows,—I have come to the conclusion, with both Courts below, that the appellant company have in point of fact appropriated and used the pith and marrow of the patented invention. The alterations which they have made upon the shape of the bent edges of the metal rim, which aid in holding the ends of the outer cover, are, in my opinion, mere modifications of the device for accomplishing the same purpose which is shown in the specification. Having regard to the evidence bearing upon the liability of the ends of the cover to blow out, when the patented device is used in combination with an inner tube of pure india-rubber, I am disposed to think that the appellant's device holds these ends more firmly, and is in that sense, and to that extent, an improvement on the device shown in the patent. But that circumstance cannot avail the appellants, if they have taken the essence of the patent as the basis of their improvements. Such improvements may involve so much inventive ingenuity as to entitle them to the protection of a patent; but, whether they do so or not, and whether they are patented or not, their author cannot use them without the licence of the original patentee or his assigns, during the currency of their letters patent. I have only to add that, in this case, the patented invention, although it is explained and illustrated in the body of the specification in its application to tyres which have an inner tube of cloth and india-rubber, is not, by the terms of the patentee's claim, limited to tyres of that class. I am, for these reasons, of opinion that the order appealed from ought to be affirmed with costs.

LORD MORRIS concurred.

LORD SHAND, whose judgment was read in his absence by LORD WATSON, after expressing his concurrence with the motion, said,—This grip is the value of the invention. It depends on the combined effect of the flanges, and the ends of the outer tire constructed as shown in the sketches annexed to the specification; and though the pressure of the inflated tube is a factor in producing the result, the existence and application of an inflated tube, more or less expansible, which had been known and used in practice before, is not of the essence of the invention. This view being taken of the invention, it follows, I think, that the appellants have infringed the patent. The metal hooks they use to catch or grip the ends of the outer tire serve the purpose of the turned-in flanges in the respondents' patent. There is, I think, substantially what has been called dovetailing action in both cases; and the respondents' design has been appropriated, whether the appellants' combination is to be regarded as, strictly speaking, a mechanical equivalent for the respondents' tire ends, and flanges enclosing them, or not. It appears, I think, that in some respects the appellants' combination is an improvement on that of the respondents', for even if a pure india-rubber inner tube is used with its greater power of expansion, the outer tire is not liable to be blown off in the use of the wheel at times when the respondents' tire would or might be. But I agree in thinking that the respondent's invention is used, though the appellants may have improved on it.

[Solicitors—Bompas, Bischoff, and Co., for the appellant; Nicholls and Son, for the respondents.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Vaughan Williams, L.JJ.) } April 1.

IN RE MAYFAIR PROPERTY COMPANY (LIMITED)—
BARTLETT V. MAYFAIR PROPERTY COMPANY (LIMITED).*

Company—Borrowing powers—Debentures—Uncalled capital—Companies Act, 1879, sec. 5.

Decision of Wright, J. (*ante*, p. 118), affirmed.

This was an appeal by the holder of a debenture issued by the above-named company, and charging its uncalled capital, from a decision of Mr. Justice Wright to the effect that the debenture created no charge on that part of the capital of the company which could only be called upon the winding up of the company (see *ante*, p. 118). The appeal raised a question of great importance upon the construction of section 5 of the Companies Act, 1879. Section 5 provides as follows:—

"An unlimited company may by the resolution passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares; provided always that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up; and in cases where no such increase of nominal capital may be resolved upon an unlimited company may by such resolution as aforesaid provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up. A limited company may by a special resolution declare that any portion of its capital which has not already been called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up, and

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up."

The facts as stated by the MASTER of the ROLLS were as follows:—The company was formed and registered as a limited company on August 16, 1892, with a nominal capital of £50,000 divided into 5,000 shares of £10 each. The memorandum of association stated that one of its objects was to borrow money and issue debentures charged on "the property and rights of the company, both present and future, including its uncalled capital." By the articles of association full power was given to the directors to issue debentures charging all the assets of the company, including its uncalled capital. Before this power was exercised—viz., on October 12, 1892—a special resolution was passed, and it was thereby declared "that such portion of the company's capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purpose of the company being wound up in accordance with the provisions of the Companies Act, 1879." In June, 1894, it was resolved by the directors to create and issue debentures for £50,000 bearing interest at 6 per cent., and 160 debentures for £100 each bearing interest at 6 per cent. were created and issued accordingly under the seal of the company. By these debentures the company bound itself to pay the principal moneys and interest secured by them, and the company as beneficial owner charged with such payments "its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being." At the time these debentures were issued £4 5s. per share had been called up. There remained to be called up £5 15s. per share, of which, however, £5 could only be called up on the winding up of the company. On August 8, 1896, an action was brought against the company by a debenture-holder suing on behalf of himself and all other debenture-holders, and on August 12 he obtained judgment in the form usual in such actions and a receiver was appointed. On the same August 12, 1896, the company was ordered to be wound up and a liquidator was appointed. By this time 15s. of the £5 15s. before referred to as uncalled up when the debentures were issued had been called up by the directors; so that on August 12, 1896, when the winding-up order was made, £5 per share had been called up by the directors and £5 more—i.e., the reserve capital—only remained to be called up for the purposes of the company being wound up. The liquidator has called on the contributors for payment of this £5 per share. The assets of the company, including the reserve capital called up by the liquidator, would not be sufficient to pay the costs of the winding up and the creditors of the company. The question, therefore, arose whether the debentures created a valid first charge on the reserve capital so as to entitle the holders of them to payment out of that fund in priority to the other creditors and to the costs of the winding up. In November, 1897, the plaintiff in the debenture-holders action applied by summons that this question might be determined, and Mr. Justice Wright determined it against the plaintiff, holding that the company had no power to create any charge on that portion of its capital which by the Companies Act, 1879, could only be called up "in the event of and for the purposes of the company being wound up." The plaintiff appealed. The appeal was heard on March 24.

Mr. Swinfen Eady, Q.C., and Mr. R. F. Norton were for the appellant; Mr. Farwell, Q.C., and Mr. George Henderson were for the respondent, the official receiver and liquidator.

The COURT dismissed the appeal.

The MASTER of the ROLLS, after stating the facts and referring to sections 4, 5, 6, and 10 of the Companies Act, 1879, continued,—The contention on the part of the appellant is that a limited company can validly charge its uncalled capital if authorized so to do by its memorandum of association or by its articles; and that the capital or money which under the Act of 1879 can only be called up in the event of and for the purposes of the company being wound up is part of the capital of the company in the full and proper sense of that word; and that there being no prohibition against creating charges upon it the power to create such charges necessarily follows. This argument is based on "*In re Pyle Works*" (44 Ch. D., 534), which finally settled that uncalled capital of a limited company governed by the Companies Act, 1862, could be validly charged in favour of particular persons. It is further contended that the payment of the secured debts of a company is as much a purpose of the company as the payment of its other debts; that there is no necessary implication requiring the Court to hold reserve capital to be incapable of being charged with the payment of particular debts; and that it may be ruinous to a company to prevent it from obtaining relief from perhaps temporary pressure by raising money on the security of its most valuable asset. Cogent as this argument is, I am convinced that it is unsound, and that to yield to it would defeat and not carry out the purpose with which the Act of 1879 was passed. When the "*In re Pyle Works*" case was decided I foresaw that the decision might be pressed further than I was prepared to go, and I pointed out that, in my opinion, it did not authorize mortgages of reserve capital formed under the Act of 1879. I adhere to that view now that I have carefully re-considered it. In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case (2 Co. 18), to consider how the law stood when the statute to be construed was passed; what the mischief was for which the old law did not provide; and the remedy provided by the statute to cure that mischief. The Companies Act, 1879, was passed in order to remedy some defects in the law relating to unlimited companies, and which defects, although long known to lawyers, startled the public when the City of Glasgow Bank stopped payment in 1878. The members of unlimited companies were in this position. First, they were liable to calls on their shares to their nominal amounts. This was the only liability which could be enforced by the company or by its directors whilst the company was carrying on business. This liability, but no liability beyond, was an asset of the company with which the company could deal. But, secondly, in addition to this limited liability the members were under an unlimited liability to the creditors of the company; and this unlimited liability could be enforced by creditors, although it was not an asset of the company which the company or its directors could charge alien or dispose of in any way whatever to the prejudice of any creditor. What was wanted was power to form a company with a reserve capital which should be limited in amount, which should be available for creditors in the event of a winding-up, and which should not be under the control of the directors any more than the funds were which the creditors could obtain, but the directors could not, under the old law. This amendment in the law was made by the Act of 1879. It appears to me plain that Section 5 was framed with a double object—viz., first, to preserve for the general creditors of the company the funds which the members were liable to pay, but which the directors could not call up, and, secondly, to enable the members to limit the amount of their

liability on a winding-up to pay the creditors more than the amount preserved for them. Now if the appellant's contention is right the first of these objects will be entirely defeated, although there is not a sign of any intention on the part of the Legislature to effect so great a change in the law, and although such a change would or might be ruinous to the great body of a company's creditors and be destructive of the credit which the preservation intact of reserve capital gives to those companies which avail themselves of the Act of 1879. To effect such a change in the law applicable to unlimited companies which avail themselves of the Act of 1879 some provision is wanted to confer on companies carrying on business power to deal with what the members are only liable to pay when the winding-up takes place. Such a power would be a complete novelty, and cannot be inferred from the absence of any words prohibiting it. I have dwelt on the effect of the Act of 1879 on unlimited companies, which take the benefit of it because the effect on them and the effect on limited companies are to be gathered from the use of exactly similar language. It was obviously desirable to enable companies originally formed and registered as limited companies to have reserve capitals and not to confine that advantage to unlimited companies registering themselves as limited companies. The object of the last part of the section is exactly the same as the object of the first part. Both classes of companies are put on the same footing so far as reserve capital is concerned. The prohibition against calling up the reserve capital in the case of limited companies is inserted for precisely the same purpose as in the case of unlimited companies—viz., to preserve such capital for the general purposes of the company when wound up. To interpret the section so as to enable a company to defeat this object by pledging or otherwise disposing of its reserve capital is, in my opinion, entirely to miss the real meaning of the Legislature as expressed in the language it has used. Neither the Act of 1879 nor the other Companies Acts give a company power to dispose of assets which cannot come into existence until it is wound up. To hand over the reserve capital or any part of it when called up to a prior assignee, or to a mortgagee who has no claim against the assets until he has realized or given up his security, is not to apply the reserve capital for the purposes of the company being wound up within the true meaning of that expression as used in Section 5, but to prevent such application. This was the view of Mr. Justice Wright, and it is mine also. With respect to the case of "Newton v. Debenture-holders, &c., of Anglo-Australian Investment Company" ([1895] A.C., 244), on which counsel for the appellant so much relied, I need only observe that it was not a decision on the Act of 1879, but a decision on an article of association, so worded as not to preserve, nor indeed to show any intention to preserve, the reserve capital for the benefit of the general creditors in the event of liquidation. I cannot regard that case as an authority against the view which I take of the Act of 1879. The appeal must be dismissed with costs.

LORD JUSTICE RIGBY concurred.

LORD JUSTICE VAUGHAN WILLIAMS gave judgment to the like effect.

[Solicitors—Mudds and Longden; Mackrell, Maton, Godlee, and Quincey.]

Q.B. Div. (Lord Russell of Kil-) 1898.
lowen, C.J., and Ridley, J.) April 1.

CLYDE CYCLE COMPANY V. HARGREAVES.

Infant—Contract—Necessaries—Racing bicycle.

This was an appeal by the defendant against a

decision of the County Court Judge of Leicester, and raised the question whether a racing bicycle could in certain circumstances be a necessary for an infant. The defendant, who was a young man of 19, apprenticed to a scientific instrument maker in Leicester, and earning 21s. a week, had bought a racing bicycle of the plaintiffs at the price of £12 10s. The defendant paid £2 on the occasion of the purchase, kept the bicycle for some months, during which he used it, and subsequently returned it to the plaintiffs, who agreed to allow him £8 for it. The present action was brought to recover the balance of £2 10s. The defendant pleaded infancy. It appeared that the defendant had used the bicycle for racing and had won several prizes, and he admitted that he had occasionally used it on the road. It appeared also that a roadster bicycle of similar quality with the usual accessories would have been slightly higher in price. The learned County Court Judge found that the bicycle was an article of utility suitable for the station in life and circumstances of the defendant and gave judgment for the plaintiffs.

Mr. FRANKER appeared for the defendant in support of the appeal, and argued that a racing bicycle was a mere luxury and, having regard to the circumstances of the defendant, could not be regarded as a "necessary." He referred to "Peters v. Fleming" (6 M. and W., 42), "Harrison v. Fane" (1 M. and G., 550.)

Mr. C. B. Marriott, who appeared for the plaintiffs, was not called upon to argue.

The COURT dismissed the appeal.

The LORD CHIEF JUSTICE said cases might easily be put in which, having regard to the character of the thing sold, there could be no doubt that it was not a necessary—for example, if a lad working in a factory were to order diamond studs worth £10 or £20, or if the defendant in this case had bought a horse. But, taking the facts in the present case, and remembering that the use of bicycles by persons in the defendant's position was common in his neighbourhood, could it be said that a Judge trying the case with a jury would have been bound to stop the case and decide as a question of law that the bicycle could not be a necessary? That was what the defendant must make out in order to succeed, for the learned County Court Judge was acting as both Judge and jury, and if the case was a proper one to have been left to a jury the decision of the learned Judge could not be reviewed. His Lordship thought that the case was one in which it was impossible to say that the County Court Judge was not justified in holding that the bicycle was a necessary. And he thought he himself would probably have come to the same conclusion if he had had to try the case.

MR. JUSTICE RIDLEY concurred.

[Solicitors—Crowders and Visard, for Owston, Dickinson, and Simpson, Leicester, for the plaintiffs, Clarkson and Son, for Herbert Simpson, Leicester, for the defendant.]

Chan. Div. }
(Wright, J.) }

1898.
April 2.

IN RE BEESTON PNEUMATIC TYRE COMPANY (LIMITED).
Company—Winding up—Assets—Distribution—
Transfer to new company—Agreement as to
distribution differing from articles of associa-
tion.

This was an application by the liquidator of the company for the direction of the Court as to the distribution of certain shares and debentures (of the Amalg-

mated Pneumatic Tyre Companies, Limited) registered in the name of the Beeston Company amongst the members of the Beeston Company in accordance with an agreement dated June 1, 1897, between the Beeston Company and the Birmingham Traders (Limited). The Beeston Company was registered in March, 1895, its objects being (*inter alia*) to acquire the undertaking of another company and also to sell its own undertaking for a consideration consisting of the shares and stock of any other company. The capital was originally £30,000 in £1 shares, of which 20,000 were preference shares as regarded both capital and income, and the rest were ordinary shares, there being power to increase the capital by the addition of shares having preferential rights. By article 72 provision was made for binding the holders of any class of shares, by extraordinary resolution at a meeting of such holders, to an abandonment of any priorities or preferential rights. Article 134 was as follows:—

"If, upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members, in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. If the surplus assets shall be insufficient to repay the whole of the paid-up capital such surplus assets shall be distributed, so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding up, other than amounts paid in advance of calls. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

Under clause 135 the liquidator on any winding up might with the sanction of an extraordinary resolution divide the assets among the creditors in specie. Clause 136 was as follows:—

"Any such liquidator may (irrespective of the powers conferred upon him by the Companies Acts and as an additional power) with the consent of a special resolution sell the undertaking of the company, or the whole or any part of its assets, for shares fully or partly paid up or the obligations of or other interests in any other company, and may by the contract of sale agree for the allotment to the members direct of the proceeds of sale in proportion to their prospective interests in the company; and in case the shares of this company shall be of different classes may arrange for the allotment in respect of preference shares of this company, of obligations of the purchasing company, or of shares of the purchasing company with any preference or priority over or with a larger amount paid up than the shares allotted in respect of ordinary shares of this company, and may further by the contract limit a time at the expiration of which shares, obligations, or other interest, not accepted or required to be sold, shall be deemed to have been refused, and be at the disposal of the liquidator or the purchasing company."

The capital of the Beeston Company was increased to £150,000 in £1 shares, of which 40,000 were preference and 110,000 were ordinary shares. By an agreement of June 1, 1897, after a recital of this increase of capital, the Beeston Company agreed to sell its undertaking and assets (with certain exceptions) to the Birmingham Company, and as the consideration for the sale there was to be paid to the Beeston Company a sum at the rate of £4 per ordinary share in the Beeston Company and a sum at the rate of 2s. for each preference share therein, such sums to be satisfied in the shares and proportions therein pointed out by the issue of debentures and shares in an

intended company afterwards registered as the Amalgamated Pneumatic Tyre Companies (Limited). There was excepted out of the property sold a sufficient amount to pay a dividend of 20 per cent. on the ordinary shares in the Beeston Company and 6 per cent. on the preference shares due up to June 24, 1897. The agreement did not, as construed by his Lordship, point out how the preference shareholders and ordinary shareholders were to divide the consideration, but the mode of distribution was explained in a circular sent with notices of a meeting held on July 22, 1897. On that day an extraordinary general meeting of the Beeston Company approved the agreement and authorized the directors to carry the same into effect with any necessary modifications. By an agreement of August 5, 1897, the excepted dividend of 20 per cent. was reduced to 10 per cent. on the ground that the larger figure had been erroneously inserted. The benefit of the two agreements was sold by the Birmingham Company to the Amalgamated Company about September, 1897, and the consideration payable to the Beeston Company was to be a large sum of debenture stock and a number of ordinary shares in the Amalgamated Company. In the meantime (August and September, 1897) special resolutions had been passed for the voluntary winding up of the Beeston Company, and in this liquidation the question as to how the assets should be distributed was raised, having regard to the fact that under the terms of the agreement the preference shareholders were to have a different interest than that given them by the articles.

Mr. Swinfen Eady, Q.C., and Mr. Stewart Smith were for the liquidator; Mr. F. Whinney for the preference shareholders; and Mr. Kirby for the ordinary shareholders.

MR. JUSTICE WRIGHT, in delivering judgment, said the case was nearly, if not quite, without precedent. After referring to the clauses of the memorandum and articles above mentioned and the terms of the agreement of June, 1897, his Lordship said that agreement had been adopted at a general meeting, and as an agreement between the two companies it was not impeached, nor was the Court asked to give effect to it. But the consideration having been paid over to the liquidator, the Court had to say how that consideration was to be distributed. There was in effect an unwritten agreement by the shareholders by their adopting the written agreement. Every shareholder who had notice of the meeting knew what was going to be done, and, notwithstanding that notice, the agreement had been adopted. It must, therefore, be inferred that the agreement was that the shares should be distributed in the manner pointed out by the circular issued when the meeting was convened. The liquidator now asked whether he could give effect to the resolution. It seemed to his Lordship that "*Somes v. Currie*" (1 K. and J., 605) enabled him to do what was suggested by the ordinary shareholders as right. In that case a distribution had been made in a manner not authorized by the company's charter, Vice-Chancellor Wood drawing the inference that an agreement had been come to for a different mode of distribution. That case had been often cited, but never disapproved. It was referred to in "*Sheppard v. Scinde, Punjab, and Delhi Railway Company*" (36 W. R., 1), when it was pointed out that "*Somes v. Currie*" depended on special circumstances. In "*Somes v. Currie*" the principal fact from which the inference of an agreement was drawn was the mode of distribution of dividends which had been adopted for some years. The present was a stronger case, because an actual agreement was approved by resolution at a meeting of which notice had been duly given. His Lordship thought he was warranted in following "*Somes v. Currie*" and giving effect to the agreement, but in so doing he

did not intend to lay down any general rule. "Griffith v. Paget" (L.R., 5 Ch. D., 894) was said to be an authority against the ordinary shareholders' contention, but in that case Sir George Jessel seemed to have thought such an arrangement possible, for at p. 900 he said:—"There is another alternative presented to me by the counsel of the defendants. They say they are giving a bonus to the preference shareholders, and that every one of the deferred shareholders consents to that. There would then be no objection to their passing a resolution to that effect." [Solicitors—Markby, Stewart, and Co.; Morley, Shireff, and Co.]

Q.B. Div. (Lord Russell of Killowen, C.J., Hawkins, Wills, Kennedy, and Ridley, JJ.)

1898.
April 2.

THE QUEEN V. JOHN HUMPHREY.*

Gaming—Betting Houses Act, 1853—"Place" used for betting—Archway.

This was a case stated for the consideration of the Court for Crown cases reserved by the Recorder of Leeds raising a question as to what is a "place" within the meaning of the Betting Houses Act, 1853. John Humphrey was tried at the quarter sessions for Leeds on January 6, 1898, upon an indictment charging him (under 16 and 17 Vic., c. 119) with having on October 20 and November 3, 4, 5, 9, and 24, 1897, opened, kept, and used a certain place, to wit an archway in Princess-street, in the city, for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to horse-races.

Mr. Joseph Walton, Q.C., and Mr. George T. Banks appeared for the appellant; Mr. Asquith, Q.C., and Mr. C. Felix Palmer appeared for the Crown.

The facts were that on the days in question Humphrey had been present in the archway, between 12.30 and 2 p.m., and had on each occasion there made bets upon horse-races, receiving money, giving tickets, and making entries in a book with several persons resorting thereto and varying in number from 13 to 40. When the bets were made Humphrey was standing sometimes on the high side and sometimes on the low side, and he had on the first of such occasions also made several bets in Princess-street, outside the archway. The archway was a private thoroughfare, the property of certain millowners and was the only means of access from Princess-street into a yard at the back of the mills, containing four dwelling-houses, three stables, and five workshops, which were also their property. Humphrey had no right in the archway, nor had any one except for the purpose of passing through the same into the yard and the houses, &c., therein. The archway was 29ft. 9in. long by 10ft. 11in. wide and 12ft. high. At the conclusion of the case for the prosecution counsel for the defence submitted that there was no evidence upon which it could properly be found that Humphrey had used for the purpose of betting any place akin or equivalent to a "house, office, or room," that there was therefore no evidence of any offence within the statute. The Recorder, however, directed the jury that the archway was a place within the statute and that if they believed that Humphrey had on the days specified in the indictment used it for the purpose of betting they ought to find him guilty. The jury convicted and the Recorder fined him £20.

Mr. JOSEPH WALTON said the question was, Was this a place? He admitted that the Recorder's direction was unimpeachable, unless it came within the principle of

"Powell v. Kempton Park Race Course Company" ([1897] 2 Q.B., 242). He submitted that under that case the conviction was wrong.

The COURT affirmed the conviction.

The LORD CHIEF JUSTICE said that in effect the Court were asked to say whether the verdict was supported by adequate evidence. The argument for the appellant mainly rested on the decision of the case of "Powell v. Kempton Park Race Course Company" ([1897] 2 Q.B., 242). Without expressing any opinion whether that was an authority which the present Court would be bound to follow, it was clear that the opinions of the learned Judges of Appeal therein must be treated with deference and respect. The question then arose, Was that case one which should oblige this Court to say that no offence against the statute had been committed? It would be matter for the greatest regret if that were taken to be the effect of the Kempton Park case. In the opinion of the learned Judge it had no such operation at all. It was necessary to state the facts of that case in order to explain this view. In that case betting took place on a racecourse, to which multitudes resorted for purposes of sport. On that racecourse was an enclosure of large area which afforded opportunities of seeing the races, and in which there were constructions affording shelter from weather. Any one who chose to pay the admission price was allowed to enter. The numbers varied. Some went there as bookmakers, others to "back their fancy," others merely to see the races. There was no appropriation of any distinct part of that large enclosure for the purpose of betting therein. The mere statement of those facts marked the difference between that case and the present. In this case there was a gateway open to the street at one end and a courtyard at the other. Its dimensions were about 29ft. by 10ft. The defendant habitually resorted to it, and "held the bank against all comers," for the purpose of betting of the worst class. It was betting away from the racecourse, and had no reference to sport. In that gateway he lay in wait—in wait for the express purpose of carrying on the business of betting with those who would bet with him. It had been admitted that this might be properly described as a place within the Act. It was obvious that it was so, and was capable structurally of being regarded as a place. Was it then used as a betting place? The answer to that was that the defendant habitually attended there alone as a bettor against all comers. There was therefore in existence everything to create the offence charged—both the place and the purpose. The conviction was therefore properly arrived at. He desired to add that it was not to the public advantage that there should be the ambiguity which existed as to the law on this matter. It was impossible to reconcile all the varying authorities. The cases that from time to time were brought up showed that there was urgent need for legislation on the subject, and that speedily all ambiguity should be removed.

MR. JUSTICE HAWKINS concurred in everything that the Lord Chief Justice had said in respect of the case before the Court. It was in accordance with the decision in "Hawke v. Dunn" ([1897] 1 Q.B., 379) and "Reg. v. Freedy" at the Old Bailey. As to "Powell v. Kempton Park," the circumstances of that case were very peculiar, and, while treating the decision with all respect, no word of his must be taken as expressing approval of it. He agreed that legislation ought to take place, and was of opinion that some mode of arriving at a knowledge of the necessary facts ought to precede legislation. The present ambiguity was unfortunate and unseemly.

MR. JUSTICE WILLS said the general principle laid down in the Kempton Park case was that one test for decision of cases of this kind was the combination of cir-

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

circumstances relating to the characteristics of the spot, and the other test was the user of the spot. That as a general proposition could not be denied. Both elements of the offence were present in this case. The archway had every physical characteristic which was required to make it fall within the Act. The user was identical with that which it would have been if the place had been boxed in and placarded up like any office. How could it, then, be said that there was no evidence for a conviction? Speaking of the Kempton Park case, of course, that case being a decision of the Court of Appeal, it was entitled to the highest respect, and he was not prepared to say that this Court might not be bound by it; but he much regretted the circumstances of the manner under which it came before the Courts. It was an action brought for a purpose. Both parties to it were desirous to get rid of "*Hawke v. Dunn*." Both parties agreed to a statement that the particular kind of betting carried on on the spot had existed since the beginning of the century. That statement made it difficult to see how such betting could come within the Act. (The Act passed in 1853 recited "Whereas a kind of gaming has of late sprung up.") It could not, it was true, be said that the judgment was based on that statement, but it was a material fact, possibly true, but collusively stated. It was very unfortunate that such a case should have come before the Court of Appeal to be the leading case. The counsel who argued it had done so with much zeal and ability, but they were bound by the admissions of their clients. In the view of the learned Judge there was urgent need for legislation. It was scarcely short of a scandal to have the leading authority on the subject obtained under the circumstances pointed out.

MR. JUSTICE KENNEDY concurred. He thought the present decision in no way conflicted with the Kempton Park case. It was therefore unnecessary to say anything more about it. He referred to the case of "*Liddell v. Lofthouse*" ([1896] 1 Q.B., 291), approved of by Lord Justice A. L. Smith in the Kempton Park case, as being undistinguishable from the present. He agreed in the importance of legislation on the subject, because questions on these points were continually being raised before the inferior Courts all over the kingdom.

MR. JUSTICE RIDLEY concurred with the judgment of the Lord Chief Justice, and had nothing to add.

[Solicitors—H. A. Child, Leeds, for defendant; W. Ward, Leeds, for the Crown.]

Court of Appeal (Lindley, M.R.,) 1898.
Rigby and Vaughan Williams, L.J.J.) April 4.

THE PNEUMATIC TYRE COMPANY (LIMITED) AND THE DUNLOP PNEUMATIC TYRE COMPANY (LIMITED) v. THE TUBELESS PNEUMATIC TYRE AND CAPON HEATON (LIMITED).*

Patent—Infringement—Bicycle tires—Action to restrain infringement dismissed.

Decision of Romer, J., affirmed (Rigby, L.J., dissenting).

This was an appeal by the plaintiffs from a decision of Mr. Justice Romer's dated December 8 last and reported in *The Times* of the following day. The action was brought to restrain the infringement by the defendants of the plaintiffs' patents for cycle tires, No. 16,783 of 1890, granted to W. B. Bartlett, and No. 19,990 of 1890, granted to W. Golding. It appeared that the action also sought relief for the

infringement of the plaintiffs' patent No. 10,607 of 1888, granted to J. B. Dunlop; but the plaintiffs stated at the hearing that, although they did not abandon their rights as to the question of the infringement of that patent, they did not intend to raise it in the present action, and they also subsequently confined the question to that of Bartlett's patent, Golding's invention being somewhat similar to Bartlett's. The defendants were the owners of what is known as the Fleuss tire. They submitted that the essential part of Bartlett's invention consisted of an inner, separate, and detached inflatable rubber tube (as was shown by the judgment of the Court of Appeal, which was delivered by Lord Justice A. L. Smith, in "*North British Rubber Company v. Gormully and Jeffery Manufacturing Company*" (13 *The Times* Law Reports, 217; 14 R.P.C., 283), where the validity of Bartlett's patent was upheld by the Court of Appeal), whereas the Fleuss tire contained within it a circular band of rubber forming a flap in lieu of a tube, and they contended that the flap was not an infringement of the tube, although the operation of both articles for the purpose intended depended on the locking together of the two parts of the tire by the pressure of the air. Mr. Justice Romer, agreeing with the judgment of the Court of Appeal in "*North British Rubber Company v. Gormully and Jeffery Manufacturing Company*," considered that the substance and essence of Bartlett's patent was the use of a separate air-tight inflatable tube. That being so, his Lordship thought that it left it open to any one, if he could, to invent a means by which he could dispense with the inner tube and leave the outer cover only to be pressed against the rim by means of air. If he could solve that problem he would not be within Bartlett's patent, but would be entitled to say that he had made an independent invention. This, in his Lordship's opinion, had been successfully done by Fleuss, who had dispensed with the inner tube, and, in truth, with any tube at all, by means of an ingenious arrangement which made the outer cover, which was not a tube, hold on to the rim by pressure of the air within it. The action accordingly failed and was dismissed with costs.

Mr. Moulton, Q.C., Mr. Roger Wallace, Q.C., Mr. J. C. Graham, and Mr. A. J. Walter were for the appellants; Mr. T. Terrell, Q.C., Mr. Astbury, Q.C., Mr. C. E. H. Jenkins, Q.C., and Mr. W. P. Rylands were for the respondents.

At the conclusion of the arguments on the 3rd ult. their Lordships reserved judgment, which was delivered (Lord Justice Rigby dissenting) affirming the decision of Mr. Justice Romer and dismissing the appeal.

The MASTER of the ROLLS read the following judgment.—This is an action brought for the infringement of a patent granted to Bartlett in 1890. The validity of the plaintiffs' patent is not in dispute. The only question is whether the defendants have infringed it. Mr. Justice Romer has held that they have not, and from this decision the plaintiffs have appealed. In this, as in all disputes about patents, the first thing to do is to turn to the specification and ascertain what the patentee's protected invention really is. For this purpose the whole specification must be carefully studied; and in order to understand it, some knowledge of the subject-matter to which it relates is always essential. Bartlett's specification is for "improvements in tires or rims for cycles and other vehicles." At the date of the patent several sorts of tires were known and their practical defects were known. It was known that the best form of tire was the pneumatic tire, which consisted of an inflated tube of indiarubber; but the known modes of fastening this on to the circumference of a wheel did not admit of easy repair if the tube was cut or punctured so as to let out the air. Another form of tire, but one in some respects not so good as the

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.
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pneumatic, was the cushion tire, which consisted of a thick continuous flat belt of indiarubber doubled up in the middle and having its sides passed into the grooved circumference of the wheel so as to make a cushion or arch with more or less air in the space between the parts pressed into the groove. Another form of tire was the solid tire, which consisted of a solid continuous belt of india rubber fastened into the grooved circumference of the wheel. This was the earliest of all, but it jolted much more than the others, and was nothing like so fast. Bartlett's invention, as I understand it, was a combination of the first two of these sorts of tires with certain improvements which resulted in a tire superior to either of them and superior to any other tire then known. [His Lordship read the specification, and continued.] It appears to me perfectly plain that the invention here described and claimed consists of the combination of an easily-detachable arched tire or cover put over a separate and distinct and easily-detachable inner tube, both of which are kept in their place by the pressure of air in that tube against the sides of the metal circumference of the wheel, which is itself so shaped as to hold the outer tire or cover firmly in its place. The combination is of three things—viz., (1) the loose arched tire or cover; (2) the loose inner tube; (3) the shape of the groove to hold both. But to this combination must be added the great merit of Bartlett's invention, which was to show that the pressure of air in the inner tube could be so utilized as to keep all the loose parts of the tire in their place without any other fastening whatever. This is his strong point in this litigation, and I fully appreciate it. But, giving him every credit for this discovery, I cannot read his patented invention as not depending on the use of the loose inner tube. The use which he makes of it is, in my opinion, the most essential part of his invention as described and claimed. This was the view taken by this Court when it had to consider the construction of Bartlett's patent in "The North British Rubber Co. v. Gormully" (14, Pat. Ca., 283), and it is the view which I take of the patent now that our attention has been more pointedly called than it was in that case to the detachable inner tube. If this be the true construction of Bartlett's specification it is clear that the defendants have not infringed the plaintiff's patent. The defendants have very likely been led by Bartlett's specification to try and avail themselves of air pressure to keep on an inner rubber tire of a different construction; and they have succeeded in producing a tire which will keep on by air pressure without any inner loose air tube at all. They have one tire with a thin indiarubber lining; not two tires—viz., a loose arched tire or cover over a loose inner air tube. It is very true that when the defendants' tire is on it forms a tube which is kept on the wheel by air pressure, but unless the plaintiffs' patent can be construed as a patent for keeping indiarubber tires on wheels by air pressure, it is impossible to say that the defendants have infringed the plaintiffs' patent. I will not repeat my reasons for rejecting this construction. It is not in my judgment warranted by the language of either of Bartlett's claims. Mr. Wallace referred to what Baron Alderson said in "Jupe v. Pratt" (1 Webs. P.C., 146)—viz., that if a patentee discovers some new principle and describes some mode of carrying it into effect he is entitled to protect himself from all other modes of carrying the same principle into effect. But in the first place it is necessary to ascertain what the patentee has claimed as his invention, and, in the next place, if he has claimed the principle and all modes of applying it his claim will be undistinguishable from a claim to the principle itself, and will be too large, as pointed out by Baron Alderson himself in "Neilson v. Harford" (1 Webs. P.C. 342 and 355). This subject will be found

discussed and put on its proper footing in "Automatic Weighing Machine v. Knight" (6, Pat. Off. Reps. 297, see pp. 304, 308). Colourable imitations—i.e., imitations with trivial or immaterial additions or subtractions or substitutions of one thing for another known to answer the same purpose, are infringements, and are more frequently met with—and are more vigilantly looked for when a patentee has invented some new principle than when his invention involves no such merit. But whether a patentee has discovered a new principle or whether he has not, his monopoly is confined to what he has really invented and to what he has claimed as his invention. Bartlett was no doubt well advised to limit his claim to what he had really invented and not to risk his patent for his great improvement by enlarging the scope of his claim so as to cover all methods of keeping on tires by air pressure. In my opinion Mr. Justice Koser's judgment is perfectly correct, and the appeal must be dismissed with costs. His Lordship added that he had written the foregoing judgment before he had read the opinions of the House of Lords in "North British Rubber Company v. Gormully and Jeffery Manufacturing Company" (ante, p. 335); but what he had written was, he thought, consistent with those opinions.

LORD JUSTICE RIGBY read the following judgment, differing from the conclusions arrived at by the Master of the Rolls:—This case seems to me to raise again the very same point of construction of Bartlett's specification that was determined by the Court of Appeal in the Gormully case ("North British Rubber Company v. Gormully and Jeffery Manufacturing Company"), though it has now to be applied to a different part of the description contained in the specification. In that case it was urged upon the Court that the inflated tube used as the air-tight tubular chamber by the defendants did not fall within the claim made by Bartlett, because it was not made of cloth and indiarubber, but of indiarubber only, which was indefinitely expansible. This was not a matter of small importance, for there could be no doubt that Bartlett introduced the word "cloth" with the distinct object of confining within narrow limits the expansibility of this tube, and it was shown that, if an indefinitely expansible tube were substituted for a cloth and rubber tube in tires formed according to the drawings to Bartlett's specification, the effect of inflating the tube beyond a very moderate extent would be to blow off the cover instead of holding it on. This was a very formidable contention. Another contention was that Bartlett purposely confined himself to the details of his specification in order to avoid the risk of making his claim too wide. The argument was renewed here without any additional evidence to support it. Both contentions were dealt with in manner shown by the following passage in the judgment of the Court of Appeal pronounced by Lord Justice A. L. Smith:—"It was strongly urged before us that the words 'substantially as described' tied the patentee down to the dovetailed groove, the horseshoe arched cover, and the composite rubber and cloth tube mentioned in the specification. These details are mere examples showing how the invention can be applied in practice. Again, it was urged that the invention was useless for a highly elastic inflated tube, and that instead of showing how to use such a tube the directions in the specification exclude its use and are misleading if applied to it. But this again is only true if the patent is construed so narrowly as to miss the true invention and to confine the patentee to the particular mode of applying it which he has described. It was also urged that unless the specification and claim were thus construed the patent would be void for want of novelty. But the evidence does not bear this out, for no one had realized the importance of making a tire of

a loose cover kept in its place by the pressure of an inflated tube beneath it. Bartlett realized this and showed how to do it." In the present case there is no question as to an indefinitely expansible tube, for by fastening that which is in working to form an inner tube (or air-tight tubular chamber, to use an expression in Bartlett's specification) to the cover the indefinite expansibility is controlled. The question here is whether the fact of the substitution of a fixed lining to the cover in place of a separate tube departs so much from Bartlett's specification as to render the defendants free from the charge of infringement. Once more the question arises how "substantially as described" is to be construed in this particular specification, and having regard to the nature of the invention disclosed. To me it seems that the whole of the reasoning contained in the passage above quoted applies with at least equal force to the case of an undetached tube, and there are additional reasons which lead me to hold that the present is a stronger case for the plaintiffs than the Gormully case. I will first clear away the question of the difference between the horseshoe shape of the plaintiffs' cover and the ultimately circular shape of that of the defendants by pointing out that in the Gormully case the flaps which turned the horseshoe cover into one which became in action a tube, when once it was shown that they had no real effect in holding the cover on, were held to be unimportant. Then I say that, assuming a separate tube to be sufficiently indicated in Bartlett's specification, which is by no means free from doubt, yet when the tube has once been inflated it is not only similar to, but identical with, that of the undetached tube in the defendants'. Each then forms an air-tight tubular chamber transmitting the pressure of the air so as to clamp the cover against the in-turned rims and by the air pressure hold it in its place. The detached tube in Bartlett's specification, still assuming that to be shown, cannot move any more than the tube formed by the lining in the other. It is not a case of a mechanical equivalent, but of the same effect produced in exactly the same way. Unless, therefore, it can be stated with truth that Bartlett was absolutely and in all cases tied down by his specification to a detached tube, I see no possible way in which consistently with the reasoning in the Gormully case it can be held that there is no infringement. If, as it was there held, the patentee was not tied down to a composite tube of cloth and indiarubber, I am unable to see how he can be tied down to a separate and detached tube. I am aware that the judgment of the Court of Appeal refers in many passages to a separate detached tube in a manner which at first sight might appear to conflict with the conclusion at which I have arrived. But all those passages seem to me to bear a meaning quite different from that attributed to them by the defendants here. Bartlett's specification pointed, I still assume, to a detached tube. But the alleged infringement also contained a detached tube. As to the separateness of the tube, no difference arose, or could arise; the Court had nothing to decide with regard to the separateness of the tube, and the words seem to me to have been used as descriptive only and for the purpose of identifying clearly the thing spoken of. The separateness of the tube is only one part of its description inferred from the advantage attributed to it; the material of which it is to be made is another part expressly mentioned in the specification. I cannot understand how one part of a description can be treated as not being of the substance whilst the other is. There is no part of the judgment which says that the separateness is essential. Suppose that an alleged infringer had produced a tire corresponding exactly in every detail with the description given by Bartlett in the letterpress and drawings of his specification, and

then by a proper solution joined the cover and tube together. Could he be said not to have taken substantially what was covered by the patent? It seems to me that he could not, and on this point I agree with Mr. Justice Romer. It is true that he would have been throwing away part of the collateral advantage indicated by the patentee—viz., the easier separability of the tire. A man, however, may infringe if he takes a substantial part of an invention, though he does not take the whole. Here the defendants may have shown invention and might be entitled to a patent as for an improvement upon Bartlett, but on the construction already given to the specification I think that they have taken in substance a material part of the invention, and that makes them infringers. Since the writing of the above judgment the decision of the Court of Appeal in the Gormully case has been affirmed on appeal in the House of Lords on grounds which appear to me applicable to the present case. (See *ante*, p. 335.) The construction there placed on the specification, in my judgment, shows that the scope of the patent is not by reason of the words of reference "substantially as described" contained in the claim to be limited to the very words of the descriptive letterpress exclusive of the description of the drawings, so as to be incapable of comprising anything not answering in every respect to those words. That being so, we find as shown by the description of the drawings, (a) an outer tire of indiarubber or other elastic material, (b) a metal tire or rim, (c) an air-tight tubular chamber, and (d) the filling tube. In this part of the description there is nothing from which the separateness of the internal tube can be inferred. Every one of these elements (a) to (d) is found in the alleged infringement when the inner tube is inflated. Regard being had to the construction put upon the words of reference "substantially as described," the defendants have, in my judgment, taken the very combination described in the first claim, and so infringed the patent. In my opinion the appeal ought to succeed.

LORD JUSTICE VAUGHAN WILLIAMS read a judgment in which he concurred with the decision of the Master of the Rolls.

[Solicitors—J. B. and F. Purchase; Field, Roscoe, and Co., agents for Smith, Pinseat, and Co., Birmingham.]

Court of Appeal (A. L. Smith } 1898.
and Collins, L.J.) } April 4.

IN RE CHELSEA COUNTY COUNCIL ELECTION PETITION—WILLES AND OTHERS V. HORNIMAN AND ANOTHER.*

Election Law—County Council—Petition—Allegations of treating—Particulars—Form of order.

This was an appeal by the respondents to the election petition from an order by Mr. Justice Grantham at Chambers. The petition alleged that before and during the County Council election for Chelsea, which was held on March 8, 1898, the respondents, Mr. Ensle J. Horniman and Mr. James Jeffery, who were declared duly elected, were by themselves and their agents guilty of the corrupt practice of treating, and also alleged general treating at common law, and the petition prayed that the respondents were not duly elected. The respondents took out a summons for particulars of the charges of treating, and Mr. Justice Grantham at Chambers made an order that the petitioners should, on or before April 6, deliver to the respondents the names of all persons, "if known," alleged in the petition to have been treated, and by whom, and the place or places

*Reported by W. F. BARRY, Esq. Barrister-at-Law.

where each act of treating was alleged to have been committed, and that the petitioners should be precluded at the trial from going into any case in respect of which the aforesaid particulars had not been duly delivered "unless for good cause shown."

Mr. ASQUITH, Q.C., and Mr. ROSKILL, for the respondents, contended that the words "if known" in the order were contrary to the practice. Under section 1 of the Corrupt and Illegal Practices Prevention Act, 1883, the petitioners must show that the person treated was a person to whom the section was applicable. The respondents were entitled to know the names of the persons who were alleged to have been treated. It was stated that only one occasion of treating would be relied upon. In "*Maude v. Lowley*" (L.R., 9 C.P., 165) the words "so far as known" were added by the Court by consent, but since "*Lenham v. Barber*" (10 Q.B.D., 293) those words had been omitted. It was desirable to have uniformity of practice. Again, the words "unless for good cause shown" ought not to be inserted.

Mr. JELF, Q.C., and Mr. S. H. DAY, for the petitioners, contended that there was no substance in the appeal. It was stated before the Judge at Chambers that the petitioners would rely in support of their case upon the giving of an entertainment at which the two respondents and various voters were present. It would be most difficult to specify the names of all the voters treated on that occasion. He did not admit that the practice since "*Lenham v. Barber*" had been to omit the words "if known" or "so far as known." The present was a very special case.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was an application to strike out certain words from an order for particulars, but in his opinion, if those words were not there, they would probably in this case be read in. He found that in "*Maude v. Lowley*" the words were inserted by the Court, though in "*Lenham v. Barber*" they were omitted. There was nothing in the appeal.

LORD JUSTICE COLLINS concurred.

Court of Appeal (Lindley, M.R., } 1895.
Rigby and Vaughan Williams, L.J.J.) } April 5.
IN RE THE SALE HOTEL AND BOTANICAL GARDENS
COMPANY (LIMITED). *

Company—Winding up—Promotion money—
Companies (Winding-up) Act, 1890, sec. 10.

This was an appeal by Mr. James R. Hesketh from a decision of Mr. Justice Wright sitting as an additional Judge of the Chancery Division, dated December 14 last. In May, 1894, the voluntary winding-up of the above-named company was ordered to be continued under the supervision of the Court. In the course of the proceedings a summons was taken out by the liquidator under section 10 of the Companies (Winding-up) Act, 1890, against Mr. Hesketh, who had been secretary *pro tem.* of the company, asking that he might be ordered to contribute to the assets £250 alleged to be promotion money improperly received by him from the vendor to the company when he was himself a promoter and officer of the company. Mr. Justice Wright was of opinion that Mr. Hesketh was a promoter who might be held liable for making a secret profit, so far as the shareholders of the company were concerned, while in a fiduciary position; and that he was therefore guilty of "fraud" within the meaning of section 8 of the Trustee Act, 1888, and was not

protected thereby. But in declaring Mr. Hesketh liable to pay £250 and costs, his Lordship said that he had not been guilty of any "moral fraud," for what had been done was done with the knowledge of the directors.

Mr. McCall, Q.C., and Mr. Younger were for the appellant; Mr. Asbury, Q.C., and Mr. E. S. Ford were for the respondent.

Their LORDSHIPS reversed the decision of Mr. Justice Wright and allowed the appeal.

The MASTER of the ROLLS, in giving judgment, said that having regard to the facts showing how Mr. Hesketh had occupied his time in getting up the company, in every sense of the words he was a "person who had taken part in the formation or promotion of the company" within section 10 of the Companies (Winding-up) Act, 1890. He was not a mere clerk or subordinate agent of the company, such as a printer. It did not follow that on that ground he was liable to repay the money he had received. (His Lordship stated the facts of the case and continued.) His Lordship failed to see any legal obligation on Mr. Hesketh to account for the money to the company. It was nothing to the company at all that he had received it. It was not incumbent upon him to tell the company that he had received it. It was not money in the widest sense had by him for the use of the company. His Lordship was not prepared to put a narrow construction on the 10th section of the Act. But putting the widest construction on its language his Lordship looked in vain for any material to make Mr. Hesketh liable to hand over the money to the company. Section 10 did not say a word about fraud. The real question was whether the company was entitled to the money. In his Lordship's judgment it was not. The whole case against Mr. Hesketh therefore failed, and the appeal must be allowed with costs.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

[Solicitors—Rowcliffes, Rawle, and Co., for Roper, Briggs, and Crosse, Manchester; W. A. Gibbs, for O. Dunderdale, Manchester.]

Chan. Div. } 1898.
(North, J.) } April 5.

IN RE GYDE—WARD V. LITTLE.*

Charity—Gift to—Construction—Gift for charitable purposes void for remoteness—Absence of general intention—*Cy-près*.

This was an originating summons taken out by the executors of the will of the late Mr. Edwin Francis Gyde, who died in March, 1894, to determine whether a legacy of £10,000 and a residuary gift bequeathed for a particular charitable purpose as soon as land should at any time be given or obtained for that purpose were void for remoteness, or whether the will of the deceased indicated such a general intention to devote the bequests to charitable purposes that the Court would uphold the gifts and administer them *cy-près*, notwithstanding the failure of the particular objects indicated by the testator. The testator bequeathed the sum of £10,000 to his trustees upon trust to transfer the same to trustees to be appointed by them or the trustees for the time being of his will (such appointed trustees to be not less than three or more than six in number) to be held by them upon trust as soon as any land should at any time be given or obtained for the purpose to employ the same in erecting almshouses. The testator bequeathed his residue

*Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

"upon trust to pay or transfer the same, as soon as they should be appointed, to trustees to be nominated and appointed by the trustees for the time being of his will, to be held upon trust as soon as any land should at any time be given or obtained for the purposes thereafter declared, to employ the same sum in erecting and maintaining at Painswick aforesaid an orphanage and institution to be called 'The Gyde Orphanage and Blind and Deaf and Dumb Asylum.' " After making provision as to the appointment of the trustees, the testator declared "that the produce of his real and personal estate devised and bequeathed in trust for sale should be so marshalled and dealt with that the produce of the real estate and of any impure personality should be used in payment of legacies and annuities to friends and others, so that the charitable legacies should be paid exclusively out of such part of his personal estate as might by law be bequeathed for charitable purposes, and he thereby expressly declared that in no case should any part of the said legacies respectively be applied in the purchase of land."

Mr. Vernon Smith, Q.C., and Mr. Ingpen were for the plaintiffs, the executors.

Mr. SWINFEN EADY, Q.C., and Mr. ROWDEN, for next-of-kin, argued that the will contained no general indication of devotion of the funds bequeathed to charitable objects apart from the particular objects indicated, which would or might be impossible to fulfil till a period that was obnoxious to the rule against perpetuities, and that therefore the gifts were void and there was an intestacy.

Mr. Stokes was for the heir-at-law.

Mr. INGLE JOYCE (the Attorney-General, Sir R. Webster, Q.C., with him) contended that there was a general intention by the testator to devote the bequests to charitable purposes, and that the Court would apply the funds *cy-près*, in case the particular object failed or till it could be provided.

The case was argued in January.

Mr. JUSTICE NORTH said that, in considering the law applicable to the present case, it was only necessary to refer to one case—that of "Chamberlain v. Brockett" (L.R., 8 Ch., 206), in which the Court of Appeal took a different view from Lord Romilly, who had decided the case in the Court below. The Court of Appeal agreed with the Master of the Rolls in the principle of law he laid down, but were able to find, looking at the will before them as a whole, that the testatrix there had indicated a general intention to apply a legacy given in terms very similar to the gifts now before the Court to charitable purposes; but had they not been able to find a general expression of charitable purpose they would have agreed with the then Master of the Rolls and held the gift void for remoteness. His Lordship in this will could find no general intention to devote the bequests to charitable purposes, and must therefore hold them void for remoteness.

[Solicitors—Burton, Yeates, and Hart, for the plaintiff; Flux and Leadbitter, for the next of kin; Kennedy, Hughes, and Ponsonby, for the heir; The Solicitor to the Treasury, for the Attorney-General.]

Q.B. Div. (Lord Russell of Kil-) 1898.
lowen, C.J., and Channell, J.) April 5.

BENSING V. RAMSAY.*

Landlord and Tenant—Lodger—Protection from distress—"Lodger," who is—Lodgers' Goods Protection Act, 1871.

This was a special case stated by Mr. Plowden, the

metropolitan police magistrate, raising the question whether a distress for rent had been properly levied on the appellant's goods, or whether those goods were entitled to the protection afforded to the goods of lodgers by the Lodgers' Goods Protection Act, 1871. The appellant had in May, 1897, taken lodgings at No. 1, Duke-street, Portland-street, of which a Mrs. Snepp was lessee, from one Parsons, who was in possession of the premises. The distress in question was for rent due from Mrs. Snepp to her superior landlord, and the substantial question in the case was whether the circumstance under which Parsons was in possession of the premises prevented the appellant from being entitled to the protection afforded to lodgers by the Act. Parsons had in February, 1897, entered into a verbal agreement with Mrs. Snepp for the assignment of her leasehold interest to him; and thereupon Parsons was let into possession of the premises and was handed the keys, but it was agreed that possession should not be considered to be actually given until after the execution of the assignment. The assignment was prepared and executed by Mrs. Snepp, and a day in April was fixed for the execution by Parsons. On that day Parsons attended for the purpose of executing the assignment, but a dispute arose owing to certain sums being claimed from him which he refused to pay; he therefore did not execute the assignment, and the negotiations with Mrs. Snepp went off. Parsons, however, remained in fact in undisturbed possession of the premises until the distress in question was levied. When the distress was levied the appellant served on the respondent, the certified bailiff levying the distress, the declaration and inventory provided for by the Act; but the respondent proceeded with the distress. The appellant then took out a summons against the respondent under section 2 of the Act. The learned magistrate, on the hearing of the summons, held that Parsons was a tenant on sufferance of the premises, and that a tenant on sufferance could have no lodger within the meaning of the Act, and he dismissed the summons subject to the present case.

Mr. Wildey Wright appeared for the appellant; and Mr. Bray, Q.C., and Mr. Lincoln Reed for the respondent.

The COURT allowed the appeal.

The LORD CHIEF JUSTICE said that, in his judgment, the learned magistrate was wrong. In this case the superior landlord, from whom Mrs. Snepp held, was seeking to obtain arrears of rent due from Mrs. Snepp out of the goods of the appellant, who claimed protection under the Lodgers' Goods Protection Act, 1871. The facts were that there was an arrangement that Mrs. Snepp's lease should be assigned to Parsons. No agreement in writing was, however, come to between Mrs. Snepp and Parsons, and there was a dispute in consequence of the refusal of Parsons to comply with certain requirements as to a half-quarter's rent and as to payment for certain fixtures. It was immaterial who was right in that dispute; the dispute occurred, and the negotiation went off. But during the negotiation Parsons was let into possession and was given the keys. He was therefore in possession much in the character of an intending purchaser let into possession pending the completion of the sale. He remained there long enough to be rated as the occupier, and he had executed certain repairs to the premises. He was therefore in ostensible legal possession of the premises. It was immaterial whether he was a licensee, a tenant on sufferance, or a tenant at will. In that state of things Parsons, who had been in possession from February, 1897, in May let the rooms to the appellant. That clearly created the relation of landlord and lodger between them. Parsons was in ostensible legal possession with the assent of Mrs. Snepp. It might be that under the agreement

*Reported by F. EVANS, Esq., Barrister-at-Law.

between them he was not to be deemed to have possession, but in fact he had possession under circumstances in which he could not be deemed a trespasser. The appellant continued as a lodger to Parsons for some time, and then this distress was put in. On that the appellant had served the declaration and inventory provided for by the statute and claimed the protection of the statute. That claim was clearly right. The Act provided that if a superior landlord should levy a distress on goods of a lodger for arrears of rent due to the superior landlord from his immediate tenant the lodger might take certain steps, whereupon the distress was not to be proceeded with. Here the distress was levied by the superior landlord for rent due to him from his immediate tenant; and it could not be doubted that as between the appellant and Parsons the appellant was lodger and Parsons landlord, the appellant would be stopped from denying that. If the relation of lodger and landlord in fact existed, the case fell within the Act.

MR. JUSTICE CHANNELL concurred.
[Solicitors—Rowe and Wilkie, for the appellant; C. J. Rawlinson, for the respondent.]

Q.B. Div. (Lord Russell of Kil- } 1898.
lowen, C.J., and Channell, J.) } April 5.

SAUNDERS V. THORNEY.*

Licensing Acts—Offences—Opening house for sale on prohibited day—Sunday Closing (Wales) Act, 1831—Purchase on Saturday—Delivery on Sunday.

This was a special case stated by the justices of the Miskin Higher Division of Glamorganshire, who convicted the appellant of unlawfully opening licensed premises on a Sunday contrary to the Sunday Closing (Wales) Act, 1831. The appellant was licensed in respect of premises in Aberdare, known as the Lord Nelson, to sell by retail beer to be consumed on or off the premises. The facts set out in the case were as follows. On Sunday, December 14, 1897, about 10 o'clock at night, a girl was seen by a police-constable to come out of the appellant's house by the front door, and upon going up to her he found she had two bottles of porter. He took her back to the appellant's house, saw the appellant, and asked why he had supplied the porter. He said he had not done so. His wife, who was present, said she had supplied the girl with the two bottles for Mr. Watkins, and there were ten more to come as he had ordered and paid for a dozen there yesterday. It was explained on behalf of the appellant—and the justices accepted the explanation—that Mr. Watkins had ordered of the appellant's wife, and paid 2s. for, a case of a dozen bottles of porter on the Saturday evening, which she (the appellant's wife) arranged to deliver at Watkins's house on the Saturday, but having met with an accident by falling down and spraining her arm she had forgotten to give instructions for the delivery thereof. Watkins on the Sunday night finding the porter had not been delivered as arranged sent over his servant, who was the girl caught by the constable, to the appellant's house, and requested the appellant to let him have two of the bottles of porter. The justices were of opinion that the sale of the porter referred to was not complete until delivery, and that in delivering the two bottles referred to on the Sunday the appellant opened his house for the sale of intoxicating liquors within the meaning of the Act.

Mr. S. T. EVANS appeared for the appellant, and Mr. W. D. BENSON for the respondent. The cases of "Pletts v. Campbell" (L.R. [1895], 2 Q.B., 229),

"Pletts v. Beattie" (L.R. [1896], 1 Q.B., 519), and "Brewer v. Shepherd" (36 J.P., 373) were referred to.

The COURT dismissed the appeal.

The LORD CHIEF JUSTICE said that in his judgment the magistrates were right. He should express his judgment upon the exact facts of the particular case, and the decision would not be a decision except upon the exact facts of the case. The charge in the case was based on section 9 of the Licensing Act, 1874, which provides that any person who "during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act . . . opens or keeps open such premises for the sale of intoxicating liquors" shall be liable to a penalty. The particular offence was committed in the Principality of Wales, in which was in operation the Sunday Closing (Wales) Act, 1831, which provides that in the Principality all premises in which intoxicating liquors are sold or exposed for sale by retail shall be closed during the whole of Sunday, and applies the provisions of the Licensing Acts, 1872 and 1874. That threw the Court back on section 9 of the Act of 1874. The charge was of opening the house for the sale of intoxicating liquors. The facts were that on the Saturday a customer of the house had ordered a dozen bottles of porter. It was contemplated that the delivery should be made on the Saturday night, but owing to an accident to the lady of the house, and her forgetfulness consequent on the accident, the delivery did not take place as had been arranged. Then on Sunday the customer's servant was sent to the house, and she fetched away some of the porter. What was the legal effect of that. The transaction of Saturday was simply a contract by the licensed victualler to sell and deliver a case of a dozen bottles of porter, and that contract would have been satisfied by the delivery of any 12 bottles of porter answering the description of that agreed to be sold. There was no appropriation of any specific goods to the purposes of the agreement. The matter therefore rested entirely in contract. No property passed. What happened on Sunday was that the delivery was sought, and that the house was opened for the purpose of the delivery of goods previously unappropriated and the property in which had not passed. Was that not evidence that the house was opened for the sale of intoxicating liquor? His Lordship had come to the conclusion, not without some hesitation, that it was. It could not be doubted that the delivery of the porter was a material act in the carrying out of the contract made on the Saturday. It was the completion of a transaction which had on the Saturday rested in contract only. There was, therefore, his Lordship thought, evidence which justified the justices in taking the view they had taken. If one looked a little beyond the words of the Act, to its object, there could be no doubt that it ought, if the words admitted, to be construed in the manner he had adopted, for it was clear that if a publican were to be allowed to defend proceedings for opening a house during prohibited hours on the ground that the house was merely open for the delivery of goods in pursuance of contracts previously made, it would open the door to contrivances which would tend to defeat the object of the Legislature. But for the expression of opinion of Chief Justice Cockburn in "Brewer v. Shepherd" (36 J.P., 373) his Lordship would have felt little doubt on the subject. That opinion was, however, not a decision binding on the Court, but was a mere opinion. The appeal must be dismissed.

MR. JUSTICE CHANNELL agreed. He thought that a person opened his premises where he opened them for the purpose of carrying out any material part of a contract of sale.

[Solicitors—Bell, Brodrick, and Gray, for Linton and Kinshole, Aberdare, for the appellant; Wrentmore and Son for Lewis and Jones, Merthyr Tydfil, for the respondent.]

Q.B. Div. (Day and)
Phillimore, J.J.)

1898.
April 5.

DENABY AND CADEBY COLLIERY COMPANY V. ASSESSMENT COMMITTEE OF THE DONCASTER UNION.*

Rating—Rateable value—Colliery—Proper method of rating—Evidence as to receipts.

This was a special case stated by Mr. Littler, Q.C., as arbitrator on a rating appeal to the West Riding of Yorkshire Quarter Sessions, raising an important question upon the proper method of rating a colliery.

Mr. Bosanquet, Q.C. (Mr. Alfred Young with him), appeared for the Assessment Committee; Mr. Cripps, Q.C., and Mr. Edward Boyle for the appellants.

The appellants own two distinct collieries in the Barnsley coalfield; one, the Denaby Colliery, has been in existence for years, and may be regarded as fully developed. The Cadeby Colliery is newly commenced, and is very far from having reached what may be regarded as its normal output. The Denaby Colliery is rated in four parishes. The totals in the four parishes for Denaby Colliery are—gross, £26,058; rateable value, £23,919. The totals for Cadeby Colliery are—gross, £10,354; rateable value, £9,641. The universal custom in the Barnsley field is to let on leases of considerable duration at a rate of so much per acre, payable (subject to a *minimum* per annum) as and when the coal is won, which price neither increases nor diminishes with the price of coal or any other circumstance, and is frequently fixed much in the dark before the field has been fully proved. In the case of both collieries the mines are held on leases having 50 or more years to run, containing no unusual clauses, and the rent received after providing for the *minimum* (which has been passed in both collieries) is calculated as above indicated at per acre of coal gotten as and when it is so gotten, the tenant paying all outgoings and maintaining the underground workings, &c., in good condition at his sole cost. The area of coal leased was very large, amounting to some 4,000 acres in the case of each colliery, and the price actually paid under the lease for coal work averaged in the case of Denaby about £207 per acre, the tenant doing all repairs and bearing all other outgoings, and in that of Cadeby about £138 per acre. The collieries have been rated by the respondents at the before-mentioned amounts on an estimate based on the rent which a tenant would in the judgment of the assessment committee be willing to give on lease, and no allowance being made from that rent, and adding thereto the annual value of the surface buildings on a valuation based on their present condition, from which latter the usual deductions are made. At the hearing the appellants contended that the best, and, indeed, the only, fair method of arriving at the net annual value was that of ascertaining the receipts in the year and then deducting therefrom the expenses, allowances for tenant's capital, &c. If this proposition was admissible in principle, it was not disputed that the method on which it was worked out was substantially correct, subject to amount, as to which the parties differed. It was objected that the arbitrator ought not to receive this evidence, but he admitted it subject to the case. Evidence was given that this was a practicable method. It was admitted that coal experts could in each year ascertain the average selling price

of coal and also could accurately estimate what the fair working expenses per ton of such a colliery ought to be. If the evidence was admissible in law the arbitrator found as a fact that this method is not only a practicable, but the best and fairest, method to both parties. The respondents contended that he had no power to adopt this principle. The appellants contended that it was impossible to find a tenant from year to year at a rent certain. If the mine were rated at the sum proposed by the respondents it would be carried on at very little profit, if not at an actual loss. If, on the other hand, their system were adopted, in good time the owners would escape their fair share of the burdens of the rate. Every colliery has its distinctive advantages and disadvantages, as, for example, its proximity to a port of shipment, its depth, liability to great fires, cost of maintenance, ease of obtaining labour, and many other considerations. There being no collieries let from year to year, there are no means of comparing the appellants' collieries with others for the purpose of ascertaining what a tenant would give from year to year. There was a second point raised. In three of the valuations in the rate-book the same figure appears in the gross and in the rateable column. In this instance there are no surface works, and wherever that is so the parishes make no difference between the gross and rateable, inasmuch as the tenant, as before mentioned, pays the outgoings. The appellants contended that the gross must necessarily include the outgoings, and that when the parish has inserted a gross value the appellant is in all cases entitled to accept that and to claim to deduct therefrom all amounts necessarily expended to maintain the rent, whether these outgoings are in fact paid by the tenant or not ("Reg. v. Wells," L.R., 2 Q.B., 592). The questions for the Court were:—(1) Is the evidence put forward by the appellants admissible? (2) Is the rent on lease, whether actual or estimated, under such circumstances binding, or any evidence in ascertaining the value for rating purposes? (3) Are the appellants, on such a rating as the three above named, where the gross and rateable are entered at the same amount, entitled to claim to deduct from that gross as shown in the rate-book outgoings by whomsoever paid and so arrive at the net value, which in such case must necessarily be less than the gross? The arbitrator postponed making his award until the judgment of the Court should be received.

Mr. BOSANQUET cited "The Coltness Iron Company v. Black" (6 App. Cas., 315), "Reg. v. Westbrook" (10 Q.B., 178), "Dodds v. Southshields" ([1895] 2 Q.B., 133), "City of London Brewery Co. v. London County Council" ([1898] 1 Q.B., 392), "Reg. v. Aylesford Union" (26 L.T., 618). Upon the point about gross value he referred to 37 and 38 Viet., c. 54, and urged that there should be no deductions from the gross value, but that the rateable value should be ascertained without reference to the gross.

Mr. CRIPPS admitted that what a tenant would be likely to give was the real test. It was as to the method of arriving at it that the difference arose. In respect of coal mines the rent could be arrived at only, as there were no similar hereditaments to compare it with by some such method as that suggested by the appellants. Coal mines were an exceptional class of property. The evidence of receipts was therefore admissible. As to the second question, he agreed that a rent on lease was not binding, but it was some evidence. Lastly, to arrive at the rateable value, deductions must be made from the gross.

The COURT adopted the views of the appellants.

Mr. JUSTICE DAY said that, in his opinion, the evidence of the receipts taken in the year was admissible. This was an exceptional case. The umpire

knew of no colliery let by the year, and there was therefore no similar property with which such a colliery could be compared. It must therefore be dealt with exceptionally. The system proposed by the appellants was the most practical. The second question had been disposed of by agreement—namely, that the rent was some evidence, but not binding evidence. As to the third, he did not see how the rateable value could be arrived at without first getting at the gross.

MR. JUSTICE PHILLIMORE was of the same opinion. The colliery was such an exception that it could only be rated in an exceptional way. With respect to the third question, he thought the ratepayers were entitled to the benefit of the finding of the assessment committee. Deduction should be made from the gross value.

[Solicitors—F. E. Nicholson, for the respondent; Dollman and Pritchard, for the appellant.]

Q.B. Div. (Lord Russell of Kil- } 1898.
lowen, C.J., and Channell, J.) } April 6.

AUCKLAND AND BRUNETTI V. COLLINS.

Contract—Agreement—Construction—Music-hall agent—Commission on "future engagements."

This was an appeal by the plaintiffs against a decision of his Honour Judge Addison, Q.C., sitting at the Southwark County Court. The action was brought by the plaintiffs, a firm of music-hall agents, to recover commission alleged to be due to them from the defendant, Miss Marie Collins, the well-known music-hall singer. The commission was claimed under an agreement in the following terms:—"Auckland and Brunetti, musical and variety agents—Memorandum of agreement made July 15, 1891, between Mr. Brighten (for Mr. Kirk), afterwards called the manager, of the one part, and Marie Collins, afterwards called the artiste, of the other part, in which the said manager agrees to engage the said artiste as serio and dancer to appear nightly at the Oxford Music-hall from April 18, 1892, at £5 weekly, and the said artiste accepts the above engagement and agrees to fulfil it under the above conditions, subject to the rules and regulations of the said establishment. In the event of the above hall closing through any unavoidable cause this contract is to be considered cancelled. In consideration of your having obtained me this engagement I hereby agree to pay you a commission of 10 per cent., and to pay you the same commission on all future engagements at the Oxford or with ——. Commission is due weekly. I hereby authorize you to apply to — for your commission and I hereby authorize him to pay the same out of my first or any subsequent week's salary. Bill matter to be sent to the management 14 days before date of opening.—(Signed) Marie Collins." It will be observed that, although the agreement was expressed to be between Mr. Brighten, acting for Mr. Kirk, and Miss Collins, the latter part of the agreement was between her and the plaintiffs. At the time when the agreement was made the Oxford was being carried on by Mr. Kirk, Mr. Brighten acting as his manager. In May, 1892, the Oxford was purchased by a limited liability company, and in June, 1892, it was pulled down and rebuilt. The commission was claimed on salary, amounting in all to upwards of £750, earned by the defendant under engagements at the Oxford entered into subsequently to the rebuilding of the hall. These engagements had been obtained for the defendant by Mr. H. J. Didcott. The learned County Court Judge held that the Oxford, at which the defendant was re-engaged, was not the establish-

ment mentioned in the agreement of 1891, and so was not within it; and on that ground he gave judgment for the defendant. The plaintiffs appealed. It appeared that, although the Oxford had changed hands since 1891 and had been rebuilt, the character of the entertainment given there had not been substantially altered.

Mr. Counsel appeared for the appellants, and Mr. Bandon for the respondent.

The COURT allowed the appeal.

The LORD CHIEF JUSTICE, after adverting to the facts, said that what the Court had to consider was the meaning of the agreement of 1891. The material part of the agreement provided that the defendant should pay commission on all future engagements at the Oxford. Then there followed certain provisions to which no effect could be given because the blanks had not been filled in. If these blanks had been filled in with specific names, though that might not have controlled the construction of the agreement, still it might have given some colour to the suggestion that the agreement should be confined to engagements at the Oxford under a particular management. But, as it was, the words of the agreement were absolutely general. One must, in construing the agreement, have regard to what would be the rights as between a commission agent and a person for whom an engagement was procured by him apart from express agreement. The ordinary rule was that the agent had to show that the engagement originally obtained was obtained upon the introduction of the agent, and as regards subsequent engagements that they were so connected with the original engagement that they would be said to have flowed from it. In such a case, if it appeared that the subsequent engagement had been obtained not through or upon the basis of the original agreement, but independently, the agent would have no claim. That statement of the law showed the difficulties likely to arise in the absence of express agreement; for example, suppose that, after the original engagement in 1891, the plaintiff, having made some reputation, had arranged a fresh engagement for herself, then apart from express agreement, the question would have arisen as to how far the subsequent engagement was the consequence of the original introduction. The parties here had, it appeared to him, intended by making an express agreement to quiet all such questions, and to agree that for the purposes of commission all future engagements of the defendant at the Oxford should be treated as referable to the introduction. The learned county court Judge had assumed that in favour of the plaintiffs; but he had based his judgment on the ground that the Oxford referred to in the agreement of 1891 had ceased to exist. In that his Lordship thought the learned Judge was wrong. The proprietorship of the hall had changed, and its outward form had been altered; but it was still identifiable with the old Oxford, and the entertainment, though perhaps improved, had undergone no substantial change in character. Under these circumstances he had come to the conclusion that the defendant, though possibly she had entered into an improvident bargain, was liable.

MR. JUSTICE CHANNELL delivered judgment to the same effect.

[Solicitors—J. Amery Parkes, for the appellants; W. H. Almsrou, for the respondent.]

Q.B. Div. (Day and } 1898.
Phillimore, JJ.) } April 6.

KELLY V. CROFT.*

Contract—Agreement—Construction—Claim for commission after determination of agreement.

* Reported by E. HARRINGTON, Esq., Barrister-at-Law

This was a special case, and the question for their Lordships' decision was whether on the true construction of an agreement made between the parties the plaintiff was entitled to certain commission after the determination of the agreement.

Mr. SAMUEL GREEN, who appeared for the plaintiff, said that his client entered into an agreement with the defendant (trading as Croft and Co.) on March 1, 1892, under the terms of which the plaintiff was appointed agent for the defendant. He undertook to obtain custom for the defendant, and was to receive 2½ per cent. commission on all orders from customers whom he introduced to the firm. It was a term of the contract that the agreement might be determined by mutual consent, six months' notice to be given by either party. The relations between the parties continued satisfactory for five years, and then the agreement was determined by the defendant, and the plaintiff was dismissed. The defendant admitted that the plaintiff was entitled to commission up to the time of his dismissal. The plaintiff claimed that he was still entitled to commission on orders obtained through his introduction after his dismissal. Counsel cited "*Bilbee v. Hasse*" (5 *The Times Law Reports*, 677), "*Boyd v. Tovill Paper Company*" (4 *The Times Law Reports*, 332), "*Salomon v. Brownfield*" (12 *The Times Law Reports*, 239).

Mr. HERBERT CHITTY (who appeared for the defendant) referred to "*Boyd v. Mathers*" (9 *The Times Law Reports*, 443), but was not called on to argue.

Mr. JUSTICE DAY held that the defendant was entitled to judgment. This was not a case in which the defendant could have dismissed the plaintiff without his consent. The agreement was to last until determined by mutual consent. It had been so determined, and therefore the plaintiff was not entitled to receive commission after such determination.

Mr. JUSTICE PHILLIMORE concurred.

Judgment accordingly.

Court of Appeal (Lindley, M.R., }
Rigby and Collins, L.JJ.) }

1898.
April 19.

ALHUSEN V. THE EALING AND SOUTH HARROW RAILWAY COMPANY.*

Lands Clauses Acts—Notice to treat—Part of a road—Lands Clauses Consolidation Act, 1845, sec. 92.

Decision of Stirling, J. (*ante*, p. 307), affirmed.

This was an appeal by the plaintiff from a decision of Mr. Justice Stirling dated March 22 last and reported *ante*, p. 307. The question raised was whether the defendants, who desired to purchase, for the purpose of making their railway, a small portion of a private road forming the approach to a house and grounds belonging to the plaintiff, could be compelled to take the whole of his property. The case came on before the learned Judge upon a motion by the plaintiff for an injunction to restrain the defendants from proceeding with the purchase of part of the plaintiff's mansion house, known as Twyford Abbey, which was comprised in a certain notice to treat served by the defendants and dated January 21, 1898, without the purchase of the remaining portion of the plaintiff's said mansion house. Twyford Abbey, mentioned in the notice of motion, is a mansion house of considerable size, situated between Ealing and Sudbury, and standing in grounds surrounded principally by hedges, but partly by a fence. In this fence are entrance gates close to

which stands a lodge. Leading from the lodge to a public highway, known as Hanger-lane, is a private road about 620 yards in length, having trees on each side and forming an attractive approach to the house. At the end of the road next to the highway is an outer lodge. Within the grounds of the mansion stands a parochial church or chapel, with a burial ground. This chapel is from time to time, but not regularly, used as a place of public worship, and interments still take place in the burial ground. The mansion and grounds and the private road, together with lands on each side of such road, originally formed part of an estate known as the Twyford Abbey estate, and were formerly the property of a Mr. Willan. By a deed dated November 6, 1890, the devisees under that gentleman's will conveyed to the plaintiff the mansion house and grounds and the site of the private road, together with the advowson of the church or chapel, and all such right and title as the vendors had in or could dispose of in the said church or chapel, subject to a reservation to the vendors and other persons claiming under the will of Mr. Willan of a right of way over and along the private road, and also a right to make and maintain openings into the private road for the purpose of access thereto from any adjoining lands forming part of the Twyford Abbey estate; and also subject to a reservation to the vendors and persons claiming under the will, and generally to all persons lawfully frequenting or going to and from the church and churchyard, of a right of way with horses and carriages from the outer to the inner lodge, and of a right of way on foot from the inner lodge to the church and churchyard. The plaintiff had ever since been, and still was, in occupation of the property so conveyed to him. The defendant railway company was incorporated by an Act of Parliament passed in August, 1894, for the purpose of making a railway between Ealing and South Harrow, and with this Act the Lands Clauses Acts and the Railways Clauses Act, 1845, Part I., were incorporated. On January 21, 1898, the defendants served the plaintiff with notice to treat for a portion of the private road (at a point distant from the inner lodge about a quarter of a mile) comprising 2r. 31p., stating that the land in question was required solely to enable the company to construct a bridge for the purposes of their railway over the same, and that the roadway would be lowered 5ft. under the bridge so as to give a headway of 15ft., and that during construction access would be preserved to Twyford Abbey; and they expressed their willingness, instead of purchasing the said lands, to accept and purchase an easement for the purposes aforesaid. On January 29, 1898, the plaintiff gave notice that he required the defendants to purchase and take the whole of the house within the moaning of and pursuant to section 92 of the Lands Clauses Consolidation Act, 1845. That section enacts that "No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." On February 7, 1898, the defendants gave notice of their intention to issue a warrant for summoning a jury to determine the value of the plaintiff's interest in the lands described in the notice to treat, and the amount of compensation for the damage to be sustained by the plaintiff by reason of the execution of the works authorized by the Act. Thereupon the present action was brought, and the notice of motion served. The question was whether that portion of the road which the railway company desired to take was part of Twyford Abbey within the meaning of section 92 of the Lands Clauses Consolidation Act, 1845. Mr. Justice Stirling was of opinion that it was not; and seeing that he was dealing with the case upon an interlocutory application he thought

*Reported by E. SCRATCHLEY Esq., Barrister-at-Law.

the motion should be refused. From that decision the plaintiff now appealed.

Mr. Balfour Browne, Q.C., Mr. Butcher, Q.C., and Mr. E. Moon were for the appellant; Mr. Beale, Q.C., Mr. Freeman, Q.C., and Mr. R. F. Norton were for the respondents.

Their LORDSHIPS affirmed the decision of Mr. Justice Stirling, and dismissed the appeal, with costs.

The MASTER of the ROLLS, in giving judgment, said that the case turned after all upon the true construction of section 93 of the Lands Clauses Consolidation Act, 1845. [His Lordship read that section, and continued.] It had been laid down ever since that Act was passed that the word "house" in section 92 did not mean a mere building, but included whatever would pass under a conveyance of the house by that description. It was very seldom, however, that a conveyance of a house was drawn without some sort of context to enable you to see what was actually conveyed. It did not follow that every ground was part of a house. In the present case what the Court had to get at was whether this railway company was taking part of a house. [His Lordship referred to the facts of the case, and continued.] In his Lordship's opinion the avenue in question was not part of the house at all. It would be stretching language to say that the avenue, situated as it was, was part of the house or would be included in a conveyance of Twyford Abbey as part of the house if the Court had nothing else. It was, however, said that the authorities were too strong for that view, and the Court was pressed with authorities which went step by step. The strongest case appeared to be "*Furniss v. the Midland Railway Company*" (L.R., 6 Eq. 473). But his Lordship was satisfied that no one looking at the plan of this property could bring it up to the scratch and say that a person crossing that avenue was dealing with part of the house. The case was not within the decisions on section 92, and the Court would be making a bad precedent and getting right away from the section if it held this avenue to be part of the house. The appeal must accordingly be dismissed, with costs.

LORD JUSTICE RIGBY delivered judgment to the same effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Crossman and Prichard; Baxter and Co.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } April 19.

HESS V. LABOUCHERE.*

Practice—Discontinuance—Answers to interrogatories—Discretion.

This was an appeal from an order made by Mr. Justice Bruce at Chambers. The action was brought in respect of an alleged libel published in *Truth*. The defendant in his defence justified the alleged libel. The defendant, having in his possession certain documents which had been brought from Pretoria and which related to the subject matter of the libel, took out a summons for an order directing the plaintiff to answer interrogatories with regard to those documents. The plaintiff, having come to the conclusion that it would be advisable not to proceed further with the action, took out a summons for leave to discontinue. The two summonses came on to be heard together before Mr. Justice Bruce, and the learned Judge made

an order directing that the plaintiff should answer the interrogatories within seven days, and dismissing the plaintiff's summons for leave to discontinue the action. The plaintiff appealed.

Mr. Carson, Q.C., and Mr. Colefax appeared for the plaintiff; Mr. J. E. Banks for the defendant.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that the suggestion on the part of the defendant was that the documents from Pretoria were in his possession temporarily, and that, if the plaintiff were allowed to discontinue the action without being compelled to answer the interrogatories, the documents would have to be returned to Pretoria, and then in all probability the plaintiff would commence another action, in which case irremediable injury would be done to the defendant. There was however, no evidence as to how the documents came to be in this country, and no evidence that they were going to be sent back to Pretoria. Under those circumstances, why should not the plaintiff be allowed to discontinue the action? Generally, in allowing a plaintiff to discontinue his action, the Court would consider whether they should not make it a condition that he should not be at liberty to bring another action. Here, however, the defendant's counsel distinctly expressed his wish that such a term should not be imposed upon the plaintiff. He was of opinion that the plaintiff should be allowed to discontinue the action without having to answer the interrogatories. The order as to the interrogatories would therefore be reversed, and the plaintiff would have leave to discontinue on payment of the costs of the action.

LOEDS JUSTICES CHITTY and VAUGHAN WILLIAMS delivered judgment to the same effect.

Court of Appeal (Lindley, M.B., } 1898.
Rigby and Collins, L.J.J.) } April 19.

THE MANCHESTER BREWERY COMPANY (LIMITED) v.
THE NORTH CHESHIRE AND MANCHESTER BREWERY
COMPANY (LIMITED).*

Trade Name—Imitation—Name of Company—
Companies Act, 1862, sec. 20.

Decision of Byrne, J. (*ante*, p. 83) reversed.

This was an appeal from a decision of Mr. Justice Byrne, reported *ante*, p. 83. The action was brought for an injunction to restrain the defendant company, its agents, and servants, from using or carrying on business under its present name, style, or title, or any other style or name which included the plaintiff company's name, or so nearly resembled the same as to be calculated to deceive the public, or induce the belief that the business carried on by the defendant company was the same as the business carried on by the plaintiff company, or in any way connected therewith. The plaintiff company was incorporated early in 1888, and had a large business, principally in and about Manchester, its brewery being in that city. There was also in existence in 1888 a company called the North Cheshire Brewery Company (Limited), which carried on business in and about the town of Macclesfield, where its brewery was. It also had some business in Manchester, at one time a good one, but this subsequently declined. This North Cheshire Company sold its business to one, Mr. Rhodes, who got up a new company (the defendant company) to carry on the old business and add to it, and this company was registered in October, 1897. Mr. Justice Byrne came to the con-

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Reported by H. E. HEMMING, Esq., Barrister-at-Law.

clusion upon the evidence that the directors of the defendant company in adopting the word "Manchester" as part of the title of the company had no intention to interfere with the business of the plaintiff company and that there was no sufficient ground for supposing that the public would be deceived by the similarity of the names of the two companies, and he, therefore, dismissed the action. The plaintiff company appealed. The question turned primarily upon the construction to be placed on section 20 of the Companies Act, 1862, which provides that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved, and testifies its consent in such manner as the registrar requires."

Mr. Moulton, Q.C., Mr. Astbury, Q.C., and Mr. O. Leigh-Clare were for the plaintiff company; and Mr. Cozens-Hardy, Q.C., and Mr. Stewart Smith for the defendant company.

The COURT allowed the appeal.

The MASTER of the ROLLS said that he was unable to adopt the view taken by the learned Judge below. After referring to section 20 of the Act of 1862, his Lordship continued,—"The short outline of the facts was this. In October, 1897, there were two brewery companies in the north of England, both registered as limited companies under the Act of 1862. One was the North Cheshire Company, which had its brewery at Macclesfield, and the other was the Manchester Brewery Company, having its brewery at Manchester. These two towns were not very far apart, and there might have been competition between the two companies. In that state of things several gentlemen formed a syndicate for the purchase of the business of the North Cheshire Company and registered a new company, with the consent of the North Cheshire Company, as the North Cheshire and Manchester Brewery Company. The question was whether they had a right, without consulting the Manchester Company, to take the whole of its name. The peculiarity of the case was that, although the names of the two companies were not identical, the defendant company had nevertheless taken the whole of the name of the plaintiff company. The name of the defendant company, to any one who knew of the existence of the two original companies, one in Macclesfield and one in Manchester, would suggest that these two companies had been amalgamated and that the Manchester Company had ceased to have any independent existence. In his Lordship's opinion the defendant company had adopted a name so nearly resembling the name of the plaintiff company as to be calculated to deceive within the meaning of section 20 of the Companies Act. It was true there was no evidence of actual deception, which might be due to the short time which had elapsed since the registration of the defendant company, but there was evidence that business people would infer from the title of the defendant company that the business of the plaintiff company was being carried on by the defendant company. His Lordship did not mean to imply that the defendant company had any monopoly in the word "Manchester," but in his opinion one company was not entitled to take the whole of the name of another company and combine it with its own, because that would lead to the inference that there was some connexion between the two companies. Such a proceeding was not justified either by law or by fair dealing.

LORDS JUSTICES RIGBY and COLLINS concurred.

[Solicitors—Chester, Mayhew, Broome, and Griffiths, for Farrar and Co., Manchester; Firth and Co., for Godfrey Rhodes and Evans, Halifax.]

Court of Appeal (A. L. Smith, } 1898.
Chitty, and Vaughan Williams, L.J.J.) } April 20.

THE ROYAL COLLEGE OF MUSIC V. THE VESTRY OF THE PARISHES OF ST. MARGARET AND ST. JOHN, WEST-MINSTER.*

Rating—Rateability—Exemptions—"Society instituted for purpose of . . . the fine arts"
—Royal College of Music—6 and 7 Vict., c. 36.

Decision of Divisional Court (*ante*, p. 136) affirmed.

This was an appeal from the judgment (reported *ante*, p. 136) of a Divisional Court (Mr. Justice Hawkins and Mr. Justice Channell) on a special case stated by order of a Judge raising the question whether the Royal College of Music was exempt from rating under the Scientific Societies Act, 1843 (6 and 7 Vict., c. 36). Section 1 of that Act provided that no persons should be assessed or rated "in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or owner, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members." The Royal College of Music was incorporated by Royal charter on May 23, 1883, and was governed by the charter and two amendments thereof. The college and its affairs were carried on wholly in accordance with and for the purposes of the charter and amendments, and wholly in accordance with the regulations. The recitals in the charter stated:—

"The purposes for which the corporation is founded are—first, the advancement of the art of music by means of a central and examining body charged with the duty of providing musical instruction of the highest class and of rewarding with academical degrees and certificates of proficiency and otherwise persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; secondly, the promotion and supervision of such musical instruction in schools and elsewhere as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and, lastly, generally the encouragement and promotion of the cultivation of music as an art throughout our dominions."

At the college there were pupils, some of whom were scholars and exhibitioners and other students. The college was not allowed to make any dividend, gift, division, or bonus in money unto or between any of its members. It was also provided that no graduate competing for, entitled to, or holding a fellowship from or in the gift of the corporation should, while he was competing for or entitled to or holding such fellowship, be a member of the Corporation. By the regulations it was provided that the buildings of the Royal College of Music should be used exclusively for the transaction of its business and the carrying into effect the purposes of the charter and the amendments thereof. The building of the college is situated in Prince Consort-road, in the parish of St. Margaret, and is built upon land demised to the institution by an indenture dated December 30, 1891, by the Commissioners of the Exhibition of 1881 for 999 years at a nominal annual

rent of £5. The lease provided for the erection of the college and its use solely for the purposes of the charter. The building was duly completed out of funds provided by private munificence, and was the subject of the rates now in question. The college was supported in part by annual voluntary subscriptions from a number of individuals and from the Commissioners of the Exhibition of 1851, and an annual subscription from her Majesty out of a grant voluntarily voted to her Majesty by Parliament for that purpose. The revenue account of the college showed annual subscriptions of £1,132, dividends and interest from investments of donations made to the college upon trust for scholarships, prizes, &c., £4,639; fees from pupils, £11,535; Government grant, £500, &c. It was stated that the fees from candidates and pupils were insufficient to defray the expenses of examinations and tuition, and teaching by the college was not carried on at a profit, or with a view of making a profit over and above the expenses. The college did not train either teachers or professional musicians or singers as such, having no course of instruction arranged with that view, but taught the science and art of music in all its branches to all its pupils alike, and imparted the same courses of musical instruction to all. Without the annual voluntary contributions, the donations, and the dividends from invested funds the college could not meet its expenses. The college had not made, and did not make, any dividend, gift, division, or bonus in money unto or between any of its members. The Divisional Court gave judgment in favour of the college, holding that it came within the exemption. The vestry, as the rating authority, appealed.

Mr. Bosanquet, Q.C., and Mr. E. Cunningham Glen, appeared for the appellants; Mr. Danckwerts (with him Mr. A. Neilson) for the respondents.

The COURT, without calling upon counsel for the respondents, dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question raised in this case was whether this society was instituted for the purposes of science, literature, or the fine arts exclusively. In his opinion the charter, coupled with the facts stated in the special case, showed that the society was instituted for the purposes of fine art exclusively. The purposes for which the corporation was founded, as specified in the charter, were plainly purposes of a fine art—viz., music, exclusively. What was the meaning of saying that a society was instituted for the purposes of music? It must mean that it was instituted for the purpose of advancing music, or of disseminating music, or of propagating music. This could only be done by some means, and one of the means by which music could be advanced or disseminated or propagated was by teaching it. It was suggested that the real object of this society was to teach music to persons some of whom intended hereafter themselves to follow the profession of teachers of music. But in his opinion the object was not less for music exclusively, because the means adopted for advancing or disseminating music was to be by way of teaching it. He therefore entirely agreed with the judgment of Mr. Justice Hawkins. But now it was argued further that this society was taken out of the exemption clause by reason of the provision which said that a society, in order to be exempted, must be one which "shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members." Reliance was laid on the fact that payments of money were made by the society to its professors, who were members of the society; and it was suggested that such payments came within the word "division" in the section. But

in his opinion "division" could not possibly include a payment for services rendered. He thought that the words "dividend, gift, division, or bonus" meant some payment by way of distribution out of the funds of the society for the benefit of the members. It was also said that some of the graduates got a benefit out of the society by being the holders of fellowships. But the charter expressly provided that a graduate while holding a fellowship should not be a member of the corporation. It was therefore impossible that any payment made in respect of a fellowship could be a division unto or between any of the members of the society. For these reasons he thought that the appeal must be dismissed.

LORD JUSTICE CHITTY delivered judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Gates, for the appellants; H. T. Boodle, for the respondents.]

Q.B. Div. (Wills and }
Kennedy, J.J.) }

1898.
April 20.

BAXTER V. LECHE AND OTHERS.*

Licensing Acts—Licence—Renewal—Notice of Objection—Validity—Licensing Act, 1872, sec. 42.

This was a special case stated by the quarter sessions for the county of Chester on an appeal against a refusal by the justices sitting at the adjourned general annual licensing meeting at Broxton, on September 28, to renew the licence held by Jane Baxter in respect of the house known as The Brown Cow, at Waverton. It raised a question as to the validity of a notice of objection to a renewal of a licence served after the date of the original annual licensing meeting, but in due time before the adjourned meeting, and also as to the form of a notice by the justices.

Mr. Clement Higgins, Q.C., Mr. Trevor Lloyd with him, appeared for the appellant; Mr. E. H. Lloyd for the objectors; Mr. S. Moss for the justices.

The quarter sessions had dismissed the appeal subject to the case. The appellant was tenant of the house, which was a fully-licensed house. On August 31, the day appointed for the general annual licensing meeting for the Broxton division, within which the house was situate, the appellant attended and applied for a renewal of her licence. No notice in writing of an intention to oppose the renewal had been served on the appellant prior to August 31, nor had any notice been served on her requiring her attendance at the meeting. At the meeting of August 31 the chairman called attention to the fact that there were convictions against the house, one of which had been endorsed on the licence, and thereupon the matter was adjourned to the meeting to be held on September 28. On September 3 the appellant was served with a notice requiring her to attend at the meeting on the 28th. She appeared with her solicitor at the meeting on September 28 and formally applied for the renewal. The solicitor for the respondents also appeared and objected to the licence in accordance with a notice of objection served on September 20. It was objected by the appellant's solicitor that the respondents had no *locus standi*, as no notice of objection to the renewal of the licence had been served seven days prior to the commencement of the general

annual licensing meeting, and also that no notice of objection purporting to be served by the direction of the justices had been served on the appellant. The justices overruled the objection. After hearing evidence, they being equally divided, the renewal was refused. The appellant appealed to the quarter sessions. The notice served by the clerk to the justices was in the following form:—"On behalf of the licensing justices . . . I hereby give you notice to attend at the adjourned annual licensing meeting for the said division . . . when the renewal of the licence now held by you will be taken into consideration." It was objected before the quarter sessions on behalf of the appellant that no notice of objection was served on the appellant seven days before the commencement of the general annual licensing meeting; that the notice, dated September 3, served by the clerk of the justices, was a mere notice to attend the adjourned meeting and did not contain any notice of objection to the renewal of the licence by direction of the justices nor state any grounds of objection; and that the notice of September 20 served by the objectors was had in that it was not served seven days before the commencement of the general annual licensing meeting. Section 42 of 35 and 36 Vic., c. 42, the Licensing Act, 1872, provides that when a licensed person applies for a renewal, the justices should not entertain any objection to the renewal unless written notice of an intention to oppose has been served on the holder not less than seven days before the commencement of the General Annual Licensing meeting, provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day when the case will be heard and the objection considered as if the notice herein before prescribed had been given.

MR. CLERMONT HIGGINS contended that the justices were wrong to refuse the renewal. He cited "Reg. v. Anglesea Justices" ([1892] 1 Q.B., 850); "Reg. v. Anglesea Justices" ([1895] 65 L.J., M.C., 12; 59 J.P., 744), which was a case decided by Mr. Justice Hawkins and threw doubt on the right of justices to start an objection. He referred to the Alehouse Act of 1823, 9 Geo. IV., c. 61, section 12, which provided for the adjournment of the licensing meetings. He also referred to "Reg. v. Altrincham" ([1894] 11 Times L.R., 3), which was distinguishable because the objection had in fact been made within the proviso; and "Daykin v. Parker" ([1894] 2 Q.B., 273). The justices could not by taking the point that there were convictions against the house open the case to the whole world to raise objection to the renewal. If the notice were not given by the direction of the justices it was wrong. "Whiffen v. Malling Justices" ([1892] 1 Q.B., 362). Here the notice of September 20 was not given by the direction of the justices, and that of the 3rd did not sufficiently state the fact. "Reg. v. Merthyr Tydvil" (14 Q.B.D., 584), "Reg. v. Eales" (42 L.T., 737) were also referred to.

THE COURT, without calling on the counsel for the objectors, decided that the refusal of the justices of quarter sessions must be upheld.

MR. JUSTICE WILLS said the first thing was to look at the words of section 42 of the Licensing Act, 1872. Sometimes too great an abundance of authorities on a section was an inconvenience. The proviso to that section was in very wide terms. Under it the justices, notwithstanding that no notice had been given, might require the attendance of the holder of the licence at the adjourned meeting, when the case would be heard

and the objection considered as if the notice had been given. The case of "Reg. v. Farquhar" (L.R., 9 Q.B., 258) showed that the justices might start the objection themselves in open Court, and then adjourn to another meeting, as had been done here. The justices must then require the attendance of the applicant, and the notice requiring him to attend must purport to come from them. Here the notice was declared specifically to be on behalf of the licensing justices. Now, what was to happen when the applicant did attend? "Daykin v. Parker" ([1894] 2 Q.B., 556) showed that the justices were not bound originally to state any specific ground of objection, but still natural justice required that the applicant should know a reasonable time beforehand what he had to meet. In the case of "Whiffen v. The Malling Justices" ([1892] 1 Q.B., 362), the justices adjourned the meeting giving direction to the superintendent of police to give notice of objection. The justices then decided on a ground not mentioned in the notice of objection. There was an appeal to quarter sessions, which Court gave the go-by to that ground of objection and decided on another ground which was included in the original notice. The Court of Appeal upheld their decision. In that case the applicant had a notice of the objection. If, in fact, the applicant had not reasonable notice of what he had to meet it seemed to be assumed in the case that the matter should be adjourned to give him an opportunity of answering it. In the present case the applicant had notice of objections given by persons other than the justices, though in that notice appeared the objection taken by the justices. The applicant knew what grounds would be relied on. That would appear to be sufficient, but there was the further point that the applicant's solicitor might be said to have waived the objection. He took this line. He objected to the validity of the notice, and considered that he was not properly before the Court, and therefore refused to cross-examine the witnesses. Yet after this he put in his own witnesses and examined them. On all these grounds the appeal must be dismissed.

MR. JUSTICE KENNEDY concurred. The justices had not done anything contrary to the Act. The notice given to the applicant by the clerk to the justices was a proper notice, on the face of it purporting to come from the justices, of the fact of the adjournment and that the applicant was to attend. In the case of "Whiffen v. Malling Justices" ([1892] 1 Q.B., 362) there was no statement that the notice was made by the authority of the justices, or that the applicant was required to attend. It was said in the present case that the notice of objection by persons other than the justices ought to have stated that it was given by the authority of the justices, but that would be adding something to the section. If the applicant had no notice of the objections to be raised against him at the adjourned meeting, he might get an adjournment, or if the justices thought it was too late to adjourn they might refuse to consider the objection. The fact of the notice of September 20 was not an essential to the case. But, however that might be, the applicant had notice and appeared and took an objection which was bad. No injustice had been done. The point before the Court was whether there was any jurisdiction in the justices to refuse. No good grounds had been established for impugning it.

Leave to appeal was given.

[Solicitors—Bower, Cotton, and Bower, for R. H. Jackson, for the objectors; Woosnam and Smith, for Boydell and Taylor, for the justices; Cunliffe and Davenport, for Churton, for the appellant.]

Chan. Div. }
(Wright, J.) }

1898.
April 21.

IN RE WAVERLEY TYPEWRITER (LIMITED).
Company—Winding up—Priority of debts.
Preferential Payments in Bankruptcy Amendment Act, 1897, held not retrospective.

In this case the commencement of the winding up of the company and the commencement of a debenture-holders' action against it both took place before July 15, 1897, the date when the Royal Assent was given to the Preferential Payments in Bankruptcy Amendment Act, 1897 (60 and 61 Vict., c. 19); and the question which now arose for decision was whether the Act applied, or only applied in cases where liquidation commenced after July 15, 1897. The Act is silent as to the date of its coming into operation. It gives priority, in respect of workmen's wages and other classes of debts mentioned in section 1 of the Preferential Payments in Bankruptcy Act, 1888, over the claims of debenture and debenture stock holders having a floating charge created by a company.

Mr. C. T. Mitchell was for the plaintiff in the debenture-holders' action; and Mr. Percy F. Wheeler for the workmen claiming priority.

MR. JUSTICE WRIGHT delivered judgment to the effect following. This case is very much on the line, but on the whole I think the Act of 1897 is not retrospective. The reasons for my opinion are two. *Prima facie* the Act is not retrospective, although the terms of section 2 are ambiguous. And, having regard to the terms of section 3, *prima facie* that provision is prospective. The observations of Lord Selborne on "Main v. Stark" (L.R., 15 App. Cas., 384) support the contention that the Act is not retrospective, and the case of "In re Joseph Suche and Co." (L.R., 1 Ch. D., 48) is a strong one in support of the same view. In the case last mentioned Sir George Jessel went out of his way to decide as he did. He said in his judgment:—"Since this question came last before me I have consulted several of the other Judges," and, referring to section 10 of the Judicature Act, 1875, he said, "I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any winding up which had been commenced before the Act came into operation. I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule—namely, that where enactments merely affect procedure and do not extend to rights of action they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration, not merely in procedure, but in the right to prove for a debt, which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a company in liquidation." In this case the Legislature has interfered with the rights of debenture-holders if they have not taken steps to realize their securities before the passing of the Act, but it has not gone so far as to interfere with their rights when they have already taken those steps. The Act of 1897 seems to form part of the Act of 1888, which in terms only applies where a winding up has commenced after the commencement of the Act. The case of "In re Anglo-French Co-operative Society" (60 Law Times Rep., 754) turned on the particular language of a different

*Reported by F. EVANS, Esq., Barrister-at-Law.

statute. No such words occur in the Act of 1897, and in this case I must hold that the workmen are not entitled to the priority which they claim.
[Solicitors—John H. Mote and Son; Sharn, Roscoe, Massey, and Co.]

Q.B. Div. (Wills and)
Kennedy, JJ.) }

1898.
April 21.

HORNER V. LEWIS.*

Medical Practitioner—Fees—Coroners Act, 1887, sec. 22 (2)—"Public hospital," what is.

This was an appeal from a County Court raising a question as to the right of a medical officer of a cottage hospital to a fee for a *post-mortem* examination of a patient made by order of a coroner.

Mr. F. Marshall, Q.C., and Mr. Samuel Fleming appeared for the plaintiff, the appellant; Mr. Naldrett (Mr. Macmorran, Q.C., Mr. Braxton Hicks with him), for the defendant.

The appeal was from the decision of the County Court Judge at the Brentwood County Court. The plaintiff's claim was for two guineas, fees alleged to be due to him under section 22 of the Coroners Act, 1887 (50 and 51 Vic., c. 71), for making a *post-mortem* examination by order of the coroner for East Essex (the defendant in the action) and for attending the inquest under subpoena to give evidence as a medical witness. The facts were these. On August 25 the defendant held an inquest at the Leyton, Walthamstow, and Wanstead Children's and General Hospital at Walthamstow on the body of a child aged seven months who had died in the hospital on August 22. The plaintiff, Dr. Charles Julian Horner, is honorary medical officer to the hospital, and receives no remuneration for it either by way of fees or honorarium or otherwise. He attended on the deceased while a patient in the hospital, and by order of the coroner made the *post-mortem* examination, and attended at the inquest under a subpoena and gave evidence as to the condition of the child when she was brought into the hospital and as to the cause of death ascertained by means of the *post-mortem* examination. He applied for his fees to the coroner, but none had been paid to him, and the coroner based his refusal on section 22 (1) and (2) of the Coroners Act, 1887. The case was brought to obtain a decision on the question in order that, if the money were payable, the coroner might obtain the payment from the county council. The action was a friendly action, and it was agreed that each party should pay their own costs. The hospital was founded in 1878. It was for the free admission and relief of patients, irrespective of creed and party, from all parts of Leyton, Walthamstow, and Wanstead; and in accordance with the deed of gift of the freehold house and grounds known as Holmcroft for the purposes of a hospital, at least two-thirds of the number of beds were to be reserved for children under 16 years of age. By one of the rules patients from Leyton, Walthamstow, and Wanstead were to be admitted by a governor's letter free of charge. Patients from neighbouring parishes might be admitted by governor's letters and a payment of not less than 5s. per week. Section 22 of the Coroners Act, 1887, provides that a legally qualified medical practitioner who has attended at a coroner's inquest in obedience to a summons of the coroner under this Act shall be entitled to receive such remuneration as follows—namely, for making a *post-mortem* examination, two guineas; and for attending to give evidence, two guineas. The material subsection

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

(2) of the section is as follows:—"Where an inquest is held on the body of a person who has died in a county or other lunatic asylum or in a public hospital, infirmary, or other medical institution, whether the same be supported by endowments or by voluntary subscriptions, the medical officer whose duty it may have been to attend the deceased person as a medical officer of such institution as aforesaid shall not be entitled to such fee or remuneration. The County Court Judge held that the fee was not recoverable.

MR. MARSHALL said there were two questions—(1) Was the Cottage Hospital a public institution within the section; (2) was the plaintiff a medical officer of the institution within the section, he being a purely honorary officer. The Act of 1887 was a reproduction in substance of 6 and 7 Will. IV., c. 89. At that date cottage hospitals were not in existence. The hospital was a small institution, and only about ten beds would be available for adults, the rest were devoted for children. It could not be called a public institution. The plaintiff was not a medical officer within the section. In a cottage hospital there was no regular paid house surgeon always there. There was no legal duty on the plaintiff, who received no remuneration for his services, to attend to the deceased. He did not, therefore, come within the section.

The COURT dismissed the appeal, holding that the institution was a public hospital, and the plaintiff was a medical officer of such institution whose duty it was to attend on the deceased.

MR. JUSTICE WILLS said the question was not whether one liked or disliked the effects of the Act of Parliament which had to be interpreted. He regretted that a medical man should be obliged to perform duties without receiving payment for them, but that would not affect his decision. There was no doubt that this hospital must be considered a public hospital within the statute. He would not attempt to define the line between public hospitals and others, but in connexion with this hospital there was a published list of governors and subscribers, and there was a medical staff, annual meetings were held, patients were admitted by governors' letters, and all other elements were present which were found in any of the great London hospitals, which no one would deny were public hospitals. It was true the patients were restricted to inhabitants of a certain area. That, however, did not prevent its being a public hospital. It was the case with certain of the great hospitals. The next question was whether the plaintiff was a medical officer whose duty it was to attend on the deceased within the section. It was said that he had no legal duty to attend. But it was clear that it was his duty, a duty of imperfect obligation, it was true, to do so. That duty brought him within the section. There could be no doubt that he was a medical officer of the hospital. He was that none the less because he was not paid for it.

MR. JUSTICE KENNEDY concurred. He thought the subscribers to the hospital would be much surprised if they heard the hospital described as a private hospital. It was a public hospital notwithstanding the fact that there was a limited area from which its patients were to be derived. On the second point it was obvious on the face of the documents that the plaintiff was a medical officer of the hospital. It was clearly his duty, having accepted that unpaid office, to attend on the deceased. To put it negatively, it would have been contrary to his duty not to have attended. If in 1887, when the Act was passed, it had been intended to provide that unpaid officers should be excluded from the proviso of section 22 (2), it would have been easy to have added some words to that effect. The appeal must be dismissed.

[Solicitors—Langhams, for the defendant; Hampsons, for the plaintiff.]

Court of Appeal (Lindley, M.R.,
Rigby and Collins, L.J.J.)

1898.
April 22.

HOWLAND V. DOVER HARBOUR BOARD.*

Nuisance—What amounts to—Noise and vibration—Interference with comfort and trade of plaintiff.

This was an appeal from a decision of Mr. Justice Romer reported in *The Times* of December 6. The action was brought by a lady who was the owner of a private hotel in Waterloo-crescent, Dover, known as Connaught-house, for an injunction and damages in respect of nuisance and injury caused by the defendants' works on an open space immediately in front of her premises. It appeared that the defendants, who were the Harbour Board and their contractor, were using the space for works in connexion with the construction of the new breakwater, and the plaintiff complained of the noise and vibration, &c., which, she said, had caused cracks in the fabric of her house and driven away her customers. Mr. Justice Romer, although satisfied that the plaintiff had suffered considerable annoyance, held that it did not amount to a nuisance at law, and he dismissed the action. The plaintiff appealed, but she did not either in the Court of first instance or upon the appeal insist upon her right to an injunction.

MR. FARWELL, Q.C., and MR. W. H. COZENS-HARDY were for the plaintiff; MR. LEVETT, Q.C., and MR. GATEY were for the Harbour Board; and MR. NEVILLE, Q.C., and MR. MULLIGAN, Q.C., for the contractor.

The COURT allowed the appeal.

The MASTER of the ROLLS thought that the learned Judge had minimized the evidence of nuisance adduced on behalf of the plaintiff. The Harbour Board were authorized by Act of Parliament to construct a new harbour, and for this purpose huge blocks of concrete were required. The contractor had obtained from the Harbour Board a piece of land where he manufactured these blocks of concrete, and he also obtained from them the right to use the piece of vacant land in front of the plaintiff's house for the purpose of storing the concrete blocks. The mere fact that this vacant piece of land was turned into a stoneyard caused a considerable amount of damage to the plaintiff's business as an hotelkeeper, but for that she had no right to damages because there was no actionable injury. The contractor had done no more than was reasonably necessary for the purpose for which the land was acquired. It was necessary, in order to move these heavy blocks, to lay down a tramway and to employ steam-engines and steam-cranes, and the result of all this had been very serious to the plaintiff. Quite apart from the loss of amenity arising from the change of the character of the land there had been a substantial interference with the comfort of the house as a dwelling-house. The use of this piece of land for the defendants' works necessarily involved an unusual amount of smoke and dirt and noise and vibration. The principles to be applied in a case of this kind were laid down by Lord Justice Mellish in "*Ball v. Ray*" (8 Ch., 487) as follows:—He said,—"I entirely agree with what has been said by the Lord Chancellor, that when, in a street like Green-street, the ground floor of a neighbouring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a pianoforte from a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises we must reasonably expect and must to a considerable extent put up with. A noise of this kind, if it

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

materially disturbs the comfort of the plaintiff's dwelling-house and prevents people from sleeping at night, and, still more, if it does really and seriously interfere with the plaintiff's trade as a lodging-house-keeper, beyond all question constitutes an actionable nuisance." Applying that test, his Lordship thought that the evidence showed clearly and distinctly that both the comfort of the plaintiff's house and also the plaintiff's trade as a lodging-house-keeper had been seriously interfered with by the defendants' operations, quite apart from the annoyance which the plaintiff had suffered by having a stoneyard next her house instead of a vacant piece of land. Then the question was, who was liable? The injunction had been waived, and it was a question of damages only. The contractor was liable, of course; but were the board liable also? If a contractor was employed to do a piece of work the employer was not liable for what might be called collateral negligence on the part of the contractor. But here there was no question of negligence. The principle upon which the board were responsible was that they had allowed the contractor to use this piece of land for the very purpose to which he applied it, and the necessary consequence of that, in the ordinary business sense of the word "necessary," was a nuisance. In other words, the board committed the nuisance by their contractor. The appeal should be allowed, and judgment should be given for the plaintiff against both defendants, the amount of the damages to be assessed by an official referee.

LORDS JUSTICES RIGBY and COLLINS gave judgment to the like effect.

[Solicitors—Gedge, Kirby, and Millett; Bower, Cotton, and Bower, for Stilwell and Harby, Dover; Batten, Proffitt, and Scott.]

Chan. Div. }
(Romer, J.) }

1898.
April 22.

IN RE THE REGISTERED TRADE MARKS NO. 27,850 AND NO. 72,790 OF JOHN BATT AND CO.*

Trade Mark—Registration—Trade mark registered without intention to use—Rectification of register.

This case raised a novel point under the Patents and Trade Marks Acts. It was a motion on behalf of Messrs. Carter and Co., the well-known seed merchants, for an order that the register of trade marks might be rectified by removing therefrom the above-mentioned trade marks, being figures of butterflies. The mark No. 27,850 was registered by the respondents, Messrs. Batt and Co., on March 13, 1882, in several classes of goods, including the whole of Class 42. The mark No. 72,790 was registered by them on February 16, 1888, in class 42. Class 42 comprises substances used as food, or ingredients in food. In 1837 Messrs. Carter and Co. applied to register certain butterfly marks in Class 42 for oats, and subsequently received from the Comptroller a notice calling attention to the above-mentioned marks of Messrs. Batt and Co., and intimating that, in accordance with section 72 of the Patents, &c., Act, 1883, as amended by section 14 of the Act, 1888, Messrs. Carter and Co.'s marks would appear incapable of registration, and that their application could not be proceeded with. Section 72 of the Act of 1883, as amended, is as follows:—"Except when the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the Comptroller shall not register in

respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods." After communications between Messrs. Carter and Co. and Messrs. Batt and Co., notice of the above motion to expunge was given by Messrs. Carter and Co. and also notice of motion for an order on the Comptroller to proceed with Messrs. Carter and Co.'s application to register. The applicants based their claim on the ground that the respondents had never used the two marks in question for oats or any goods in Class 42 and never had any *bona-fide* intention of so using them, and it was asked that either the respondents' marks should be expunged or their registration limited so as not to cover oats. The respondents stated that they were exporters of and dealers in many kinds of goods, including articles of food, and that they had in fact used the said marks for certain articles of food, and they also denied that they had no *bona-fide* intention of using the marks for goods in Class 42, and submitted that if their marks were rightly registered there was no jurisdiction to remove them from the register on account of non-user.

Mr. Neville, Q.C., and Mr. J. Austen-Cartmell appeared for the applicants; Mr. Levett, Q.C., and Mr. Sebastian for the respondents and Mr. Ingle Joyce for the Comptroller.

MR. JUSTICE ROMER said that he took it to be clear that if persons registered new trade marks which they said they intended to use they must at the date of registration have a *bona-fide* intention of using these trade marks in respect of the goods for which they registered them. (See "*Edwards v. Dennis*," L.R., 30 Ch.D., 454, per Lord Justice Cotton, p. 474.) One could not help seeing the evils which might result from allowing trade marks to be registered broadcast, there being no real intention of using them or only an intention possibly of using them in respect of a few articles. The cost and inconvenience of such a practice would be very great, and it would lead in some cases to absolute oppression, for persons would be enabled to use the position they had got as registered owners of trade marks, which were not really *bona-fide* trade marks, for the purpose of trafficking in them and using them as weapons to obtain money from subsequent persons who might want to use *bona-fide* trade marks in respect of some classes of goods for which they found the bogus trade marks registered. In fact he was sorry to say that it appeared from the evidence given before him by several experts that such a system of traffic was carried on. These latter observations did not apply to the respondents. But they had registered over 40 trade marks in the year 1882. When he looked at the variety of these trade marks and the variety of goods against which they were registered it was at least difficult to suppose that there could have been a *bona-fide* intention on their part to use all these trade marks in respect of all the classes against which they were registered. With regard to the two marks in question he came to the conclusions of fact that there was no real user at any time before registration; that there had been no real user since registration in respect of the articles in Class 42, and that at the date of registration there was no *bona-fide* intention to use these trade marks for any of the goods in that class. He therefore ordered the two marks to be expunged and the respondents must pay costs of the motion to rectify. With regard to the other motion he ordered the Registrar to proceed with the application to register and that the applicants pay the Comptroller's costs on that motion.

[Solicitors—Taylor and Mann; Shepheards; The Solicitor to the Board of Trade.]

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

Q.B. Div. (Wills }
and Kennedy, JJ.) } 1898.
April 22.
LEICESTER COUNTY COUNCIL V. LEICESTER ASSESSMENT
COMMITTEE.*

Rating—Poor-rate—Rateability—Police—Chief
constable's residence—Exemption.

This was a special case stated under 13 and 13 Vict., c. 45, section 11, after notice of appeal against a poor-rate made on the chief constable's residence at Leicester. In 1867 the police premises, including the chief constable's residence, had been assessed to the poor-rate of St. Martin's parish, Leicester. The justices of the county appealed against the assessment, and a case ("Reg. v. St. Martin's, Leicester," L.R., 2 Q.B., 493) was stated for the opinion of the Court of Queen's Bench, which Court decided that the justices were not liable to poor-rates for such premises. Since then neither the justices nor the county council had been rated for the premises till the rate in question was made on April 3, 1897. The rate was only in respect of the portion of the police buildings used exclusively for residential purposes. The property belonging to the appellants comprise a building consisting in part of certain rooms occupied by the chief constable of the county in his official capacity for the purpose of residence. The rest of the building is occupied for ordinary police purposes, and comprise a strong-room for records, a police library, office for chief constable, office for superintendent and clerk, and office for recruits and public. The chief constable resides in the portion of the building occupied by him rent free, and it was a condition that he should reside there. His residence and the portions occupied for ordinary police purposes are not structurally severed and constitute one building. On April 1, 1889, by virtue of section 64 of the Local Government Act, 1888 (51 and 52 Vic., c. 41), the property of the justices, including the said premises, passed to and became vested in the county council. The police of the county of Leicester are inspected annually by a Government officer. If his report is satisfactory one-half of the cost of the pay and clothing for the preceding year is chargeable on the "Exchequer contribution account" in substitution of the grant previously made by the Exchequer.

Mr. E. W. Garrett (Mr. S. Everard with him) appeared for the appellants; Mr. Hugo Young and Mr. C. B. Marriott for the respondents.

Mr. GARRETT contended that no part of the premises should be rated. He referred to the case of "Reg. v. St. Martin's" (L.R., 2 Q.B., 493). It was clear that police offices were exempt. Was it possible to draw any distinction between residence by policemen and occupation for police purposes? "Reg. v. Stuart" (8 E. and B., 27, L.J., M.C., 81) showed that a wife and family might be included without the exemption being lost. He cited "Gambier v. Lydford" (3 E. and B., 346, 23 L.J., M.C., 69). There was a distinction drawn in some cases between a house within the walls and a house at some distance off. Here the residence was one with the police offices. He also cited "Martin v. West Derby Assessment Committee" (11 Q.B.D.) and "Reg. v. Lancashire JJ." (27 L.J., M.C., 209, E.B. and E.).

Mr. YOUNG, on the other side, contended that there was a distinction between the old cases and the present. For one thing the ownership had been transferred from the justices to the county council. Moreover, the Court of Appeal in 1896 had decided that in looking at a building used partly for Crown purposes and partly

for administrative county cases the building might be split up according to the purposes for which each portion was used. He submitted that these buildings might be divided up for rating purposes. He cited "County Council of Middlesex v. Assessment Committee of St. George's Union" ([1897] 1 Q.B., 64) and "Worcestershire County Council v. Assessment Committee of St. Nicholas, Worcester" ([1897] 1 Q.B., 480). The question for the Court was whether this portion was occupied for Crown purposes exclusively ("Greig v. University of Edinburgh," L.R., 1 H.L., 348).

The COURT allowed the appeal.

MR. JUSTICE WILLS said it was clear that premises used exclusively for police purposes were exempt from rating. The question here was whether the occupation by the chief constable was an occupation exclusively for police purposes. The chief constable was required to live there so that he might be always at hand ready to discharge his duty. In the learned Judge's view the chief constable's residence there was exclusively for police purposes. Now, did it make any distinction that his wife and family lived with him? It would be an absurdity to say so. A wife and family might practically be considered as a necessary appendage. The learned Judge appreciated the point that the old decisions had ceased to be conclusive because there had been a change in the possession, and the principle of severing one building into portions had been laid down. Premises occupied by the justices and therefore exempt might not be exempt when occupied by the county council.

MR. JUSTICE KENNEDY concurred.

[Solicitors—Field, Roscoe, and Co., for Whetstone and Frost, for the respondent; Kingsford, Dorman, and Co., for William Jesse Freer, Leicester, for the appellant.]

Court of Appeal (A. L. Smith } 1898.
and Chitty, L.JJ.) } April 23.

THE QUEEN V. LYON AND OTHERS.*

Licensing Acts—Licence—Notice of intention to
apply for—Validity—Application by secretary
of a company.

This was an appeal by Mr. H. R. Carter from an order of the Divisional Court (Mr. Justice Wright and Mr. Justice Darling) directing a writ of *mandamus* to issue to the licensing justices for the division of Lower Bramber, in the county of Sussex, commanding them to hear and determine an application by Thomas Skinner, the secretary to the Crawley and Horsham District Licensed Victuallers' Wholesale Supply Company (Limited), for a certificate to hold an excise licence to sell wines to be consumed off the premises at a shop, No. 15, East-street, Horsham. It appeared that at the general annual licensing meeting, held on August 28, 1897, Skinner applied for a certificate authorizing him to hold various excise licences, amongst others an excise licence to sell wine, in pursuance of the Act 23 Vict., c. 27, section 3, to be consumed off the premises at the shop in question. The application was opposed by Carter, and the justices refused it, there being a dispute as to the ground upon which the application was refused, it being stated by the present appellant that the justices refused the application upon the ground that Skinner was not a shopkeeper within section 3, which provides that "every person who shall keep a shop for the sale of any goods . . . shall . . . be entitled to take out a licence under

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

this Act to sell by retail . . . in such shop foreign wine not to be consumed on the premises where sold." It appeared that the company were the owners of the shop, and carried on business as grocers there. The licensing meeting was adjourned to September 25, when Skinner again applied for a certificate authorizing him to hold an excise licence to sell wine to be consumed off the premises at the shop in question, on this occasion inserting in the notice of the application, after his signature, the words "Secretary for the Crawley and Horsham District Licensed Victuallers' Wholesale Supply Company (Limited)," and he produced an authority from the company to apply for the certificate. The justices again refused the application, the present appellant stating that the application was refused upon the ground that it was an application by Skinner for a licence to himself, and not to the company, the mere addition to his signature, stating that he was secretary of the company, not being sufficient to make it an application on behalf of the company. In a letter written by the clerk of the justices it was stated that the ground of the refusal was informality in the notices of intention to apply for the licence. The Divisional Court made the rule absolute for a *mandamus* as above, holding that the justices, as appeared from the letter written by their clerk, had not heard the application on its merits, but had decided it upon a preliminary point and had decided that point wrongly, and that therefore the justices must hear and determine the application. Carter appealed.

Mr. BOWEN ROWLANDS, Q.C., and Mr. FOULKES GRIFFITHS, for the appellant, contended upon the affidavits that the justices had gone into the merits of the case, and had refused the application upon the ground that the notice of Skinner's intention to apply was given on behalf of himself, he not being qualified as a shopkeeper, and that the addition of the words after his signature, "Secretary for" the company, did not make it an application on behalf of the company. That was what the justices meant when they said that they had decided upon the ground of an informality in the notice. The *mandamus* was therefore wrongly issued.

Mr. BOXALL and Mr. W. W. GRANTHAM, for the respondent, contended that the application was in proper form and complied with all the requirements of section 7 of the Wine and Beerhouse Act, 1869. It was not necessary that Skinner should describe himself as a shopkeeper in the application. He had properly applied for a licence for himself, as a company could not apply for or hold a licence. Further, by stating that he was secretary "for" the company he showed that he was applying on behalf of the company. They referred to "Reg. v. Justices of Over Darwen" (39 L.T., 444). The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that he had no doubt that the justices had declined jurisdiction upon a preliminary point—that is, upon an informality in the notice. They held that the notice was bad. The question therefore was whether this was a bad notice. He would only take the second notice. Was this notice so obviously bad that the justices could refuse to proceed further with the matter? The Crawley and Horsham District Licensed Victuallers' Wholesale Supply Company (Limited) were grocers and carried on business at the shop in question. They wanted a wine licence under section 3 of 23 Vict., c. 27. The limited company could not ask for a licence for themselves. They had a secretary named Skinner, and they sent him to make the application, and he gave the notice in question. In his opinion, the true construction of this notice might well be that Skinner on behalf of the company was applying

for this wine licence. The justices decided that this notice was bad because Skinner was not a shopkeeper. He could not think that this notice necessarily led to the conclusion that Skinner would apply for the licence for himself. It might fairly mean that he was applying on behalf of the company. The notice, therefore, was not necessarily bad. The *mandamus* accordingly must issue. All the points might be raised before the justices. One point, which was taken here, was that the secretary of the company could not apply for the licence. His Lordship would not decide that point, but he thought that a secretary could apply for a licence on behalf of a limited company.

LORD JUSTICE CHITTY concurred. In his opinion, this notice was sufficient. It was conceded that if it was stated in the body of the notice that Skinner was applying for the licence for and on behalf of the company the notice would be good. One must not scrutinize these notices as closely as one used to do the old forms of pleading. Skinner added to his signature "Secretary for" the company. The right conclusion was that Skinner there stated that he was applying on behalf of the limited company. It was conceded that the company could not hold the licence. His Lordship was not prepared to say that the company could not apply by Skinner, their duly authorized agent, the notice stating that he applied on their behalf. He did not decide that point, but left it open. The question also, if it should arise, whether Skinner did keep a shop within the meaning of section 3 of the Act, was also left open for the justices to deal with.

[Solicitors—Prince and Co., for the appellant; Morrisons, for Coteching, Horsham, for the respondent.]

Q.B. Div. (Grantham }
and Kennedy, JJ.)

1898.
April 23.

HIGH WYCOMBE CORPORATION V. THAMES CONSERVATORS.*

River—Thames Conservancy—Pollution of river
—"Wilfully" suffer, meaning of—Thames
Conservancy Act, 1894, sec. 92.

This was a case stated by the justices of the borough of Chipping Wycombe, otherwise High Wycombe, before whom the appellant corporation were charged, on information preferred at the instance of the respondents, for that they on December 7, 1897, did unlawfully wilfully suffer a large quantity of washing or other substance produced in the making or supplying of gas to flow or pass into the Wye stream, a tributary of the River Thames, in the borough of High Wycombe, contrary to section 92 of the Thames Conservancy Act, 1894. The facts were substantially as follows:—The appellants, as the urban authority of their borough, have control of the sewage outfall works and of the sewage farm connected therewith. The sewage outfall works consist of two tanks, together capable of holding 34,250 gallons, and a sludge pit. The sewage passes into the tanks, in which the sludge is deposited, and from which the sludge is from time to time removed into the sludge pit. The sewage water passes from the tanks through pipes called "carriers" to and over some one or more of the several portions into which the sewage farm is divided, for the purposes of filtration and cultivation, which portions are called "lands." The sewage farm comprises 19 such lands, separated from each other by open channels. The water percolates through the earth of these lands and ultimately passes into the Wye stream.

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

There are 11 such "lands" on the north side and eight on the south side of the Wye stream. These "lands" are used for the purification of the sewage water by turns, several being so used at one time, while others which have been previously so used are allowed to rest. On the morning of December 7, 1897, a large quantity of an offensive liquid substance from the works of the High Wycombe Gas Company, which works are situated nearly one-and-a-half miles above the sewage works, was discharged into the sewers. The substance was highly offensive, and largely consisted of liquid ammonia. The offensive substance began to reach the tanks about 10 o'clock in the morning, and continued to flow until about noon, passing continuously out of the tanks into the "carriers," and thence into the soil or earth of the five "lands" used on the date in question, as is mentioned below, for arresting and purifying sewage matter. It was of rather less specific gravity than the bulk of the sewage, and tended to rise to the surface and to overspread the surface as a film. About half-past 10 the same morning the attention of the borough surveyor was called to a highly offensive smell proceeding from a manhole of the sewers in the High-street of the borough, and, in consequence thereof, he later in the morning visited the sewage farm, which is situate within the borough, but he did not reach the farm till about noon, nor did he give the foreman any instructions as to dealing with the offensive matter. About a quarter to 1 he went to see the manager of the gas company, but nothing was said as to the proper manner of disposing of the substance. On the same morning the foreman in charge of the sewage outfall works was on duty as usual, and gauged from time to time the sewage overflow. He noticed an unusually offensive smell from the sewage, and scattered disinfectants on the ground near the tanks, but made no change in the treatment of the sewage itself, or the outflow thereof from the tanks and through the "carriers" to and over such "lands" of the sewage farm as were then in use. On that morning five "lands" were in use for the purification of the sewage water. The lands were those used for the purifying ordinary sewage on the day in question, and there would have been no difficulty in passing the offensive matter over more "lands" than were used. This was the first time such an event had happened, and the foreman called the attention of the borough surveyor to it when he came down at noon, but took no steps to communicate with him or obtain his instructions previously, although the liquor had been coming down for two hours or thereabouts. Large quantities of dead earthworms were observed on the surface of the five "lands" in use on the morning of December 7 by the conservancy inspector when he visited the farm two days afterwards. Large quantities of the offensive substance also passed into the Wye stream. A large number of fish in the stream were killed by it. If the sewage water charged with such offensive substance had been distributed over a larger number of "lands" its offensive quality would have been mitigated. The chief inspector of the Thames Conservancy, who was called for the prosecution, stated that the foreman in charge of the sewage farm should, in the circumstances of the case, have consulted his superior officer, the borough surveyor. The borough surveyor and the foreman of the sewage works stated that no special precautions were taken to deal with the offensive matter, although each recognized its extremely offensive character. At the close of the case for the prosecution it was submitted by counsel for the appellants that no offence within the statute had been made out, but the justices decided that there was evidence of such offence, and called upon the appellants to proceed with their case. On behalf of the

respondents, it was contended that the appellants had wilfully suffered the offensive substance to flow or pass into the Wye stream within the meaning of the above-named section. On behalf of the appellants, it was contended—(1) that the offensive substance had been unlawfully and wrongfully discharged into their sewers by other parties, and that the appellants were not liable under the Act for the consequence of such unlawful act of other parties; (2) that the foreman of the sewage outfall works and the borough surveyor had been taken by surprise; that, in dealing with the offensive matter, no precaution had been neglected which was reasonable or possible under the circumstances, which circumstances were of an unusual character; (3) that the word "wilfully" ought to be construed as wantonly or causelessly; and (4) that, in order to be brought within the section, there must have been some exercise of volition on the part of the appellants or the borough surveyor or the foreman of the sewage works; that no volition had, in fact, been exercised, the appellants' officers having been passive throughout the proceedings complained of, and the proceedings having been involuntary so far as concerned them. The justices convicted the appellants, and inflicted a fine of £2, and stated the present case, the question for the Court being "whether the appellants did, by reason of the facts proved, wilfully suffer a large quantity of washing or other substance produced in the making or supplying of gas to flow or pass into the Wye stream, a tributary of the River Thames, in the borough of High Wycombe, contrary to the provisions of section 92 of the Thames Conservancy Act, 1894." It appeared from the statements of counsel that the gas company had been proceeded against under the Act by the respondents in respect of the occurrence in question; and that they had pleaded guilty and been fined. Section 92 of the Thames Conservancy Act, 1894, provides that "If any person without lawful excuse . . . wilfully causes or suffers any washing or other substance produced in making or supplying gas or any other offensive matter, whether solid or fluid, to flow or pass into the Thames or into any tributary . . . he shall for every such offence be liable to a penalty not exceeding £20, and to a daily penalty not exceeding £10."

Mr. Bray, Q.C., and Mr. David appeared for the appellants; and Mr. J. Eldon Banks for the respondents.

The cases of "Smith v. Barnham" (L.R., 1 Ex.D., 419); "Lewis v. Great Western Railway" (L.R., 3 Q.B.D., 195); and "Re Young and Harston's Contract" (L.R., 31 Ch.D., 168) were referred to in the course of the argument.

The COURT allowed the appeal.

MR. JUSTICE GRANTHAM said the case was anything but free from difficulty, and was very near the line. That the offensive matter was not wilfully sent into the stream by the appellants there could be no doubt. It was wilfully sent by the gas company, who had been properly convicted and fined. But for some reason the Conservancy had not been content with the conviction of the gas company, and had proceeded against the local authority for what was at best a mere error of judgment on the part of their officers. He should have thought the proceedings in any case unnecessary; but that was immaterial; the question was whether the offence charged against the local authority had been made out. Looking at the facts, however, he thought the respondents had failed to show that the appellants had "wilfully" suffered the deleterious matter to pass into the Thames or any tributary. What had happened was that unexpectedly the foreman in charge of the sewage farm at 10 in the morning found that the sewage was more offensive than usual. He did not

know what caused it; he might have suspected the reason, but there was nothing to show that he knew. He at once applied disinfectants to mitigate the smell. At that time there were five "lands" in use for deodorizing and filtering the sewage water; and it had been found by experience that five "lands" in use at one time sufficed for the sewage of the town. The Court must assume that the foreman supposed that the five "lands" were sufficient to deodorize and filter the whole of the sewage on the day in question though it was more offensive than usual. It did not appear that the sewage was greater in quantity than usual; if it had appeared that the sewage was much increased in quantity there would have been more ground for contending that the foreman ought to have known that he must use more "lands." But, as the facts stood, there was nothing to show that the foreman ought to have known that more "lands" ought to have been brought into use. The magistrates had found that if the sewage water had been distributed over more "lands" its offensive quality would have been mitigated; therefore, all that would be suggested against the appellants was that they might have mitigated the evil. But in his Lordship's opinion it did not follow because the authority did not do what might have mitigated the offensive quality of the deleterious substance that they were guilty of wilfully suffering that substance to pass into the stream. Without questioning the authority of "Smith v. Barnham" (L.R., 1 Ex. D., 419), though he would not be disposed to go as far as Lord Justice Bramwell did in that case, his Lordship thought that to establish a "wilful" suffering more must be proved than one omission to do something which science showed might have mitigated the evil. The appeal therefore must be allowed with costs, and the conviction quashed.

MR. JUSTICE KENNEDY delivered judgment to the same effect.

[Solicitors—Alfred Cox and Son, for A. J. Clarke, High Wycombe, for the appellants; the Solicitor to the Thames Conservancy, for the respondents.]

Q.B. Div. (Grantham and)
Kennedy, J.J.)

1898.
April 23.

BLENKINSOP V. OGDEN AND CO.*

Master and Servant—Neglect to fence dangerous machinery—Factory and Workshop Act, 1878, sec. 82—Injury to servant.

This was a case stated by Horace Smith, Esq., a metropolitan police magistrate, on the hearing of an information and complaint preferred by the appellant, one of her Majesty's Inspectors of Factories, against the respondents, the occupiers of a factory, under section 82 of the Factory and Workshop Act, 1878. That section provides that "if any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced . . . the occupier of the factory . . . shall be liable to a fine not exceeding £100, the whole or any part of which may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines." The present proceedings were taken under the section in respect of an accident occurring to a boy named Wright, who was employed in the respondent's factory, and who, while working at a machine there, caught his hand in the

wheels of the machine and lost a finger. The learned magistrate found that the machine in question was not securely fenced, but that the injury to the boy was caused by his own carelessness and wilful disobedience to orders, and that if he had done as he was told the accident would not have happened; and the learned magistrate was of opinion that as the injury was caused by the boy's own carelessness and wilful disobedience to orders the respondents were not liable under the section, and he dismissed the summons, subject to the present case.

MR. HENRY SUTTON appeared for the appellant; and Mr. Ruegg, Q.C., and Mr. Forman for the respondents. The COURT allowed the appeal.

MR. JUSTICE GRANTHAM said he had no doubt that the learned magistrate was wrong and ought to have inflicted a fine. It had been argued that the section was only applicable where the injury was not due to negligence on the part of the person injured, but he would not adopt that construction. If there were a hole in a road and a boy playing in the road, carelessly it might be, fell into the hole and were killed the accident would be in consequence of the existence of the hole. Again, if a man out of his mind laid his head on a line of rails and was killed by a passing train the death would be in consequence of the passing of the train. So where injury resulted from a neglect to fence machinery the injury was a consequence of the neglect, though there might have been negligence on the part of the person injured. The object of the section was to punish persons who neglect to fence machinery where injury or death ensues, and there was no reason for adopting the narrow construction suggested.

MR. JUSTICE KENNEDY delivered judgment to the same effect.

[Solicitors—The Solicitor to the Treasury, for the appellant; B. Webb, for the respondents.]

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Morris, and } 1898.
James of Hereford) April 25.

THE LONDON TRAMWAYS COMPANY (LIMITED) V. THE LONDON COUNTY COUNCIL.*

Practice—Appeal—House of Lords—Jurisdiction. It is an inflexible rule that the House of Lords will not review its own decisions.

Their Lordships met for the despatch of judicial business this morning for the first time since the Easter recess, for which they adjourned on April 1.

This was an appeal from the Court of Appeal, of which the ostensible purpose was to obtain the reversal of the decision of the Court of Appeal with respect to the basis upon which the undertaking of the appellants was to be acquired and paid for by the respondents. But the only question argued, and that upon which their Lordships gave their decision, was whether the House of Lords was bound by its former judgments in the cases of "Edinburgh Street Tramways Company v. Lord Provost and Magistrates of Edinburgh" and of "London Street Tramways Company v. the London County Council." These decisions were pronounced on July 30, 1894, and were reported in 10 *The Times* Law Reports, 625-630; [1894] A.C., 456; 63 L.J., Q.B., 769. On those occasions the House was constituted of Lord Herschell (then Lord Chancellor), Lord Watson, Lord Shand, and Lord Ash-

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

bourne. The latter dissented from the judgment of the majority.

SIR R. T. REID, Q.C., and Mr. SEWARD BRICE, Q.C. (Mr. J. R. Paget with them), whilst they contended that the present appeal was distinguishable from the others, urged that the House was not bound to follow such construction of the language of section 43 of the Tramways Act, 1870, as was adopted in the previous cases. In support of their argument they quoted a *dictum* of Lord Eldon in "Perry v. Whitehead" ([1801] 6 Vesey, 547), that a rule of law laid down by the House of Lords must remain until altered by the House of Lords, thereby implying that the House was not bound by its own decisions. In "Bright v. Hutton" ([1852] 3 H.L. Cas., 341-388), in "Wilson v. Wilson" ([1854] 5 H.L. Cas., 40; 23 L.J., Ch., 697), and in "Scott v. Maxwell" (1854) (1 Macq., 791), Lord St. Leonards claimed for the House the same inherent power of correcting an error into which it might have fallen which was enjoyed by other tribunals. But they admitted that in other cases which they cited a contrary view had been expressed by noble and learned lords. If the House should have interpreted a statute contrary to its real meaning, the right view was that the statute had by anticipation repealed the construction of the House, and the House might in a subsequent case correct its own error.

Mr. Freeman, Q.C., and the Hon. Alfred Lyttelton, for the respondents, were not heard.

The LORD CHANCELLOR, in moving that the appeal should be dismissed with costs, said their Lordships were much indebted to the learned counsel for the appellants for the candour with which they had argued the appeal. It had been admitted that there was upon this very question a decision of their Lordships' House. For his own part, he was prepared to adhere to the language held upon this question by Lord Campbell, and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford, and others, to the effect that a decision of that House once given upon a point of law was conclusive upon the House itself, and that it was impossible to raise such question again. There had been no real decision to the contrary of the practice which had now been settled for centuries. It was not competent to rehear and reargue a question which had already been decided. The only trace of authority in favour of the appellants were certain *dicta* of Lord St. Leonards, and he entertained some doubt whether that noble and learned lord was satisfied as to the logic of his own reasoning. It would be absurd to disregard the whole current of authority and to permit each litigant in turn to reargue a question already decided. He did not deny that cases of individual hardship might arise; there might be decisions contrary to abstract justice, but the evil in such a case was not comparable to the disastrous consequences which would arise in the dealings of mankind if settled questions were always open to review. There could be no *finis litium* if such a practice were permitted. It had been ingeniously argued that the House might have omitted to notice the existence or the repeal of a particular Act of Parliament. But that would be a pure question of fact and had no relation to the proposition that the same question of law might, after decision by the House of Lords, be reopened and reargued. The long-established principle, upon which their Lordships would do well to act, was that a decision of that House upon a question of law was conclusive, and that nothing but an Act of Parliament could set that right which it was alleged the House had decided wrongly.

The other noble and learned lords concurred, and the appeal was dismissed with costs.

[Solicitors—Murray, Hutchins, and Co. for appellants; W. A. Bland, for the respondents.]

Court of Appeal (A. L. }
Smith and Chitty, L.J.J.) }

1898.
April 25.

LONDON AND NORTH-WESTERN RAILWAY COMPANY v. DONNELLAN.*

Railway—Charges—Siding rent—Arbitration of "differences"—London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891.

Decision of Divisional Court (*ante* p. 290) reversed.

This was an appeal by the defendant from an order of a Divisional Court (Mr. Justice Wright and Mr. Justice Darling) reversing the decision of the Deputy County Court Judge at Crewe, reported *ante*, p. 290. The action was brought to recover siding rent. The defence was that the County Court had no jurisdiction, on the ground that under the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 and 55 Vict., c. cxxi.), the jurisdiction was given to an arbitrator to be appointed by the Board of Trade. The County Court Judge held that he had no jurisdiction, and entered judgment for the defendant, thinking that the reasonableness of the charge should be determined by an arbitrator. He found that the defendant always refused to pay the siding rent claimed and in fact had never paid it, and that he had always told the company's servants that it was "exorbitant and unjust." It appeared that in January, 1895, the railway company had issued a circular to all their traders, including the defendant, stating that a charge would be made for the accommodation of trucks when standing on the company's sidings for more than four days. Evidence was given that a charge of 8d. a day per truck after four days had elapsed was made on all traders over the system of the London and North-Western Railway Company. The same charge was made by other railway companies. By section 5 of the schedule to the order scheduled to the above Act "the company may charge for the services hereunder mentioned:—when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that when, before any service is rendered to a trader, he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience." Among the services specified were—"(iv.) the detention of trucks or the use or occupation of any accommodation, before or after conveyance, beyond such periods as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignee or consignee to give or take delivery thereof." In the present case the trucks, which belonged to the defendant, remained on the company's sidings for more than four days, and the company claimed 8d. a day per truck after the first four days. The Divisional Court held that the County Court Judge was wrong and gave judgment for the amount claimed.

Mr. T. W. CHITTY (Mr. Gilchrist Alexander with him), for the defendant, contended that the defendant having disputed the reasonableness of the amount of the charge, as the County Court Judge had found, a "difference" had arisen within the meaning of section 5, and the tribunal appointed to settle that difference was an arbitrator appointed by the Board of Trade. If the company rendered the service they could charge a

reasonable sum for that service, and what was a reasonable sum was a matter for arbitration, each case depending upon its own facts. The decision of the Divisional Court was therefore wrong.

Mr. C. A. RUSSELL, Q.C., and Mr. J. NOBLE, for the plaintiffs, contended that there must be a difference as to the reasonableness of the amount of the sum charged so as to oust the jurisdiction of the Court. That was the only question for the arbitrator. The question as to the time when the charge was to commence was not a matter for arbitration any more than the question whether the company could make any charge at all. No difference had arisen in this case as to the amount charged. The County Court Judge had not found that there was such a difference. The defendant was disputing his liability to pay any charge at all, and that was not a difference to be determined by arbitration within the meaning of the section. The right of the company to make a charge did not depend upon this section; it existed independently of the section; and therefore there was no "difference" within the section. The claim of the company was not made under the section, and the defendant objected to the charge *in toto*. They referred to the Railway and Canal Traffic Act, 1888, section 24.

The COURT said that they would hear the next case before giving judgment.

LONDON AND NORTH-WESTERN RAILWAY COMPANY V. BILLINGTON (LIMITED).

This case raised the same question as the last. The County Court Judge at Chester had, however, found in this case that the defendants knew of the charges and accepted the services, though protesting against the charges, and made no complaint as to the reasonableness of the charges so as to enable the company to apply to the Board of Trade for the appointment of an arbitrator, nor did the defendants themselves apply for the appointment of an arbitrator, and that therefore the defendants must be taken to have agreed to the charges. He therefore gave judgment for the plaintiffs, and the Divisional Court affirmed his judgment.

Mr. T. W. Chitty and Mr. Gilchrist Alexander appeared for the defendants; Mr. C. A. Russell, Q.C., and Mr. W. J. Noble appeared for the plaintiffs. The COURT allowed both the appeals.

LORD JUSTICE A. L. SMITH said that the question was what was the true construction of section 5 of the Provisional Order. The Provisional Order came into existence under section 24 of the Railway and Canal Traffic Act, 1888, which dealt with the revised classification of traffic and schedule of rates, and subsection 10 made the rates and charges, specified in a Provisional Order and confirmed by Act of Parliament, those which the company should be entitled to charge and make. Therefore the rates and charges which the company were entitled to charge and make were those specified in the Provisional Order now before the Court. In his opinion, as regards sections 5, 6, 7, and 8 of the order, the Legislature had enacted that differences arising thereunder should be settled by arbitration, and not taken into a Court of law. Decisions of the Divisional Court had been cited, where Mr. Justice Mathew and Mr. Justice Wright seemed to think that the reasonableness of the amount of the charges was the only matter for arbitration. With great respect to those learned Judges he could not think so. Section 5 had a number of subsections, in each of which the words "services rendered to a trader at his request or for his convenience," which occurred in the first part of the section, must be considered as repeated. What was the true meaning of the words "any difference arising under this section"? The railway company asked them to read in the words "as to the

reasonableness of the amount of the charges." Those words were not in the section. The words, in his opinion, included all matters which arose under the section and which were in dispute between the parties. Take subsection (i.), which dealt with services rendered by the company at or in connexion with sidings not belonging to the company. The arbitrator must first find out whether the sidings belonged to the company or not before he could find out whether the charge was reasonable. So as to subsection (ii.), which dealt with the collection or delivery of merchandise outside the terminal station, the arbitrator must first find out whether the services rendered were outside the terminal station or not. It was said that these questions must first be decided by a Court of law, and then the arbitrator must be called in to decide whether the amount of the charge was reasonable. He could not adopt that view. So as to subsection (iv.), in finding out what was a reasonable charge for the services there specified, the arbitrator must ascertain what was the period reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof. The arbitrator who was called in to settle the dispute must settle the whole dispute. The same observation applied to sections 6, 7, and 8, which were part of the same group of sections. For those reasons, looking at those sections, in his opinion the arbitrator must settle the whole matter, and not merely fix the amount of the charge, leaving the rest to a Court of law. That being, in his opinion, the true construction of the statute, the facts in the first case showed that the defendant objected to the charge *in toto*, saying that it was exorbitant and unjust. The defendant thought that four days for unloading the trucks were not enough, and he refused to pay. That constituted a dispute under section 5, subsection (iv.), as regards the detention of the trucks. Therefore the County Court Judge had no jurisdiction to entertain the dispute. The same reasons applied also to the second case. The defendants refused to pay the charges, and the section said that the arbitrator was the proper tribunal to determine that dispute. It was no more the duty of the trader to invoke the assistance of the arbitrator than it was the duty of the railway company. In his opinion judgment must be entered for the defendants in each case.

LORD JUSTICE CHITTY concurred. There was no such limit to the words in section 5 "any difference arising under this section" as was suggested on behalf of the company. They were not limited to the reasonableness of the amount of the charge. The words included all that was material with reference to the various subsections which followed. All matters which were material to the decision of the difference arising under the section, whatever that difference might be, were for the arbitrator. The company contended that the matters should be split up, some going before a Court of law and some before an arbitrator. In his opinion the Legislature had said that this was a class of case which had better be determined by a skilled arbitrator than by a Court of law, and it never intended that the matters should be split up.

[Solicitors—C. H. Mason for the plaintiffs; George Turnbull, Bradford, for the defendants.]

Q.B. Div. (Wills and)
Kennedy, JJ.)

1898.

April 25.

CUCKFIELD RURAL DISTRICT COUNCIL V. GORING.*

Highway—Repair—Liability *ratione tenuræ*.

Where lands are repairable *ratione tenuræ* the

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

occupier is the person liable to proceedings for non-repair.

This was an appeal by the defendant from the decision of the County Court Judge of Sussex sitting at Worthing. The action was brought under section 25 (2) of the Local Government Act, 1894, which provides that "where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails, when requested so to do by the district council, to place it in proper repair, the district council may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing," to recover the cost of repairs executed by the plaintiff council to two foot-bridges, which it was alleged the defendant was liable to repair *ratione tenuræ*, as owner of two farms. The learned County Court Judge held that a liability to repair the foot-bridges attached to the farms in question, and he further held that under section 25 (2) of the Local Government Act, 1894, proceedings might be taken against the owner of lands to which such an obligation attached, and he gave judgment for the plaintiffs. The defendant appealed.

Mr. R. E. MOORE appeared for the defendant and contended that proceedings under the enactment in question could only be taken against the occupier of the lands subject to the liability; and he cited "Reg. v. Barker" (L.R., 25 Q.B.D., 213), "Baker v. Greenhill" (3 Q.B., 148).

Mr. DICKENS, Q.C., and Mr. BOXALL, on behalf of the plaintiffs, argued that although an indictment for non-repair can only be preferred against the occupier, still the ultimate liability is upon the owner, who is liable to reimburse the occupier the expenses incurred in repairing the way. They pointed out that in "Baker v. Greenhill" Lord Denman spoke of the owner as the person who "ought to have repaired." They also cited "Reg. v. Bucknell" (7 Mod., 55).

The COURT allowed the appeal.

MR. JUSTICE WILLS said he failed to understand the argument for the respondents, and felt no doubt on the matter. At the passing of the Local Government Act, 1894, it was well established law that the occupier of land subject to a *ratione tenuræ* liability for the repair of highways is the only person who can be made to perform the obligation. As Lord Coleridge said in "Reg. v. Barker" (L.R., 25 Q.B.D., 213), that proposition had been established from the time of Rolle's Abridgment, where (p. 783, Tit. Chimin, B. 2) it is laid down both in the positive and negative that you must indict the occupier and cannot indict the owner. The passage in Rolle's Abridgment did not in terms refer to highways repairable *ratione tenuræ*, but in subsequent cases it had been pointed out that it was intended to refer to such highways. There was therefore old authority for the proposition that the occupier is the only person against whom the liability can be enforced. As between the owner and the occupier the occupier no doubt had a right to be reimbursed; but that was a matter as between them with which the public had no concern. It was suggested, on the strength of the chance expression in "Baker v. Greenhill" (3 Q.B., 148), "the owner who ought to have repaired," that there was, what all the authorities had repudiated, a liability on the owner's part to repair, as distinguished from a liability to reimburse the occupier the expenses incurred by him in repairing. But his Lordship could not accept that suggestion. Then section 25 (2) of the Act of 1894 simply provided a new and less umbrous means of getting repairs done and paid for. And it was impossible to suppose, on the strength of the one casual expression which had been

referred to, and in opposition to a long chain of authorities, that when the Act spoke of "the person liable to repair" it was intended to create a new liability and give a remedy against a new person. That would be a most forced and strained construction. There was, so far as his Lordship could see, no intention to bring in a new person, but the only object was to give a simpler remedy. It was therefore quite clear that the proceedings were misconceived, and the appeal must be allowed.

MR. JUSTICE KENNEDY concurred.

[Solicitors—Buckwell, Brighton, for the appellant; C. H. Waugh for E. Waugh, Haywards Heath, for the respondent.]

Prob., Divorce, and Adm. Div. } 1898.
(Gorell Barnes, J.) } April 25.

ROBINSON V. ROBINSON AND WILSON.*

Divorce—Practice—Costs against co-respondent—Discretion.

There is no general rule as to condemning a co-respondent in costs. The Court will consider each case on its merits.

This was the petition of Arthur William Robinson for the dissolution of his marriage with Caroline Robinson by reason of her adultery with William Alfred Wilson. The case was heard by his Lordship on April 20 last and a decree *nisi* was pronounced, but his Lordship reserved the question of giving costs against the co-respondent, as it appeared from the evidence that at the time the misconduct commenced the co-respondent was not aware that the respondent was a married woman. After he did know, however, he continued to live with her.

MR. HEBER JONES, for the petitioner, now applied to his Lordship to condemn the co-respondent in costs. Most of the cases no doubt went to show that where the co-respondent at the time the misconduct commenced was unaware that the respondent was a married woman the Court would not condemn him in costs. The President had so held in "Newby v. Newby and White" (*The Times*, March 2, 1897, and 77 L.T., 142). In that case the cases of "Priske v. Priske and Goldby" (29 L.J., P. and M., 195) and "Whitlock v. Whitlock and Zaccarti" (*The Times*, Aug. 13, 1895) were followed and approved. The learned counsel also referred to "Mayne on Damages," and submitted that actions for damages in divorce were by statute substituted for the old action for *crim. con.* He also cited "Teagle v. Teagle and Nottingham" (27 L.J., P. and M., 55), "Norris v. Norris, Lawson, and Mason" (4 Sw. and Tr., 237), and "Whitmore v. Whitmore and Brettell" (L.R., 1 P. and D., 25). In the present case on July 24 the petitioner had informed the co-respondent that he was living with his (petitioner's) wife, but in spite of that warning on July 26 they were still living together and had continued to do so down to as recent a period as February of this year. She had in December last given birth to a child, and but for the co-respondent's conduct the husband might possibly have forgiven her.

MR. JUSTICE BARNES.—That is hardly probable under the circumstances. The respondent had left her husband the previous year and the child could not well be his. It appears to me that this question of costs is one of discretion, and in that view I am supported by the fact that there are cases each way. There is no uniform practice. His Lordship referred to a decision

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

of the late Sir Charles Butt in "Learmonth v. Learmonth and Austin" (62 L.T., P. and M., 608), and said that there could be no general rule. Each case must be considered on its merits, as there must be extreme cases each way. In the present case he should make no order as to costs.
[Solicitor—H. R. Sadd.]

Chan. Div. }
(Romer, J.) }

1898.
April 26.

EHRMANN AND SONS V. FRANK BARTHOLOMEW.*
Contract—Personal service—Negative covenant
—Breach.

Application for an injunction to enforce negative stipulation refused.

This was a motion by the plaintiffs, who were a firm of London wine merchants, for an injunction to restrain the defendant from engaging or employing himself in any other business than that of the plaintiffs' firm, and from acting as a traveller for Messrs. Marzell and Co., another firm of London wine merchants, and from soliciting orders for them during the term of ten years from August, 1897, mentioned in an agreement of that date. It appeared that by the agreement in question the defendant was engaged by the plaintiffs as a traveller for a term of ten years, determinable on notice by the plaintiffs, and covenanted to devote the whole of his attention and time during usual business hours to the business of the firm, and not to directly or indirectly engage or employ himself in any other business, or transact any business with any other person or persons than the firm during the continuance of the agreement. The defendant had left the plaintiffs' employ and was stated to have entered that of Messrs. Marzell and Co. The question arose as to the validity of the restrictive covenant.

Mr. H. E. Wright appeared for the plaintiffs; and Mr. Buckmaster for the defendant.

MR. JUSTICE ROMER.—The serious question arises whether the Court ought to enforce such a negative stipulation as is contained in this covenant. It would in terms prevent the defendant, at any rate during the usual business hours, from employing himself in any business other than that of the plaintiffs' and from transacting any business with or for any person or persons other than the plaintiffs. And this for a period of ten years from August 30, 1897, or for so much of that period as the plaintiffs choose. And it is clear that in this clause the word "business" cannot be held limited by the context to a wine merchant's business, or in any similar way. So that the Court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion, such a stipulation is unreasonable, and ought not to be enforced by the Court. As the present Master of the Rolls stated in "Whitwood Chemical Company v. Hardman" (7 The Times L.R., 325; L.R. [1891], 2 Ch., 416), cases where negative stipulations in contracts of service are enforced by the Court ought not to be extended and are to be regarded as anomalies which it would be very dangerous to extend. To enforce such a general negative stipulation as I find here would be, in my opinion, a dangerous extension, for here the stipulation extends to business of any kind, while the negative stipulations enforced in the prior cases, such as "Lumley v. Wagner" (1 D.M. and G., 604), were confined to special services. For

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

these reasons, I refuse the motion, but, looking at the conduct of the defendant, I do so without costs. Of course, by this order the plaintiffs will in no wise be prevented from enforcing another clause of the agreement, which prohibits the defendant after the termination of his employment from supplying or soliciting the plaintiffs' customers.

[Solicitors—W. H. Southern; Goren and Tapp.]

Q.B. Div. }
(Ridley, J.) }

1898.
April 26.

HARROLD V. WATNEY.*

Negligence—Personal injuries—Defective fence—
Trespasser—Contributory negligence.

This was an action for personal injuries incurred by the defendant's negligence. The defendant denied negligence and pleaded contributory negligence on the part of the plaintiff.

Mr. Watson Moyes, Mr. Chamier, and Mr. W. L. L. Bell appeared for the plaintiff; Mr. David for the defendant.

The action was tried on Monday, April 25. The plaintiff was a boy aged four years. The defendant was the owner of a piece of waste land in South-street, Wandsworth, separated from the highway by a wooden fence also belonging to the defendant. The plaintiff alleged that, as he was passing along the street upon June 27, 1897, a part of this fence fell upon him and inflicted the injuries complained of. The defendant contended that the plaintiff was climbing the fence and pulled it down upon himself. The plaintiff was too young to give evidence, but two witnesses for the defence (the only persons called who saw the accident happen) said that the plaintiff "had put one foot on the fence and was going to put the other on" when it fell. As to the condition of the fence there was a conflict of evidence.

MR. JUSTICE RIDLEY, in summing up, said that the conduct of the plaintiff, even according to the defendant's story, could not be considered negligence in so young a child. But if the jury believed that plaintiff was climbing the fence he was a trespasser and could not recover. There was no duty upon defendant to supply a fence which might be climbed with safety.

After an absence of upwards of two hours the jury returned with the following verdict:—"We find that the fence was very defective, but actually fell through the child standing wholly or partly on the fence not for the purpose of climbing over. If the plaintiff is entitled to recover, we assess the damages at £45."

Upon this verdict both parties asked for judgment, and MR. JUSTICE RIDLEY adjourned the case for further argument.

MR. MOYES, on behalf of the plaintiff, asked for judgment. It was the duty of any one whose property abutted on the highway to keep it in a safe condition. The defendant knew that children frequented this neighbourhood and ought to have contemplated the natural actions of children. In this case the child was not climbing the fence, which might have disentitled him to recover, but had merely put his foot upon it. The learned counsel quoted "Ponting v. Noakes" ([1894] 2 Q.B., 281); "Lynch v. Nurdin" (10 L.J., Q.B., 73); "Jewson v. Gatti" (2 The Times Law Reports, p. 381, and on appeal at p. 441); "Lay v. Midland Railway Company" (84

*Reported by H. O. BUCKLE, Esq., Barrister-at-Law.

L.T., N.S., 80); "*Barnes v. Ward*" (19 *L.J.*, C.P., 193); and "*Clark v. Chambers*" (3 Q.B.D., 327).

Mr. DAVID, for the defence, urged that "*Jewson v. Gatti*" was a case of abnormal user of the highway. In such a case a duty was cast upon the defendant to protect the public from the consequences of such user. Also that was a case of a trap, or at any rate an invitation. Here the child had no business to touch the fence and was a mere trespasser, who could not recover. "*Abbott v. Macfie*" (33 *L.J.*, Ex. 177); "*Mangan v. Atterton*" (*L.R.*, 1 Ex., 239).

MR. JUSTICE RIDLEY, in giving judgment, said,—I think that the cases that have been quoted are all very near the line. But this case seems to me to be on the defendant's side of the border. When it appears that the accident was brought about by the plaintiff's wrongdoing he cannot recover. If there had been anything of the nature of an invitation, or even if the plaintiff's touching the fence had been accidental, the defendant would have been liable. But here the trespass was deliberate, as much as if the boy had climbed the fence. Some of the cases which have been quoted concern things dangerous in themselves. But that is not the case here. I think this comes into the same class as "*Abbott v. Macfie*." There was no invitation on defendant's part, and no trap. The child could have passed safely if he had not chosen to get upon the fence. Judgment for the defendant, stay of execution pending appeal.

Court of Appeal (A. L. Smith } 1898.
and Chitty, L.J.J.) } April 27.

CHAPLIN V. PUTTICK AND SIMPSON—LAING, CLAIMANT.*

Practice—Evidence—Commission—Sending article abroad for identification—"Leader v. Smyth" (8 *The Times* L.R., 612) over-ruled.

This was an appeal from an order made by Mr. Justice Grantham. The action was brought by the plaintiff, Chaplin, against the defendants, Puttick and Simpson, who were auctioneers, to recover possession of a stamp album, which had been placed in the custody of the defendants for sale. The plaintiff alleged that the album was worth £1,000 and had been stolen from him at Johannesburg. The claimant, Laing, alleged that the album was his property, and that he had bought it for £170. The defendants interpleaded, and an interpleader issue was directed to be tried. The plaintiff, having obtained an order for a commission to be sent out for the examination of certain witnesses on his behalf at Johannesburg, made a further application and obtained the order which was now appealed against—viz., an order that the stamp album should be sent out by post to the British Consul at Johannesburg for the purpose of being shown to the witnesses when they were examined.

Mr. G. BLACKWELL appeared for the claimant in support of the appeal, and contended that the Court had no jurisdiction to order the property in dispute in an action to be sent abroad. He cited the case of "*Leader v. Smyth*" (8 *The Times* Law Reports, 612), an action of slander, in which the plaintiff complained that the defendant had accused her of stealing a brooch. There the Court refused to order the brooch to be sent abroad to be identified on commission.

Mr. Hansell appeared for the plaintiff; Mr. Colam for the defendants.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion,

the learned Judge had jurisdiction to make this order, and the order itself was a just one. The Court had power to make such an order either under Order 37, rule 5, or Order 50, rule 3. The former rule allowed the Court, in any cause or matter where it should appear necessary for the purposes of justice, to make any order for the examination upon oath before the Court or Judge, or any officer of the Court, or any other person, and at any place, of any witness or person. And the latter rule gave the power of making any order for the inspection of any property or thing being the subject of the cause or matter. As to the case of "*Leader v. Smyth*," it was impossible to read it without seeing that Mr. Justice Mathew, if he had followed his own opinion, would have held that the Court had jurisdiction to make the order which was asked for. He was prepared to overrule that case and say it was wrongly decided.

LORD JUSTICE CHITTY delivered judgment to the same effect.

Chan. Div. } 1898.
(North, J.) } April 27.

ATTENBOROUGH V. JAY.*

Trade Name—Similarity of name of trader—Injunction refused.

This was a trade-name action of a novel character. The plaintiffs were six persons named Attenborough, who were all stated to have some relationship with one Robert Attenborough who came to London about a century ago and established a pawnbroking business. The plaintiffs have among them nine establishments in London, where they severally carry on the businesses of silversmiths, jewellers, and pawnbrokers. They are not connected in business, except that they severally trade under names the principal feature of which is Attenborough. It was stated that except the establishments of the defendants, and one business carried on under a style containing the phrase "late Attenborough" and another carried on under a style containing the phrase "successor to Attenborough," there is no similar business carried on in London under a style of which the name "Attenborough" is part. The defendants have two shops, Nos. 142 and 144, Oxford-street, communicating with one another. No. 144 is apparently a silversmith's shop, with the word "Jay's" on the fascia. No. 142 has, and for many years has had, the name "Attenborough" on the fascia. Adam and Eve-court is by the side of the premises, and up the court are two entrances to the premises, one admitting to an ordinary pawnshop, where pledges for sums not exceeding £10, and therefore within the Pawnbrokers Act, 1872, are taken; the other entrance admits to an office, where pledges of larger amount, outside the Act, are taken. This latter business is known as contract business in the trade. The door of the contract office has for years borne the name Attenborough, but over the pawnbroking door, in accordance with statute, the name of the actual licensee, till recently "James Jay," has been placed. Some 40 years ago one Richard Attenborough established a business of silversmith, jeweller, and pawnbroker at what is now 142, Oxford-street. He died in the latter part of 1886. In April, 1887, the late James Jay bought at auction the remainder of the lease of the premises, which had been put up for sale by the executors of Richard Attenborough, and, under options given to the purchaser of the lease as a condition of the sale, James Jay also bought the pledge contracts of the testator and the stock-in-trade on the

*Reported by F. G. HUCKER, Esq., Barrister-at-Law.

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

premises. He carried on a business similar to the business of Richard Attenborough down to his own death in 1896, with the addition that he took the adjoining shop, No. 144, in 1891. He bequeathed the benefit of his shops and business to five persons. These persons associated with themselves two other persons, intended to act as managers, and took steps to form themselves into a limited company under the name, as finally determined, of "Jay, Richard Attenborough, and Co. (Limited)." The plaintiffs brought this action against the seven signatories to the memorandum of association. They claimed, *inter alia*, an injunction to restrain the defendants from proceeding with registration of a company under the name "Jay, Richard Attenborough, and Co. (Limited)" or any other name of which "Attenborough" formed part.

Mr. H. Terrell, Q.C., and Mr. Carver (Mr. Swinfen Eady, Q.C., with them) were for the plaintiffs: Mr. Everitt, Q.C., and Mr. T. Douglas for the defendants.

Mr. H. TERRELL, Q.C., in reply, asked only for an injunction to prevent carrying on the business of pawn-broking proper—that was to say, relating to pledges within the Pawnbrokers Act. The evidence, he argued, showed that there had been no acquiescence in the carrying on by the defendants of a business of this character under the name of Attenborough, and, in fact, this part of the defendants' business had never been carried on in the name of Attenborough.

MR. JUSTICE NORTH, having stated the facts of the case, said he did not see what ground there was for interfering by injunction. It was conceded that an injunction could only be granted in respect of the pawn-broking business under the Act. As far as that was concerned, a company could not carry on the business in their own name. If they desired to advance sums under £10 on pledge they must conform to the Act. A licence would have to be taken out in the Christian and surname or names of some one, whose name would have to be used on the premises. He did not see how either a Christian or surname of a company could be put on a licence. He was told that as matter of practice, in the case of a limited company, licences were taken out in the names of directors and the pledge tickets filled up with their names. He did not see, therefore, how the company, when registered, could carry on that part of the business in the name of Attenborough. There was a further difficulty in the plaintiffs' way. He did not see how these plaintiffs, who were in no way connected in business, could combine to get the relief they asked for.

[Solicitors—Stanley J. Attenborough, for the plaintiff; Cuthbert Curtis, for the defendant.]

O.B. Div.
(Mathew, J.) }

1898.
April 27.

THE HOME MARINE INSURANCE COMPANY (LIMITED) v. SMITH.*

Insurance—Marine—Underwriter's slip—Stamp Acts—Stamp Act, 1891, secs. 91 and 93.

The underwriter's slip issued at Lloyd's cannot be stamped and sued upon as a policy of insurance.

This was an action brought to recover the sum of £350 16s. 5d. under a contract of reinsurance underwritten by the defendant and other Lloyd's underwriters, dated July 26, 1896. The plaintiffs' case was that the defendant agreed to reinsure the plaintiffs to

the extent of the excesses over certain amounts upon risks which the plaintiffs had then taken, or might take, on goods by vessels of certain named steamship lines. In June, 1896, goods insured by the plaintiffs per the Golden Fleece, a steamship belonging to one of the named lines, were totally lost, and the plaintiffs paid a total loss in respect of them to the amount of £5,008 4s. 5d. The excess which fell upon the reinsurance contract was £3,808 4s. 5d., of which the defendant's proportion was £350 16s. 5d., the sum claimed in the action. The plaintiffs claimed in the alternative a declaration that under the contract above-mentioned they were entitled to have issued to them by the defendant a duly subscribed policy in respect of the lost goods and to recover under such policy when issued. The defendant contended that the plaintiffs had by their conduct repudiated and terminated the contract of reinsurance, and, further, that there was no contract of reinsurance expressed in a policy sufficient to satisfy the requirements of the 54 and 55 Vict., c. 39, section 93 (the Stamp Act, 1891). The contract sued upon was expressed in words, initial letters, and figures, the signification of which was as follows:—"Open cover. 30-6-97. Dawson Brothers (the plaintiffs' brokers). Cash. Steamer or steamers and steamers. United Kingdom or Continent and (or) America. Reinsurance. Rates as per endorsement." Then followed the amounts taken by each underwriter, and initialled by them. "F.G.A. and York-Antwerp rules. Detention clause. Old or new bill of lading, including all risks from warehouse lighterage and until delivered at destination. Negligence clause. £4,000" (i.e., the limit of the excess taken on any ship). On the back there was a list of the steamship lines on which excesses on goods were insured and the amount of the line reserved by the plaintiffs and the rate of premium in each case. By an order made in Chambers by Mr. Justice Bigham it was directed that the question raised in the defence on the Stamp Acts should be determined before the trial of the action. This question came on for decision yesterday.

Mr. Carver, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Seratton for the defendant.

MR. CARVER and Mr. J. A. HAMILTON contended that either the cover note was a policy of sea insurance within the meaning of the Stamp Act and could be stamped on payment of the proper penalty, or that it was a contract outside the provisions of the statute, and did not require any stamp at all, and was enforceable as a contract to issue a policy.

MR. JOSEPH WALTON, Q.C., contended that the contract did not meet the requirements of the Stamp Act, 1891, the sum insured not being mentioned. The cover only provided the amount which should be taken by the reinsurers in each particular case. It did not provide what the total amount of insurance taken by them should be, and, inasmuch as the stamp duty was payable at so much per cent. on the amount of the insurance, it was impossible to say what the duty on this contract would be.

The following cases were referred to in the course of the arguments:—"Fisher v. Liverpool Marine Insurance Company" (L.R., 8 Q.B., 469, and L.R., 9 Q.B., 418), "Cory v. Patton" (L.R., 7 Q.B., 304; L.R., 9 Q.B., 877), "Ionides v. Pacific Insurance Company" (L.R., 6 Q.B., 674; L.R., 7 Q.B., 517). The material portions of the Stamp Act, 1891, are as follows:—Section 91.—For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance. Section 93.—(1) A contract for sea insurance (other than such insurance as

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance. (3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding 12 months.

His LORDSHIP, in giving judgment this morning, said that this was a case of importance, and raised for the first time in a Court of law the question whether, under recent changes in the Stamp Acts, the "slip" issued at Lloyd's could be stamped and sued upon as a policy of insurance. (His Lordship then stated the facts, read the cover note or slip, and continued.) There was no question that by the course of business it was the duty of the plaintiffs to declare upon a contract of this kind any excess coming forward by a particular vessel, to provide for the payment of premium and stamps and to obtain a policy signed by the reinsurers. The defendant alleged that that course of business had not been followed by the plaintiffs, that they had failed to make declarations for a long time until the loss in question had occurred, that he and his fellow-underwriters had thereby failed to receive premiums which they ought to have had, and for that reason they had taken the course, which he (the learned Judge) regarded as regrettable, of insisting on a stamp objection. The question now to be determined was whether that objection was well founded and afforded a good answer to the action. It seemed to the learned Judge that the key to the interpretation of the Stamp Acts on this subject was contained in the old statute of 35 Geo. III., c. 63, section 11, which provided that any contract or agreement of insurance in respect of which a duty was by the Act made payable should be "engrossed, printed, or written, and should be deemed or called a policy of insurance," and should specify the rate of premium, the particular risk, the names of the underwriters, and the sums insured. That statute was followed by others *in pari materia*. At one time it was thought that provisions might be made for stamping a slip, and an Act was passed for that purpose, but it was contrary to the ordinary course of business and the practice of underwriters, and it came to nothing. The Act of 30 and 31 Vict., c. 23, repealed the former Stamp Acts. That Act had been the subject of considerable litigation. Before it came into force it was thought that the slip could not be looked at for any purpose, and great injustice was done in consequence. It was now clear that the slip could be looked at for collateral purposes, and it was equally clear that the slip was not a policy of insurance (see section 7). It was a contract of sea insurance, but was not binding at law, because it was not expressed in a policy. (See "Cory v. Patton," "Ionides v. Pacific Insurance Company," and "Fisher v. Liverpool Marine Insurance Company," *ubi sup.*) The Act of 39 Vict., c. 6, for the first time enabled a policy of marine insurance to be stamped after execution on payment of a penalty of £100. It did not provide that a slip might be stamped, and there was no indication of any such intention. The Act now in force was the Stamp Act of 1891. (His Lordship read the sections set out above.) That statute once more stated that an enforceable contract of sea insurance must be contained in a policy. It was perfectly clear that this cover note was not a policy; it was not within the language of any of the statutes to which he had referred. If it were a policy, then every party to it would be liable to the penalties imposed by section 97 of the Act of 1891. Neither was it a contract to issue a policy. It was a contract of insurance binding in honour only. There must be judgment for the defendant, but without costs.

Q.B. Div. (Wills and)
Kennedy, JJ.)

1898.
April 27.

REG. V. COTHAM AND ANOTHER, JUSTICES, AND WEBB—
EX PARTE SAME.*

Licensing Acts—Licence—Transfer—Validity—
Alehouse Act, 1828 (9 Geo. IV., c. 61), sec. 4—
Mandamus granted.

This was the argument on the rules for two writs of *certiorari* and a writ of *mandamus* to licensing justices for the Prescott Division of Lancashire in respect of a transfer of a licence.

Mr. AVORY and Mr. R. M. Montgomery appeared for the applicant; Mr. MATTINSON, Q.C., and Mr. Thomas Swift for the respondent. The justices were not represented.

The facts were rather peculiar. At Prescott, on December 21, the licensing justices transferred to John Webb the licence granted on August 25 to Joseph Wallace, authorizing Joseph Wallace to apply for and hold an Excise licence to sell by retail at a house situate at Church-street, Farnworth, Widnes, beer to be consumed either on or off the premises. It appeared that the premises in question had been used as a draper's shop, and for a period of 13 years no beer, cider, or other intoxicating liquor had been sold upon them. For ten years Joseph Wallace had not resided in them, though he had yearly obtained a certificate from the justices to hold a licence in respect of these premises. The last of these was taken out on August 25. Mr. Webb did not at the date of the application reside on the premises. In these circumstances the transfer by the justices was said to be illegal. The one rule for a *certiorari* was to quash the grant of the licence on August 25, the other to quash the transfer in December, and the *mandamus* was to call on the justices to hear and determine according to law the transfer in December, it being alleged that the justices had no jurisdiction to grant such a transfer.

Mr. MATTINSON, who showed cause against the rule, admitted that Wallace was not the resident occupier. He contended that a *certiorari* did not lie, and that the applicant was not a person aggrieved. The only ground given for a *mandamus* was that the justices had decided wrongly. That was not a ground for a *mandamus*. The justices had heard and determined the case. If the licence was null and void the licensee could be proceeded against for selling without a licence. The case for the applicant was that the licence granted to Wallace was null and void, because under 3 and 4 Vic., c. 61, the licensee must be the real resident holder and occupier of the premises. Neither Wallace nor Webb could be considered the real resident holder or occupier here. If the original grant was invalid the subsequent transfer must be null and void. As to the transfer, the material section was section 4 of the Alehouse Act, 1828 (9 Geo. IV., c. 61). Wallace was not a person within that section so as to justify a transfer from him. These cases were cited:—"Reg. v. King" (20 Q.B.D., 430), "Reg. v. Sharnan" (14 *The Times* Law Reports, 269), "Reg. v. Bowman" (14 *The Times* Law Reports, 303), and "Reg. v. Justices of London" (1895, 1 Q.B.).

MR. JUSTICE WILLS said it was clear that the justices had given a decision which was unsupported by any Act of Parliament or any other authority. There had been an application for a transfer of the certificate, which by the operation of the several statutes depended on section 4 of the Act of 1828 (9 Geo. IV., c. 61). That section provided that it should be lawful to the justices to license such persons intending

to keep inns theretofore kept by other persons being about to remove from such inns as they . . . should deem fit. In the present case there was a person intending to keep an inn on premises which for ten or 12 years before the application had been licensed in the name of Wallace. But those premises had not been "theretofore kept by other persons being about to remove from such inns." Wallace had obtained the licence from the justices for the house, but somebody else had dwelt in it and used it as a draper's shop. That essential part of the section had not, therefore, been complied with. But beyond that Wallace was not "about to remove from such inn." He had not resided there for many years. The justices had acted without jurisdiction. In such a case he would have been inclined to think that a *certiorari* might be granted, but there had been a decision in the Divisional Court that a *certiorari* was not the proper remedy. This Court was bound to conform to that decision. The *certiorari* must therefore be discharged, but without costs. Was it then a case for a *mandamus*? There was a distinction between an erroneous decision of justices and a failure to hear and determine. The line was often very thin, and cases near the line on each side were to be found. The leading principle was this—that if the justices had confined themselves to the sections and the points properly to be considered in relation thereto it did not matter how erroneously they determined, for no *mandamus* would issue to review their decision; but certainly when it appeared by direct evidence that they had taken into consideration matters wholly outside their jurisdiction, wholly outside what they should properly consider, the *mandamus* would go. Take the recent case (reported *ante*, p. 303) where the justices put up licences practically to auction. In that case a *mandamus* was held to lie because they had taken into consideration matters entirely foreign to the points properly left to them. Such a thing in the present case was not directly stated in the affidavits. But if the fact was demonstrated by what had taken place the result was the same. Here the justices had granted a licence to a person intending to keep an inn, but not one belonging to a person "theretofore keeping it." The justices must therefore have entered upon some extraneous considerations. There was no question of misconstruction of a statute. No possible construction could make Wallace a person who had theretofore kept the premises as an inn and was about to remove from such inn. The justices could not be said to have confined their attention to those matters only which by law they ought to have considered. The rule for a *mandamus* must be made absolute.

MR. JUSTICE KENNEDY concurred on similar grounds. It appeared on the face of the grant of transfer that it purported to be granted in pursuance of the Intoxicating Liquor Licensing Act, 1828, and the Acts amending the same, and it granted to John Webb "the licence now held by Joseph Wallace, a beerhouse keeper." It was clear that Wallace did not come within that section. Under section 4 of the Act of 1828 the grant of the licence was to be regulated "in the manner hereinafter directed." One was therefore referred to the provisions of section 14 of the same Act. That section was the complement and explanation of the fourth. Section 14 gave the cases in which a grant might be made. It provided, amongst others, if any person duly licensed shall "remove from or yield up the possession of the house." Wallace could not be said to have removed from or yielded up possession of the house. It was quite inexplicable on what grounds the justices had granted the transfer. What then was the remedy? Really the justices had acted in a case in which they had no jurisdiction. A *certiorari* had been held not to

be applicable. As to a *mandamus*, it was apparent from the cases that the Courts had been rather more liberal in granting such writs in licensing cases than in several others. The learned Judge was of opinion that the justices had come within the remedial powers of the Court. They had not heard and determined according to law. The rule for the *certiorari* would be discharged; that for the *mandamus* would be made absolute.

MR. JUSTICE WILLS added that he concurred with Mr. Justice Kennedy's remarks on section 14.

[Solicitors—John Hands, for Edwin Berry, for the respondent; Lloyd-George, Roberts, and Co., for Herbert Lewis and Davies, for the applicant.]

House of Lords (Lord Halsbury, L.C.,
Lords Macnaghten, Morris, and
James of Hereford) } 1898.
April 22.

FASMORE AND OTHERS V. OSWALD TWISTLE URBAN
DISTRICT COUNCIL.*

Local Government—Sewers—Breach of statutory
duty by local authority—Remedy for default.

An action for a *mandamus* is not maintainable against a local authority for breach of statutory duty to make sewers under section 15 of the Public Health Act, 1875, there being a remedy provided by sec. 299 of the Act.

Decision of the Court of Appeal (13 *The Times* L.R., 297) affirmed.

This was an appeal from a decision of the Court of Appeal reported 13 *The Times* L.R., 116, 297; [1897] 1 Q.B., 384, 625; 66 L.J., Q.B., 106, 392. The action was for a *mandamus* commanding the defendants (respondents in the present appeal) to cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiffs to carry the liquid proceeding from his factories or manufacturing processes into the sewers under their control. The action was begun by Philip Cadell Peebles (since deceased), who owned and carried on the business of paper making at a factory called the Whiteash Paper Mill, and before it was instituted Mr. Peebles requested the defendants, and the defendants refused, to provide sewers for the reception of the liquids from the paper mill. The claim was based on the Public Health Act, 1875, sections 15 and 21 of which impose on a local authority the duty of providing a proper sewage system. The respondents, however, contended that such obligation was not one towards the appellants or any individual occupier, but for the benefit and purposes of the whole district. They also relied upon section 299 of the Act, which prescribes, as the remedy in such a case, complaint to the Local Government Board. That section enacts that when such complaint is made the Local Government Board, if satisfied after due inquiry that the local authority has been guilty of default, shall make an order limiting a time for the performance of the duty so neglected. That remedy, the respondents urged, was the only and exclusive one in case of any default by the respondents. The case was heard by Mr. Justice Charles on November 11, 1896, and by arrangement the question of law was argued before any evidence was gone into. The learned Judge granted the *mandamus*, but on March 18, 1897, the Court of Appeal [the Master of the Rolls (Lord Esher), Lord Justice Lopes,

* Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

and Lord Justice Chitty] reversed that decision and dismissed the action with costs.

Mr. Cozens-Hardy, Q.C., and Mr. C. A. Bussell, Q.C., were for the appellants; Mr. Joseph Walton, Q.C., and Mr. Danckwerts for the respondents.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said there was nothing in the Public Health Act which would justify the issue of a *mandamus*. The whole purview of the Act made impossible the application of such a remedy. The principle upon which the question arose was that a specific remedy was provided of a kind which was very familiar to our law, and the principle was accurately expressed in the "Bishop of Rochester's case" (1 B. and A.). The principle was that performance of a statutory obligation could not be enforced in any other manner than that prescribed by the statute. The obligation was created by this statute, and it was nothing to the purpose to say that there were other statutes creating similar obligations which might be enforced otherwise. It would be exceedingly inconvenient if the jurisdiction placed by the Act in a Government department which is enabled to call upon a district to reform its whole system of sewage and drainage could be taken out of the hands of that department by a private person. He entirely concurred in the judgment of the Court of Appeal and thought the case should be decided according to the familiar principle of law to which he had referred. There was another point dealt with by Mr. Danckwerts to which he would briefly advert, though he should be sorry to rest his judgment upon it. The insufficiency of drainage in this case only extended to a particular manufactory. It was, therefore, within the exact words of the Rivers Pollution Prevention Act, 1876, section 7 of which provided for the grant of facilities for enabling manufacturers to get rid of refuse and enacted that no sanitary authority should be required to give such facilities where the sewers of such authority were only sufficient for the requirements of their district. The duty lay primarily on the manufacturer to get rid of his own refuse, and it would be unreasonable to permit a man to come to a small district and to require the local authority to reconstruct its system for his purposes. But he preferred to rest his judgment on the other point on which the Court of Appeal had decided the case.

LORD MACNAGHTEN read a judgment to the same effect, and the other noble and learned Lords concurred.

[Solicitors—Soames, Edwards, and Sons, for the appellants; Pritchard, Englefield, and Co., for the respondents.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Macnaghten, Morris, and } April 28.
James of Hereford)

TATHAM, BROMAGE AND CO. V. BURR—THE ENGINEER.*

Insurance—Marine—Collision clause—Proviso—Construction.

Decision of the Court of Appeal in "The North Britain" (10 *The Times* L.R., 104) approved and followed.

This was an appeal from a decision of the Court of Appeal (Lord Esher and Lords Justices A. L. Smith and Rigby), given on August 6, 1897, which affirmed a previous decision of Mr. Justice Bruce on June 1, 1897. In both Courts formal judgment was given in favour of the respondent on the authority of a decision of the Court of Appeal in 1894 on precisely similar facts in

"The North Britain" (10 *The Times* L.R., 104; [1894] P.D., 77; 63 L.J., P., 33). The question now finally decided is one of great importance to underwriters and shipowners, involving the construction and application of a clause and proviso usually inserted in marine policies. The following is the agreed statement of facts:—1. On June 14, 1895, the plaintiffs (appellants) as owners of the steamship *Engineer* effected with the defendant (*inter alios*) a policy of insurance subscribed by the defendant in the sum of £160 on the hull and machinery of the steamship *Engineer*, valued at £8,500, for 12 months from noon, June 14, 1895, to noon June 15, 1896. 2. Attached to the said policy were certain clauses known as institute clauses, the material one with proviso attached being as follows:—"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding, in respect of any such collision, the value of the ship hereby insured, we, the assurers, will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our respective subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability with the consent in writing of two-thirds of the subscribers to this policy in amount, we will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels shall become limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision." "Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures consequent on such collision or in respect of the cargo or engagements of the insured vessel or for loss of life or personal injury." 3. On April 19, 1896, whilst the said policy was in full force and effect, the s.s. *Engineer* came into collision with the s.s. *Harraton* near the entrance to the river Tees, and by reason of the said collision the *Engineer* was considerably damaged, and the *Harraton* sank and became a constructive total loss. 4. The place at which the *Harraton* sank was within the limits of the jurisdiction of the Tees Conservancy Commissioners, who thereupon, under their statutory powers in that behalf, took the necessary steps to remove the obstruction caused by the wreck of the *Harraton*—in the first place by lighting and watching such wreck and subsequently by dispersing and removing it so as to put the approaches to the river into a safe and proper condition. The total of the charges and expenses incurred by the said Commissioners amounted to the sum of £1,346. 5. An action was begun in the Admiralty Division by the owners of the s.s. *Harraton* against the owners of the s.s. *Engineer*, and a counterclaim was entered on behalf of the defendants, but by agreement between the parties in the said collision action both ships were deemed to have been in fault, and the damages suffered by both parties to the suit respectively as assessed by the Registrar of the Admiralty Division, assisted by merchants, were duly paid by each to the other. 6. The plaintiffs, as owners of the s.s. *Engineer* properly paid

to the owners of the s.s. Harraton under the said agreement £673, being a moiety of the said £1,346 for removing the obstruction caused by the wreck as being a loss or damage sustained by the owners of the s.s. Harraton incidental to and arising out of the said collision, and thereafter the plaintiffs sought to recover the moiety aforesaid from their underwriters (including the defendant), but they declined to pay any part thereof, alleging that they are expressly excepted from liability in respect of the said sum by the terms of the proviso set out in paragraph 2 of the statement of facts. The question for the determination of the Court is whether the defendant is liable under the said policy to pay to the plaintiffs such proportion of three-fourths of the sum of £673 in paragraph 6 hereof mentioned as the defendant's subscription bore to the value of the ship. The Court of Appeal, in conformity with the decision of Lords Justices Lindley, A. L. Smith, and Davey in "The North Britain," held that the respondent was not liable, as the proviso exempted him from indemnifying the appellants for payments made directly or indirectly for removal of obstruction under statutory powers.

Mr. Cohen, Q.C., and Mr. Carver, Q.C., appeared for the appellants; Mr. Joseph Walton, Q.C., and Mr. Scrutton, for the respondent, were not heard.

Their LORDSHIPS, expressing their concurrence with the decision and reasoning of the Court of Appeal in "The North Britain," affirmed the decisions of the Courts below, and dismissed the appeal with costs.

[Solicitors—Holman, Birdwood, and Co., for the appellants; Waltons, Johnson, Bubb, and Whetton, for the respondents.]

Q.B. Div. (Wills and)
Kennedy, JJ.)

1898.

April 28.

GRAHAM V. ELI, GRAHAM V. HUGHES, AND GRAHAM V. BARLOW.*

Patent—"Patent agent"—Person knowingly describing himself as patent agent—Penalty—Patents, Designs, and Trade Marks Act, 1888, sec. 1.

These were cases stated by Sir John Bridge and Mr. Lushington, metropolitan police magistrates, upon the dismissal of information laid against the respective respondents for knowingly describing themselves as patent agents in contravention of section 1 of the Patents, Designs, and Trade Marks Act, 1888.

Mr. Macmorran, Q.C., and Mr. Corrie Grant appeared in each case for the appellant; Mr. Woodfin for Eli and Hughes; and Mr. Shackleton for Barlow.

Section 1 (1) of the Act above referred to provides as follows:—"After the first day of July, 1889, a person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act." Subsection 4 provides a penalty in the case of a person knowingly describing himself as a patent agent in contravention of the section, and subsection 5 defines "patent agent" as meaning exclusively a patent agent for obtaining patents in the United Kingdom. The case against Eli was that on December 2, 1897, he was in occupation of the first floor of No. 76, Chancery-lane. On the outside were the words "Designs," "Trade Marks," and "Patent Office," and on a plate at the entrance were the words "Patent, Designs, and Trade Marks Office," and on the

street door of the premises were the words "Office for Patents, Designs, and Trade Marks—Foreign and Colonial." Inside the entrance were the words "Patent Office," and on a glass case the words "Inventors' Medium." The respondent's name was also proved to have appeared on specifications as agent of the applicant. It was also proved that on December 2 a man named Barlow said to the respondent, "If you want a patent agent, I am the man for you," and "If you do not want me, here is Mr. Eli (the respondent) who is ready to do anything for you." The respondent was not at the time registered as a patent agent in pursuance of the Act above mentioned. The case against Hughes was similar to that against Eli, with whom he was in partnership. It was proved in addition that he issued partnership notices in which he described himself and his partner as "patent experts," and that his name had been struck off the register by order of the Board of Trade. The case against Barlow was that he described himself in certain specifications and documents and on his place of business as a "patent expert," and that he had been introduced personally, by a man named Waller, to several persons as a patent agent, and further that he had never been registered as a patent agent under the Act. The magistrates dismissed all the information on the ground that there was no evidence that the respondents had in any of the cases in terms described themselves as patent agents. It was contended on behalf of the appellant that, in order to constitute an offence under the section, it was not necessary for the respondent to describe himself as a patent agent in terms, if it was proved that he in fact held himself out as a patent agent.

The Court dismissed the appeals upon the grounds given by the magistrates.

MR. JUSTICE WILLS said that any man was entitled to hold himself out as willing to do work in connexion with bringing out patents. The Act only prohibited such a man from using the term "patent agent." The object of those who wished to give to this term a peculiar sanctity was better served by this construction of the Act than that for which the appellant had contended.

[Solicitors—Radford and Frankland, for the appellant; S. Lambert, for the respondent.]

Q.B. Div. (Wright and)
Channell, JJ.)

1898.

April 28.

AFTHORPE V. PETER SCHOENHOFEN BREWERY COMPANY.*
Revenue—Income-tax—English company—Brewery carried on at Chicago—Trading in England.

This was a revenue case stated under 43 and 44 Vic., c. 19, section 59, by the Commissioners for the General Purposes of the Income-tax Acts for the City of London, for the opinion of the Queen's Bench Division. The question raised was as to the liability for income-tax of a brewery situate at Chicago carried on by an English company.

The Attorney-General and Mr. Danckwerts appeared for the Crown; Mr. Asquith, Q.C., and Mr. Scrutton for the respondents.

At meetings of the Commissioners on October 15, 1896, and May 6, the Peter Schoenhofen Brewery Company (Limited) appealed against assessments made upon them of £66,266 for the year ended April 5, 1896, and of £63,970 for the year ended April 5, 1897, under Schedule D of the Act 16 and 17 Vic., c. 34. The respond-

*Reported by G. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

ent company is an English company registered on July 30, 1889, under the Joint Stock Companies Acts, with memorandum and articles of association, and with a registered office at No. 57, Old Broad-street, in the City of London. The respondent company was formed for the purpose of acquiring a brewery, malthouse, and establishment the property of a brewery company called the Peter Schoenhofen Brewery Company of Chicago. This brewery was established by Mr. Peter Schoenhofen in the year 1860, and had been managed by him continuously since that time. The American company was formed by him, and consisted of five persons, who by contract dated June 25, 1889, became vendors of all except three of the shares in and the property, plant, and business of the American company to the respondent company. In order to avoid any difficulty in connexion with the Illinois State laws, which prevent alien corporations and persons from holding real property in the said State, it was agreed between the respondent company and the vendors that the American company should be kept on foot, and that the whole of the capital stock of the American company, except three shares of \$100 each, should be acquired by the respondent company, so that in substance the respondent company became the owners of all the property and assets of the American company. The amount of profits made by the brewery business, after allowing all proper deductions of the cost of administration and otherwise, were assessed at the sum of £96,266 for the year ended April 5, 1896, and £63,970 for the year ended April 5, 1897. Out of the moneys appearing in the balance-sheets of the respondent company there was remitted to England between April 8, 1895, and February 3, 1896, the sum of £2,561 18s. From this amount the sum of £625 was applied in payment of the respondent company's expenses, and the balance of £1,936 18s. was distributed as dividend amongst the shareholders. Out of the same moneys there was remitted to England between April 13, 1896, and March 25, 1897, the sum of £3,256 3s. 4d. From this amount the sum of £710 was applied in payment of the respondent company's expenses, and the sum of £2,481 12s. was distributed as dividend. The breweries at which the profits are made are situate at Chicago, in the State of Illinois, U.S.A., where the manufacture of beer and other liquors is carried on which results in the profits accruing to the respondent company. The beer and other liquors are sold in the State of Illinois and other neighbouring States, and the trade is exclusively carried on there. All the officials and workmen who assist in the manufacture and sale and the carrying on of the trade are located at Chicago aforesaid. The respondent company raised and found the capital for the purpose of carrying on the business at Chicago. A large number of shareholders in the respondent company reside in England, but the larger number of shares are held in the United States. The affairs of the brewery and of the American company can be, if necessary, directed from and administered at the registered office of the respondent company by the board of directors of the latter, who have the entire right of control and the entire directing power over the affairs of the American company and of the staff and business at Chicago. In fact, however, the directors of the respondent company delegated their power to the managers of the brewery at Chicago who were the directors of the American company. The board of directors meet in England and have power to dismiss any or all of the managers, officials, and others carrying on the business in Chicago, and have in fact the power to exercise absolute control not only of the company in general but of the business carried on in Chicago. The Commissioners found as follows on the facts:—1. That the business carried on

at Chicago was in fact carried on by and was the business of the respondent company and that the profits made were the profits of the respondent company. 2. That the head and seat and directing power of the respondent company were at the respondent company's registered office in the City of London, and that if the business at Chicago and the profits made thereby were technically the business and profits of the American company, the American company was for such purpose the agent of the respondent company. The Commissioners, however, considered themselves bound by the decision in "Bartholomay Brewing Company v. Wyatt" ([1893] 2 Q.B., 499), and they accordingly reduced the assessment to the amount of the remittances to England—viz., for the year ending April 5, 1896, the sum of £2,561 18s., and for the year ending April 5, 1897, to the sum of £3,256 3s. 4d. The Surveyor of Taxes expressed his dissatisfaction with the determination of the Commissioners, and required a case to be stated.

The ATTORNEY-GENERAL contended that the Commissioners were wrong. The power in the English company to dismiss officials and exercise control over the business in Chicago showed that the company traded in England. He distinguished the case of "Bartholomay Brewing Company v. Wyatt" ([1893] 2 Q.B., 499) from the present. He referred to "Colquhoun v. Brooks" (L.R., 14 App. Cas. 493), and observed that while it was passing through the Courts the rules were unsettled. He also cited "Cesena Sulphur Company v. Nicholson" (L.R., 1 Ex.D., 428); "San Paulo (Brazilian) Railway Company v. Carter" ([1895] 1 Q.B., 580); "Denver Hotel Company v. Andrews" (3 Tax Cases, 356; 11 *The Times* L.R., 238).

Mr. ASQUITH submitted that it was a question of fact whether the inference drawn by the Court in the Bartholomay case, which was identical with the present case, was right or not. He submitted there was nothing in the San Paulo case to throw any doubt on it. The Court of Appeal held that the Denver case fell within the principle of the San Paulo case. The question of fact was this, Where during the year of assessment was the business actually carried on?

The COURT decided in favour of the Crown.

MR. JUSTICE WRIGHT said the San Paulo case governed the present. The Commissioners had found facts which showed that though the profits were earned in the United States the trade was carried on in England. The persons who earned the profits or made the loss in America were appointed or reappointed or dismissed by the English company. In that state of things the observations in the judgments of the San Paulo case applied. His Lordship then referred at length to the judgments therein. His Lordship thought that delegating to persons in America the exercise of the supreme power was an exercise by the English company of the supreme power. There must be judgment for the Crown.

MR. JUSTICE CHANNELL concurred.

[Solicitors—Julius and Thomas, for the respondent; the Solicitor for Inland Revenue, for the Crown.]

Q.B. Div. } 1898.
(Mathew, J.) } April 28.

MERSEY DOCKS AND HARBOUR BOARD V. TWIGGE AND BUTTERS.*

Harbours and Docks—Mersey Docks Act, 1858, sec. 234—Construction—Foreign dock rates—Coastwise dues.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

This action was brought to recover from the defendants foreign dock rates and town dues at 2d. per cwt., less credit for coastwise town dues, on 150 bags of tapioca, weighing 200 cwt., imported into Liverpool under the circumstances hereinafter stated. The plaintiffs claimed that the tapioca was liable under section 234 of the Mersey Dock Acts Consolidation Act, 1858, to foreign dock rates and town dues on an importation into the port of Liverpool from Singapore, a port beyond the seas. The defendants contended that the tapioca was liable under the same Act, and under resolutions of the Board now in force remitting the dock rates on goods imported coastwise, to coastwise town dues only on an importation into the port of Liverpool from London coastwise, which had been paid. The amount in dispute was small, being only £1 5s., but the action being a test case was one of considerable importance. The following facts were admitted. A consignment of tapioca, consisting of 306 bags, was shipped by Stiven and Co., at Singapore, on board the steamship Agamemnon, belonging to a Dutch company registered at Amsterdam, for carriage to Liverpool under the terms of a bill of lading which contained a power to tranship at London. The Dutch company and the Ocean Steamship Company, an English company, worked in conjunction, and the profits of the Dutch company went to the shareholders of the English company. The Agamemnon proceeded to Amsterdam, where she discharged some and loaded other cargo, and then to London, where she discharged all her inward cargo. Entry was made with the Customs in London of all her cargo carried to London, including the tapioca in question. The steamer was cleared inwards by the Customs on July 20, 1897, and a complete "jerk" note issued to her. The tapioca was placed in the dock sheds in London and the usual London dues were paid on it. The ship and cargo were treated by the Customs officers in London as arriving from ports beyond the seas for the purposes of the Customs Acts. The tapioca was laden from the dock sheds in London by the agents of the owners of the Agamemnon on board the English steamship Sarpedon, owned by the Ocean Steamship Company. The Sarpedon started from London on a voyage to Liverpool and thence to China, and carried some cargo, including the tapioca to be delivered at Liverpool. The Liverpool cargo was carried under a "transire" from the Customs, a document which is only issued in respect of cargo carried (so far as Customs are concerned) coastwise. On arrival at Liverpool the tapioca with the other cargo from London was discharged in the Harrington Dock belonging to the plaintiffs. Such cargo was treated by the Liverpool Customs as carried coastwise for Customs purposes, and the Customs made no examination and no entries were passed in respect of it. The voyage of the Sarpedon to Liverpool and the carriage of goods in her to Liverpool was treated by the Customs under the Customs Act and by the Trinity House as regards light dues as a coasting voyage. One hundred and fifty bags of the tapioca were delivered from the plaintiffs' dock to the defendants, who had purchased the parcel from the endorsees of the bill of lading.

Mr. Joseph Walton, Q.C., Mr. Carver, Q.C., and Mr. T. G. Horridge appeared for the plaintiffs; Mr. Boyd, Q.C., and Mr. Scrutton for the defendants.

MR. JUSTICE MATHEW, in delivering judgment, said that section 234 of the Mersey Dock Acts Consolidation Act, 1858, provided that all goods imported into the port of Liverpool from ports beyond the seas should be liable to the dock rates mentioned in Schedule C. The section further provided that goods imported coastwise should pay certain other dock rates. When the

plain language of section 234 was looked at, nothing would seem to be clearer than that, under the circumstances of this case, the goods were imported into Liverpool from a port beyond the seas. It was said, however, on behalf of the defendants, that the section had a subtle and concealed meaning and that it must be construed by reference to the Customs Consolidation Act, 1876, and the regulations made under that statute. It was said that the effect of that statute was to deprive the plaintiffs of the dues payable in respect of goods imported from beyond the seas which they would otherwise have been entitled to under the Act of 1858. That would be a most extraordinary result, because the Customs Act had nothing to do with these dock dues, which were payable for harbour and dock services rendered by the plaintiffs. The defendants' case was put in this way. The Customs Act, it was said, must be taken to contain a provision that goods transhipped at London were to be deemed to be imported into London and then carried coastwise to Liverpool. There was no express provision in the Customs Act to that effect, or in the regulations made under it, but it was said such a provision ought to be implied from the course of business. The evidence showed that the course of business of the Customs authorities was that when a vessel arrived in London it was ascertained what dutiable and what non-dutiable goods were on board, and when that had been done the Customs had no further interest in non-dutiable goods. The tapioca in question, which was non-dutiable after transshipment, was not placed on a coasting vessel, but on the Sarpedon, which, after discharging a part of her cargo at Liverpool, proceeded on a foreign voyage, so that the action of the Customs authorities in sending the tapioca under a "transire," which was only issued in respect of goods carried coastwise, was irregular. When the goods were dutiable they were treated after transshipment in a different manner. They were forwarded under a bond. In other words, the Customs authorities kept their hands on them till they reached their destination, where the Customs were paid and the record made. Therefore in the case of the transshipment of dutiable goods no such implication as was contended for by the defendants could arise. But, if the contention of the defendants prevailed, it would result that there would be one set of dock dues payable to the plaintiffs in respect of dutiable goods and another set of dues in respect of non-dutiable goods. Under these circumstances there did not appear to be any reason for implying any such regulation in construing the Mersey Docks Act of 1858. The extremely slender foundation on which the defendants' argument was based was that in the case of "Henderson v. Mersey Docks and Harbour Board" (13 App. Cas., 600) the late Master of the Rolls and the House of Lords had had recourse to the language of the Customs Act in order to ascertain the meaning of the words "trading inwards" in a section of the Mersey Docks Act; but in that case the Customs Act was merely referred to as a dictionary might be referred to for the purpose of ascertaining the meaning of an ambiguous word. Because that had been done, it was now argued in this case that whenever a question arose as to the meaning or construction of the Mersey Docks Act that question must be determined by referring to the Customs Act. The argument of the defendants was, in his Lordship's opinion, quite untenable. There would, therefore, be judgment for the plaintiffs for the amount claimed, with costs on the High Court scale.

[Solicitors—Rowell, Rawle, and Co., for A. T. Squarey, Liverpool, for the plaintiffs; Stokes and Stokes, for Thornely and Cameron, Liverpool, for the defendants.]

House of Lords (Lord Halsbury, L.C., } 1898.
 Lords Macnaghten, Morris, and } April 29.
 James of Hereford)

SYDNEY HARBOUR COLLIERIES (LIMITED) V. EARL GREY.*

Contract—Agreement—Construction—Agreement to underwrite shares—Liability.

Decision of Court of Appeal (13 *The Times* L.R., 564) affirmed.

This was an appeal from the Court of Appeal dated August 3, 1897, reversing, or rather varying, a decision of Mr. Justice Grantham and Mr. Justice Wright given on May 14, 1897. The case is reported in 13 *The Times* L.R., 564. The short question was whether the liability of signatories to an underwriting agreement in respect of shares so underwritten, which liability was to cease or be diminished according as the whole or part of the shares were taken by the public, was to be held as diminished by the shares taken "firm" by the underwriters themselves. The following was the "Underwriting agreement.—The Sydney Harbour Collieries (Limited).—Issue of 34,000 preference shares of £10 each. It is proposed to underwrite 34,000 shares of £10 each. To Messrs. Robinson, Fleming, and Co., 9, Billiter-square, E.C. Gentlemen,—I undertake when called upon by you to subscribe for— shares of the above issue, on the terms of the annexed prospectus or any modification thereof, and to pay the instalments on such shares in accordance therewith. If the public subscribe *bona fide* for 34,000 shares, then my responsibility is to cease. If the public do not subscribe such an amount, but shall *bona fide* subscribe any smaller amount, my undertaking is to stand for the number of shares that will constitute my *pro rata* contribution with the other underwriters, to make up the difference between the amount subscribed by the public and the total amount underwritten. In the event of my failing to put in an application for such shares when called upon by you, I hereby irrevocably authorize you to make an application, and sign the same on my behalf, and I agree to accept the allotment which may be made to me upon such application subject to the conditions before stated. This undertaking is conditional on an allotment taking place not later than March 31, 1895. In the event of an allotment taking place, you are to pay me, in consideration of this undertaking, the sum of 7 per cent. as a commission upon the total number of shares hereby underwritten, such sum to be paid by you to me in cash within one month of the first allotment of shares by the company." The number of shares underwritten by the respondent was 2,000. Some of the underwriters sent applications in the ordinary way with cheques, for shares to be taken "firm," and the question was whether shares so taken were to be considered as shares taken by the public, within the meaning of the underwriting agreement, so as to diminish the extent of liability under such agreement. The question was referred to the present Mr. Justice Channell, then at the Bar, as arbitrator, and he found that the shares taken "firm" by underwriters were to be taken in diminution of the underwriters' liability. On that finding Lord Grey was held liable for 854 shares. The question was referred to the Court on a special case and the two Judges adopted the other view, the result of which was that the respondent was held liable for 1,470 shares. The Court of Appeal accepted the view of the arbitrator and the company appealed.

Mr. Robson, Q.C., and Mr. Bremner were for the appellants; Mr. Buckley, Q.C., and Mr. English Harrison, Q.C., for the respondent.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said that it was perfectly clear that the underwriting agreement was a perfect contract in itself and had no relation to the note endorsed by certain of the underwriters to the agreement that they would take so many shares "firm." Those underwriters thereby entered into a perfectly independent contract to take such shares. In addition to being underwriters they thereby undertook to become shareholders. It was hopeless to contend that the persons who made these applications in the ordinary form and sent their cheques, and thereby as between themselves and the company were entitled to allotment, were but members of the public within the meaning of the underwriting agreement. The shares were as really taken by the public as if the subscribers were different persons from the underwriters.

LORD MACNAGHTEN concurred, and held that there were really in each of these cases two distinct contracts—one to underwrite and the other to take shares.

LORD MORRIS and LORD JAMES OF HEREFORD also concurred, and the appeal was dismissed with costs.

[Solicitors—Ashurst, Morris, Crisp, and Co., for the appellants; Lowless and Co., for the respondents.]

Judicial Committee of the Privy Council } 1898.
 (Lords Watson, Macnaghten, Morris, } April 29.
 and Sir R. Couch)

YOUNG V. ADAMS.*

Privy Council Appeals—New South Wales—Servant of Crown—Wrongful dismissal—Public Service Act, 1895.

Section 58 of Public Service Act, 1895, does not apply to servants of Crown dismissed before passing of that Act.

This was an appeal by the Minister of Public Works of New South Wales (Mr. Young) from a judgment of the Supreme Court of New South Wales of April 26, 1897, allowing, by a majority of the Judges, the plaintiff's demurrer to a plea filed by the appellant in an action brought by the respondent, Mr. Alexander Adams, to recover damages for wrongful dismissal from the Civil Service of the colony.

Sir R. T. Reid, Q.C., and Mr. Vaughan Hawkins were counsel for the appellant; Mr. Cozens-Hardy, Q.C., and Mr. James Bacon for the respondent.

LORD WATSON, in delivering their Lordships' judgment, said the respondent entered the service of the Government of New South Wales in 1885 as a road surveyor at a yearly salary. He continued in that capacity until June 30, 1895, when he was summarily dismissed without compensation. During the period between the original engagement of the respondent and his dismissal the rights of Civil servants in the colony of New South Wales were governed by the Colonial Act, 48 Vic., No. 24. In the appeal "*Gould v. Stuart*" (App. Ca. [1896], p. 577) it was held by the Judicial Committee, affirming the judgment of the Supreme Court of New South Wales, that the power generally possessed by the Crown to dismiss a Civil officer at pleasure was restricted by the provisions of the Civil Service Act, 1884, and that the Government had no power to dismiss a Civil servant except upon the grounds and after the inquiry which that statute prescribed. Upon July 14, 1896, the present suit was brought by the respondent against the appellant, who had been duly appointed to be used as nominal defendant on behalf of the Government of the colony. The declaration set forth the employment of the re-

Reported by W. J. SOUTHWICK, Esq., Barrister-at-Law.

respondent as a Civil servant and the fact that he was not dismissed in the manner and on the terms prescribed by the Civil Service Act of 1884; and it concluded with a claim for the sum of £6,160 as damages. By his third plea in defence the appellant maintained that the services and employment of the respondent "were the services of a person employed in the public service within the meaning of the Act 59 Victoria, No. 25, section 58, and the alleged grievances were the exercise by the Government of the right and power of the Crown to dispense with the services of any person employed in the public service and not otherwise." The statute upon which the plea was founded, the short title of which is the Public Service Act of 1895, was passed upon December 23, 1895, five months after the summary dismissal of the respondent. The 58th section enacts that "Nothing in this Act, or in the Civil Service Act of 1884, shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service." The respondent demurred to the third plea, and the appellant joined in the demurrer, which was then heard before the Supreme Court of the colony. On April 26, 1897, the majority of the Court, consisting of Chief Justice Darley and Mr. Justice Owen, gave judgment for the respondent. Mr. Justice Stephen dissented. Their Lordships had come to the conclusion that the decision of the majority was right, and they approved of the reasons which were assigned for it in the opinion delivered by Chief Justice Darley. It was argued for the appellant that the provisions of section 58, being declaratory, must of necessity be enforced by the Courts of the colony in every case, whether arising before or after the date of their enactment, and consequently that, the present case having been brought before the Supreme Court after December 23, 1895, when the Public Service Act became law, the summary dismissal of the respondent must be held to have been within the power of the Government, although on June 30, 1895, when it took place, such act of dismissal might have been illegal and might then have given the respondent a good cause of action. It might be true that the enactments were declaratory in form, but it did not necessarily follow that they were therefore retrospective in their operation and were meant to apply to acts which had been completed or to interests which had vested before they became law. Neither the context of the statute nor the terms of the clause itself, appeared to their Lordships to favour that result. Section 58 was the last of a group of ten clauses which were collected under the statutory heading—"Dismissals, removals, &c.," which was part of the statute, and must be taken into account in construing its provisions. Leaving section 58 out of view in the meantime, the other clauses of the group dealt exclusively with the dismissal, removal, or punishment of officers permanently employed in the public service in consequence of misconduct committed after the commencement of the Act of 1895. Section 58 was complementary of those provisions, and restored the power of the Crown, which was taken away by the Act of 1884, to dismiss at pleasure, and without cause assigned. The right or power which it restored was "to dispense with the services of any person employed in the public service." Could these words be reasonably construed so as to include persons who were not employed in the public service, and who, like the respondent, had ceased to be so before its power of summary dismissal was given back to the Crown? In the opinion of their Lordships the words of the clause as they stood did not admit of that construction. Counsel for the appellant were by

the exigencies of their case driven to maintain the contrary, and they accordingly argued that the clause ought to be read in the same way as if after "any person employed in the public service" there had been inserted, "or who, before the passing of this Act, had been dismissed from the public service." The words of the clause, according to their ordinary and natural meaning, referred to persons who were employed in the public service; and neither in section 58, nor in the context of the Act, was there to be found any expression which could qualify that meaning, and make them refer to persons who had been, but had ceased to be, employed before the Act came into existence. Their Lordships were unable to discover the least analogy between the enactments which required to be construed in this appeal and those which were under the consideration of the Court in "The King v. Inhabitants of Dursley" (3 B and Ad., 465) and in "Attorney-General v. Theobald" (24 Q.B.D., 557), which were much relied on in appellant's argument. It did not seem to be very probable that the Legislature should intend to extinguish, by means of retrospective enactment, rights and interests which might have already vested in a very limited class of persons consisting, so far as appeared, of one individual—namely, the respondent. In such cases their Lordships were of opinion that the rule laid down by Chief Justice Erle in "Midland Railway Company v. Pye" (10 C.B., N.S., 191) ought to apply. They thought that in a case like the present the learned Chief Justice was right in saying that a retrospective operation ought not to be given to the statute "unless the intentions of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment." The *ratio* was equally apparent when a new enactment was said to convert an act, wrongfully done at the time, into a legal act and to deprive the person injured of the remedy which the law then gave him. Their Lordships did not suggest that the language of section 58 was in any sense ambiguous. On the contrary, its enactments appeared to them to have plain reference to persons who were actually employed in the public service at and after the date of the Act of 1895, and to those persons only. In their opinion no construction was possible which would extend the enactments to persons who had ceased to be employed in the public service before the date of the Act without reading into the clause words which were not implied and were not to be found there. Their Lordships would therefore humbly advise her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

[Solicitors—Light and Galbraith, for the appellant; Ullithorne, Currey, and Currey, for the respondent.]

Judicial Committee of the Privy Council
(Lords Watson, Macnaghten, Morris,
and Sir R. Couch) } 1898.
April 29.

YOUNG V. WALLER, AND WALLER V. YOUNG.*

Privy Council Appeals—New South Wales—Servant of Crown—Wrongful dismissal—Civil Service Act, 1884—Superannuation allowance—Abolition of office.

A servant of the Crown dismissed owing to the abolition of his office is not entitled under the Civil Service Act, secs. 10 and 46, to demand

either further employment or compensation if he has not become entitled to a superannuation allowance.

These were cross-appeals from a judgment of the Supreme Court of New South Wales of May 6, 1897, upon two demurrers in an action brought by Mr. Thomas Francis Waller against the Minister of Public Works of New South Wales (Mr. Young), who was appointed nominal defendant on behalf of the Government of the colony, to recover £7,500 damages for wrongful dismissal from the Civil Service.

Mr. Cozens-Hardy, Q.C., and Mr. Corrie Grant were counsel for Mr. Waller; Sir R. T. Reid, Q.C., and Mr. Vaughan Hawkins for Mr. Young.

The arguments were heard before the same board as in the case of "Young v. Adams" (*ante*, p. 373) when judgment was reserved.

LORD WATSON, in delivering their Lordships' judgment, said the plaintiff in the suit, who was respondent in the leading appeal, obtained employment in the public service of the Government of New South Wales after the passing of the Civil Service Act, 1884. Before the Public Service Act, 1895, was passed the office which he held was abolished by the Government. After the Act of 1895 became law the suit was brought by the plaintiff against the Government claiming £7,500 damages for wrongful dismissal and deprivation of office. By his defence, the defendant by his second plea pleaded "that the services and employment of the plaintiff were the services of a person employed in the public service within the meaning of the Act 59 Vict. No. 25, section 58, and the alleged grievances were the exercise by the Government of the right and power of the Crown in the section mentioned to dispense with the services of any person employed in the public service, and not otherwise." He pleaded in his third plea "that, whilst the plaintiff was in the service and employment the Government abolished the plaintiff's office, and thereupon dispensed with the services of the plaintiff as such officer in consequence of the abolition of his office under and in accordance with the Civil Service Act, and the grievances are the dispensing with the services of the plaintiff in consequence of the abolition of his office and not otherwise." Those two pleas were heard, on demurrer, before Chief Justice Darley with Justices Stephen and Cohen, who, on May 6, 1897, unanimously entered judgment for the plaintiff on his demurrer to the defendant's second plea, and over-ruled his demurrer to the defendant's third plea, with costs. The opinion of the Court was delivered by Chief Justice Darley with the concurrence of the two learned Judges who sat with him. Their judgment upon the demurrer to the second plea was rested, without discussion, upon the decision of the Supreme Court in the case of "Adams v. Young." In that case, however, the plaintiff's office was not abolished, and the loss of which he complained was solely due to his summary dismissal by the Government. In this case, the plaintiff's loss of his office and its emoluments had not been due to his summary dismissal, but to the abolition by the Government of the office which he held. Now, although it was decided by the Judicial Committee in "Gould v. Stuart" (App. Ca. [1896], p. 575) that the effect of the Civil Service Act, 1884, was to deprive the Crown of its right to dismiss its Civil servants summarily without following the procedure prescribed by the Act, it was certainly not suggested that the provisions of the Act did—either directly or by implication—take away the right of the Crown to abolish a Civil office. In the argument addressed to them for the plaintiff it was not disputed that the Crown's power of abolition was recognized

by the Act of 1884, which made special provision, in the event of its exercise, for the compensation to be made to the Civil servant who was thereby deprived of his office and its emoluments. The substance of the defendant's third plea, to which the plaintiff demurred, was that the plaintiff was not entitled to any compensation under the Act of 1884. If that could be shown, it followed that the plaintiff had no title to insist on his claim of damages at common law as for breach of contract. There were only two clauses in the Act of 1884 which bore upon that question. Section 10 provided:—"If the services of any officer be dispensed with in consequence of the abolition of his office or of any departmental change, and not from any fault on his part, such officer may be required, at the rate of salary last received by him, to perform any duty for which he is considered competent in any public department, and should he refuse such change of duty he shall not be entitled to receive any compensation." Section 46 enacted—"When the services of any officer are dispensed with in consequence of the abolition of his office and no office can be offered to him at the same salary as hereinbefore provided or at a salary of not less than five-sixths of the same, he shall be entitled to retire upon the superannuation allowance herein-after provided." It was admitted in the argument for the plaintiff, that at the date when his office was abolished he had not been a Civil servant for such a period of time as would entitle him to a superannuation allowance. He therefore rested his claim for damages or compensation upon the failure of the Government to fulfil their statutory obligation, by offering him employment as a Civil servant in some public department, at the rate of salary received by him before the abolition of his office, or at a salary of not less than five-sixths of the same. The argument of the plaintiff was rested entirely upon the contention that, by sections 10 and 46 of the Civil Service Act, 1884, an imperative duty was imposed upon the Government of the colony, in the event of their abolishing a civil office, to make compensation to the holder of it, by offering him an office in some public department, at the same salary which he had received before the abolition, or at a salary not less than five-sixths of the same. For that contention, in their Lordships' opinion, there was no warrant to be found in the language of the Act, which placed it entirely within the option of the Government to re-engage the Civil servant whose office had been abolished, or not, as they should see fit. Section 10 merely provided that the displaced official might be required to perform any duty for which he was considered competent in any public department, at the rate of salary last received by him; and the penalty of his declining to accept the duty, when required was that he shall not be entitled to any compensation. But it was clear that all questions relating to his competency, and to the propriety of requiring him to accept another situation, were left to the discretion of the Government. In like manner Section 46 enacted that a Civil servant, displaced by the abolition of his office, should be entitled "to retire upon the superannuation allowance hereinafter provided," if no other office could be offered to him at the same salary as hereinbefore provided, or at a salary of not less than five-sixths of the same. Those enactments, in so far as they related to the offer of another office, referred back to the provisions of Section 10, and left the right of judging whether such an offer ought to be made to the Government. Their Lordships would therefore humbly advise her Majesty to dismiss both the original and the cross-appeal. The parties would each bear their own costs.

[Solicitors—Light and Galbraith, for Young; Hemsley and Hemsley, for Waller.]

Court of Appeal (Lindley, M.R.,)
Rigby and Collins, L.J.J.)

1898.
April 29.

WELL V. OFFICIAL TRUSTEE OF CHARITY LANDS.*

Charity—Charitable Trusts Amendment Act,
1855—Trustees—Prohibition against charging
a charity estate.

This was an appeal from a decision of Mr. Justice Romer. The plaintiffs were churchwardens of the parish of St. Botolph Without, Aldersgate, during the years 1885, 1886, 1887, and 1888, and as such churchwardens under the operation of a trust deed of November 17, 1865, and in accordance with previous trust deeds and immemorial custom of the parish were during their respective terms of office trustees for the administration of the funds derived from the various properties forming the parish estates. By the deed of November 17, 1865, the parish estates were conveyed by the surviving trustee under a former deed of trust to certain persons upon trust to permit and suffer the churchwardens of the said parish for the time being to receive and take the rents, issues, and profits of the same hereditaments and premises as the same should from time to time arise, grow due, and be payable as formerly had been used, and for such charitable uses, intents, and purposes as the same had been usually disposed of and employed by the parishioners of the said parish, whether in or about the repairs of the church, the relief of the poor of the said parish, or any other the public affairs of the same parish, and to and for no other use, trust, or purpose whatsoever. Between the years 1885 and 1888 various sums amounting in the aggregate to £3,000 had been advanced by the London and County Bank to the parish and credited to the churchwardens' account in the books of the bank. These sums were obtained and expended for ordinary parish purposes, the income of the parish having been temporarily diminished by about £500 owing to the falling in of certain leases and the granting of new leases at a peppercorn rent during rebuilding and to other causes. In 1891 by a scheme established under the City of London Parochial Charities Act, 1883, which incorporated the Charitable Trusts Act, 1853 to 1867, the parish estates were vested in the Official Trustee of Charity Lands, and were thenceforward to be administered by the trustees of the London Parochial Charities. The London and County Bank had recently brought actions in the Queen's Bench Division against the present plaintiffs to recover the sums respectively advanced to them for the purposes of the parish, and these actions were still pending. The plaintiffs then commenced these proceedings against the Official Trustee of Charity Lands and the Trustees of the London Parochial Charities to determine the question whether they ought not to be indemnified out of the parish funds in respect of these advances. Mr. Justice Romer held that the plaintiffs failed. Under the terms of the trust deed the churchwardens had not, in his Lordship's opinion, any power to anticipate the income and had no rights against the future income of the parish. The plaintiffs appealed. Upon the appeal the question turned mainly upon the construction to be put upon section 29 of the Charitable Trusts Amendment Act, 1855, which provides that "it shall not be lawful for the trustees of any charity to make or grant otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the

Board," i.e., the Charity Commissioners, "any sale, mortgage, or charge of the charity estate."

Mr. Neville, Q.C., Mr. P. S. Stokes, and Mr. Arthur Powell were for the plaintiffs; the Attorney-General (Sir Richard Webster, Q.C.) and Mr. Vaughan Hawkins were for the Official Trustee of Charity Lands; Mr. Farwell, Q.C., and Mr. Reginald Neville were for the Trustees of the London Parochial Charities.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the question was one of some difficulty and of some importance and interest. The deed of 1865 in effect made the churchwardens trustees of the rents and profits of the parish property; but churchwardens were merely annual officers. It was contended that they were a corporation; but churchwardens were not a corporation, except to a limited extent by the custom of London; they could not sue or be sued as a corporate entity. The substance of the case was that these churchwardens were annual officers, and were trustees only of the rents and profits which it was their duty to receive under this trust deed. Still, it did not necessarily follow upon the construction of this deed that it was impossible for the churchwardens as such trustees ever to look beyond the income for the year of their office. If it was customary for the churchwardens in old times to borrow money beyond what they had in hand in any one year and to recoup themselves out of the future income, his Lordship was not prepared to say, apart from recent legislation, that such a course was illegal or improper. But, in his Lordship's opinion, to give effect to the plaintiffs' contention in this case would be to do the very thing which modern Acts of Parliament had endeavoured to prevent. In 1883 the London Parochial Charities Act was passed for the purpose of reorganizing and consolidating the City charities, and special machinery was provided for that purpose. Speaking generally, the objects of the Act were to be effected by means of a scheme, and the charitable funds were to be vested in the official trustee. The scheme affecting this particular charity did not come into operation till 1891. In the meantime—viz., 1885–88—the trustees—i.e., the churchwardens—in order to meet a temporary deficiency in the income of the parish, borrowed money to the extent of £3,000. Knowing perfectly that a scheme was in contemplation, and having spent this money upon the parochial charity, they now asked the Court to indemnify them out of the future income of the charity. Under the Charitable Trust Act, 1855, it was obvious that they could not themselves have created any mortgage or charge on this property without the consent of the Charity Commissioners, and this they must be presumed to have known. Yet, without consulting anybody but the vestry, they obtained these advances, spent the money in a way which they thought beneficial, and they now claimed to be entitled to a charge. If that could be done it would not only be an evasion of the Act of 1855 but it would be depriving the charity of a very great protection against its funds being wasted. No doubt the language of section 29 forbidding trustees "to make or grant a charge" except upon the terms therein mentioned was not particularly apt to cover a transaction of this kind, but it would be an extremely narrow construction of the words to say that this transaction was not hit. The distinction between making a charge and doing that which necessarily involved a charge appeared to his Lordship to be too subtle to be relied upon. It was then suggested that the Court ought now to declare a charge in favour of the trustees under section 29, but, so far as this was a matter of discretion, in his Lordship's opinion the Court ought not to accede to that suggestion. The appeal should be dismissed.

*Reported by H. B. HAMMOND, Esq., Barrister-at-Law.

LORD JUSTICE RIGBY concurred. The churchwardens, when they borrowed the money, intended to look to the future income of the charity to recoup themselves. Though there was no writing it was their intention to create a charge, and if they had not thought that what they did had the effect of making a charge they would never have made themselves responsible for the advances. It would be idle to prohibit borrowing if a man was allowed to pay the money out of his own pocket and claim to be recouped. This transaction was within the mischief and within the words of the Act of 1855.

LORD JUSTICE COLLINS entirely concurred, and added that, upon the construction of the trust deed, the inclination of his judgment was in favour of the view adopted by Mr. Justice Romer.

[Solicitors—W. H. Court ; Clabon ; Pearce.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } April 29.

IN RE CRONMIRE—EX PARTE TRUSTEE.*

Stock Exchange—Gaming and wagering contract
—Deposit of money as cover—Recovery of.
Order of Wright, J. (*ante*, p. 242), varied.

This was an appeal by the trustee from an order of Mr. Justice Wright admitting the proof of Alfred Edward Waud against the estate of Cronmire. The case is reported *ante*, p. 242. The facts, so far as material to this report, were as follows:—Cronmire had carried on business as an outside dealer in stocks and shares under the style of Gregory and Co. Cronmire died in April, 1897, and his estate was now being administered in bankruptcy under an administration order. Waud had had various transactions with Cronmire in stocks and shares, and at the beginning of 1897 Cronmire was indebted to Waud in respect of these transactions in the sum of £375. At this time Waud gave Cronmire an order to buy for him for investment £200 Great Eastern Railway Stock, and Cronmire sent to Waud a contract note stating that he had sold to Waud the stock in question, "to be taken up." There was also a subsequent order to purchase a small amount of Dover "A's." The stock had not been delivered at the date of Cronmire's death, and Waud sent in a proof against his estate for £375, being the above-mentioned balance on the purchase and sale of stocks, and it included a sum of £49 3s. 9d. which Waud had deposited with Cronmire as cover. The trustee rejected the proof, on the ground that the transactions were gambling transactions, and upon appeal Mr. Justice Vaughan Williams directed an issue to be tried by a jury as to whether they were gambling transactions. The jury found that the transactions were gambling transactions, but that the purchases of the railway stocks were real transactions. The trustee then applied to Mr. Justice Wright, who had succeeded Lord Justice Vaughan Williams as the Judge taking bankruptcy matters, for judgment upon the verdict of the jury, when the proof was taken as amended by turning it into a proof for damages for non-delivery of the stocks above-mentioned. The trustee contended that the claim in respect of the stocks stood on the same footing as the claim for £375, which sum, being the balance due in respect of gambling transactions, as the jury had found, could not be proved in bankruptcy; that there was a mere substitution of stock for money; and that, therefore, the rejection of the proof was right. Mr.

Justice Wright came to the conclusion that the last two transactions as to the purchase of the stocks, being genuine transactions, were independent of the gambling transactions, and that it was not until afterwards that Waud directed Cronmire to apply the £375 in his hands in payment for the stocks. He accordingly admitted the proof for the full amount, which included the cover. The trustee appealed.

Mr. W. S. Robson, Q.C., and Mr. Macaskie appeared for the trustee; Mr. H. Reed, Q.C., and Mr. Israel Davis appeared for the respondent Waud.

The COURT varied the order below.

LORD JUSTICE A. L. SMITH said that according to the verdict of the jury the £375 was the result of wagering and gaming transactions. The jury found that the purchases of the Great Eastern and Dover A stocks were real transactions—that is to say, investment transactions. When Waud sent in his proof he made an affidavit which stated very clearly what the transaction was, and which was in exact accordance with what he (the Lord Justice) would have thought to be the true nature of the transaction. Waud stated in the affidavit that instead of receiving the £375 in cash he arranged with Cronmire to purchase from him the above-mentioned stocks to be delivered and to be taken as payment of the amount due to him. It was clear that the stocks were to be purchased with the produce of the gaming and wagering transactions. The trustee contended that Waud could not prove for the £375, and that he could not shape his claim in any way so as to succeed. An ingenious argument as to what must have been the real transaction was addressed to them as well as to Mr. Justice Wright, which induced that learned Judge to decline to act upon Waud's affidavit. It was said that there had been a settlement of account between Cronmire and Waud, and that was evidence of an account stated, and that, therefore, there had been payment for the purchase of the railway stocks. Now, an account stated was only evidence of payment and not conclusive evidence. How could they say that the account stated showed a payment when Waud swore that it was no such thing? It seemed to him, therefore, that Mr. Justice Wright was wrong in holding that Waud could prove against Cronmire's estate for so much of the £375 as represented the produce of the gambling transactions in whatever way the claim was shaped. Waud could not claim it by turning his proof into one for damages for non-delivery of the stocks. Then as regards the £49 3s. 9d. cover. "Cover" was money deposited by a customer with a broker to secure the latter against loss in the event of the stock falling. As Lord Herschell said in "Universal Stock Exchange v. Strachan" ([1896] A.C., 166, at p. 173), the security deposited was deposited as security against a debt which might arise from a gambling transaction, and it was not deposited to abide the event of a wager. The gaming and wagering transactions had come to an end, and the result was that Cronmire still had this £49 3s. 9d. in his hands. Why could not Waud claim it back? It had never been used by Cronmire for the gaming transactions, nor had there ever arisen any occasion to use it. There was no defence to such a claim. There was no necessity to go into any question of appropriation, for in this case the event for which the money had been deposited had come to an end, and the money had never been used. Waud therefore could prove for the £49 3s. 9d.

LORD JUSTICE CHITTY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

The COURT refused leave to appeal to the House of Lords.

[Solicitors—Atkinson and Dresser; H. H. Boone.]

Q.B. Div. (Wright)
and Channell, J.J. }

1898.
April 29.

IN RE THE ROYAL COLLEGE OF SURGEONS.*

Revenue—Property of bodies corporate or unincorporate—Exemptions—Institutions for promotion of “education . . . science”—Royal College of Surgeons—Customs and Inland Revenue Act, 1885.

This was a petition by the Royal College of Surgeons praying for the discharge of an assessment made on them under the Customs and Inland Revenue Act, 1885. The ground on which the exemption was claimed was that the Royal College of Surgeons was an institution for the promotion of “education, literature, science, or the fine arts.”

Sir Edward Clarke, Q.C., and Mr. J. R. Paget appeared for the petitioners; the Attorney-General and Mr. Danckwerts for the Crown.

The petition showed (1) that by the Customs and Inland Revenue Act, 1885, it was enacted that there should be levied in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate a duty at the rate of £5 per annum upon the annual value, income, or profits of such property after deducting all necessary outgoings subject to exemption from such duty in favour of property of the description following—that is to say, property which, or the income or profits whereof, shall be legally appropriated and applied for the promotion of education, literature, science, or the fine arts; (2) that the petitioners were a body politic established by Royal charter in the year 1800; (3) that the objects of the petitioners' incorporation, as specified in the said Royal charter, are the benefit of the common weal of this kingdom by the promotion of the art and science of surgery and the due promotion and encouragement of the study and practice of the said art and science of surgery; (4) that further powers and privileges had from time to time been conferred upon the petitioners by subsequent Royal charters with the object more effectually to promote and encourage the study and practice of the said art and science of surgery; (5) that by the charter obligations and duties were imposed upon the corporation for the benefit of the public at large and the promotion and encouragement of the said art and science of surgery; (6) that they were, under terms imposed by Government, the custodians at their own expense of the Hunterian collection, which is national property; (7) that on June 24, 1894, the annual value or income from real property was £7,200, the total value of the personal estate was £187,195 17s. 11d., and the income therefrom for the same yearly period was £5,833 5s. 7d.; (8) that the whole property was legally appropriated and applied for the benefit of the public at large or for the promotion of science, literature, or education; (9) that the petitioners were called upon by the Commissioners of Inland Revenue to deliver an account in accordance with section 17 of the Customs and Inland Revenue Act, 1885, that they did deliver such an account claiming exemption; (10) that the petitioners were notwithstanding assessed by the Commissioners at £3,161 and required to pay as duty thereon the sum of £158 1s.; (11) that they had been compelled to pay the same. (12) The said sum of £3,161 included the following:—The sum of £300, the annual value of that part of the library within the premises Nos. 40, 41, 42, Lincoln's-inn-fields; the sum of £250, the annual value of the official residence of the conservator of the museum; £200, the value of 39, Lincoln's-inn, another

portion of the library. (13) Apart from the general claim to total exemption the petitioners submitted that, in any event, the above property came within the provision for exemption. The affidavits used stated that the College had fulfilled the duties and obligations imposed by the charters, and had in addition, in conjunction with the Royal College of Physicians, instituted examinations and granted diplomas to successful candidates which entitled them to practise as surgeons. They also issued diplomas to dentists. The museum is very large and represents an annual value of £1,900. The Royal College of Surgeons had expended £90,000 in building it, to which the Government had contributed £42,500. The original nucleus of the collection inside was the Hunterian collection. The library is of the annual value of £500, and contains over 47,000 volumes. Admission is accorded practically to every person having a *bona fide* object for admission, though the regulations give special advantages to members. Another portion of the property is the house appropriated to the conservator of the museum as his official residence. He is required to reside there. It adjoins the museum. The college has no school course of instruction or training for persons seeking admission to the membership of the college. Professors, however, deliver lectures in the theatre of the college, to which lectures the public are admitted free of charge. The college awards prizes for dissertations on subjects connected with the science of surgery. The Crown had granted exemption in respect of the museum, but contended that neither the library, the examination hall and offices, nor the conservator's house should be exempted, they not being both appropriated and applied, in fact, for the promotion of science. For the college it was contended—first, that they were altogether exempt; and, in the alternative, that the separate buildings were all or some exempt. These cases were cited:—“Society of Writers to the Signet v. Commissioners of Inland Revenue” (2 Tax Cases, 257); “The Tailors of Glasgow v. Commissioners of Inland Revenue” (24 Scott. L.R., 516); “*In re Bootham Ward Strays*” ([1892] 2 Q.B., 152); “The Commissioners of Inland Revenue v. Scott” ([1892] 2 Q.B., 161; in Court below, 60 L.J., Q.B., 615); “The Linen and Woollen Drapers Case” (53 L.T., 954); “Forrest v. Commissioners of Inland Revenue” (15 App. Cas., 334).

The COURT found for the Crown, with the exception of the conservator's house, which was declared exempt.

MR. JUSTICE WRIGHT said the section provided an exemption for property legally appropriated and applied for the promotion of science. There were two classes of property, the first—property of such a character as to be exempt as a whole—being property of which the main or sole object was the promotion of science. In such a case no declaration of trust was necessary. That, however, was not the present case, for on the authorities cited it could not be said that the property of the Royal College of Surgeons was legally appropriated and applied for the promotion of science at the time of the assessment. At the time of the original charter science might have been the main object, but the actual object at the present day was to be gathered from the later charters and the by-laws. That object mainly was the granting certificates or diplomas to persons desiring to become surgeons. The balance-sheets showed that the largest source of income and expenditure was the examinations. The evidence brought before the Court failed to show that the promotion of science was now the main object. The case of the Institute of Civil Engineers showed that in such a case the property was not exempt as a whole. The second class of property was that where the promotion of science stopped short of being the main object—when,

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

though there was a promotion of science, the objects were of a mixed character. In such a case, apparently, each part of the property must be considered and each part examined to see if it had been actually—i.e., not by mere conveyance or declaration of trust—appropriated and applied to the purpose for which exemption could be claimed. His Lordship referred to passages in Lord Watson's judgment in the case of the Institute of Civil Engineers—"Forrest v. Commissioners of Inland Revenue" (15 App. Cas., 334). The principles of that case must be applied here. As to the museum, the Crown had conceded in fact, though not in theory, that it was exempt. In the opinion of the learned Judge the Hunterian Museum was within the exemption. Money had been voted by Parliament to build it, and it could not be used for purposes other than a museum without a breach of trust. Then came the offices, value £700. They could not now be said to be appropriated and applied for purposes of science, but for examination purposes. With regard to the examination hall and properties attached to it, it was very clear that the main object was not the promotion of science. Thirdly, there was a library. That seemed a more difficult point, and was very near the line. It had not, however, been shown that the library was applied for purposes of science. The case of the Writers to the Signet was an authority that in such a case a library was not exempt. The house of the conservator of the museum was said on behalf of the Crown not to be exempt because the college might appoint another house for his residence. The museum was appropriated to science, and it was within the purposes of the college to have a conservator's house. It did not require an unchangeable appropriation.

MR. JUSTICE CHANNELL concurred. It must be remembered what the particular Act was out of which this question arose. The cases cited were not all on the same Act. In the Acts relating to income-tax and rating the exemption depended on the character of the society. In the present case it depended on the particular property. Under this statute, speaking generally, corporations were chargeable. The exemption was not given to the corporation, but to the property. It was only necessary to consider the character of the corporation in order to see if any of the property should be exempt. For that purpose it must be seen what the corporation was doing lawfully with the particular property at the time of the assessment. He did not think that the objects—and certainly not the motives—of the Crown in granting the charter would be necessarily conclusive on this question. If the object was to form a body for the promotion of science, but the body so formed acted partly in the promotion of science and partly to give benefits to its members, such a society might come within the preamble to the charter, because it might well promote science all the better if the members had a personal interest in it, but that society would have a double object. It could not be said that it had acted *ultra vires* in giving benefit to members. The society here had undergone a change of that description. It had a double object, and it could not be said that all the property was devoted to one of them only—namely, the promotion of science. He agreed as to the position of the examinations. They were instituted for the benefit of those examined, and not for the promotion of science. It followed that the examination hall could not be exempt, nor the general offices which were attached to it. There was nothing whatever to show that the society was exempt generally. As to the library, the case of "The Writers to the Signet v. Commissioners of Inland Revenue" (2 Tax Cases, 257) was enough to show that it was not exempt. Though the public might

without much difficulty obtain admission, it was clear that the members had special privileges. It could not be said to be appropriated to the special purposes of science. The conservator's house should be treated as part of the museum. It would be a breach of trust to give up the museum, yet it might be moved. If moved it would still be exempt. That was an argument in favour of exempting the conservator's house, notwithstanding that he might be removed to another residence. The assessment must be reduced by £250 in respect of the house.

[Solicitors—The Solicitor for Inland Revenue, for the Crown; Wilde, Moore, and Wigston, for the petitioner.]

Q.B. Div. (Wills)
and Kennedy, J.J.)

1898.
April 29.

PRIOR V. THE SLAITHWAITE SPINNING COMPANY.*

Factory—Young person—Employment during unlawful hours—Factories and Workshops Act, 1878.

This was a case stated by magistrates of the West Riding of Yorkshire upon the dismissal of an information preferred against the respondents for employing a "young person" at their factory during a time specified in a notice affixed in the factory as a time allowed for meals and absence of work contrary to the Factories and Workshops Act, 1878.

The Solicitor-General, Sir Robert Finlay, Q.C., and Mr. Sutton appeared for the appellant; and Mr. Rawlinson, Q.C., and Mr. Harper for the respondents.

The respondents' factory was a textile mill and the business of the boy in question was that of a piecer; it was his duty to tie up ends when they were down. On November 5 last the boy, finding it warmer in the mill than outside, had his dinner in the mill during the interval allotted for that purpose. After he had finished his dinner he set to work to oil the spindles in order to while away the time. It was not the boy's business to oil the spindles. The magistrates dismissed the information on the ground that there was no evidence of employment of the boy by the respondents in contravention of the Factories and Workshops Act, 1878. Section 17 (2) of the Act of 1878 provides that "a child, young person, or woman shall not during any part of the times allowed for meals in the factory or workshop be employed in the factory or the workshop."

Mr. RAWLINSON, Q.C., contended that the mere fact of the boy doing what he did was not necessarily evidence that he was working. What he did might have been a mere piece of mischief, and the magistrate was therefore right in taking the view he did. Counsel further contended that the respondent was entitled to exemption under section 87, which provides that "where the occupier of a factory or workshop is charged with an offence against the Act, he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the occupier of the factory or workshop proves to the satisfaction of the Court that he used due diligence to enforce the execution of the Act, and that the said other person had committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the occupier shall be exempt from any fine."

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The COURT allowed the appeal and remitted the case to the magistrates to convict.

MR. JUSTICE WILLS said that the policy of the enactment was to ensure that certain classes of persons employed in factories should have the hours allowed for their meals preserved intact, and though extreme cases might arise they were not likely to be of frequent occurrence, and ought not to prevent the Act being construed rigorously so as to ensure the fulfilment of its object. In this case the boy was oiling spindles within the prohibited hours. Though his object in doing so was to amuse himself, that did not prevent what he did being work. The magistrates did not find that the boy did not work. All they found was that he was not employed by the respondents. The respondents were not entitled to the benefit of the exemption under section 87 because there was no information before the magistrate by which any other person was charged with the offence. Section 87 was intended to meet cases where the occupier was in no way to blame, but the relief afforded by the section was conditional on another person being suspected and brought before the magistrates. Still, even where nobody could be brought to book, the magistrates who administered the Act had a discretion as to the amount of the fine, and could meet a case of hardship by moderating such fine.

MR. JUSTICE KENNEDY delivered judgment to the same effect.

[Solicitors—The Solicitor to the Treasury, for the appellant; Learoyd and Co., for the respondent.]

Court of Appeal (A. L. Smith,)
Chitty, and Collins, L.J.J.)

1898.
April 30.

ATTORNEY-GENERAL V. BEECH AND ANOTHER.*
Revenue—Estate duty—Finance Act, 1894.

Held, that estate duty was not payable on the death of a person, who, having a life estate in certain property, had assigned it during her life to the reversioner.

Decision of Divisional Court ([1897] 2 Q.B., 535, and 13 *The Times* L.R., 549) reversed.

This was an appeal by the defendants from the judgment of a Divisional Court (Mr. Baron Pollock and Mr. Justice Ridley) upon an information by the Attorney-General claiming estate duty under the Finance Act, 1894 (reported in 13 *The Times* L.R., 549; [1897] 2 Q.B., 535). The question raised was whether, when a tenant for life surrendered his life estate in certain property to the person entitled in remainder, estate duty became payable upon the death of the tenant for life. By a marriage settlement dated July 13, 1853, the wife's property, present and future, was conveyed to trustees upon trust during the joint lives of the husband and wife to pay the income thereof to the wife for life for her separate use, without power of anticipation, and, in case of her surviving her husband (which event happened), to pay the income to her and her assigns during her life, and, after her decease, as to the capital of the trust funds and the income thereof upon trust for the children of the marriage, with a power to the wife to appoint to one or more of them by deed or will after her husband's death. The husband died in 1885. By an indenture dated December 21, 1886, the wife appointed the property to the defendant, her son, subject to her life interest. By an indenture dated December 18, 1894, the wife surrendered to the trustees of the settlement her life interest in the property as specified in the schedule thereto, to the

end and intent that such life interest might merge in the interest in remainder to the defendant. The wife died on August 27, 1896. The information claimed that upon the death of the wife estate duty became payable under section 2 subsection 1 (b) of the Finance Act, 1894, upon the principal value of the trust property comprised in the schedule to the indenture of December 18, 1894, as property passing on her death. The Divisional Court gave judgment for the Crown.

MR. COZENS-HARDY, Q.C., and MR. LEVETT, Q.C. (Mr. W. M. Spence and Mr. Austen-Cartmell with them), appeared for the defendants; The Attorney-General (Sir Richard Webster, Q.C.) and Sir R. T. Reid, Q.C. (Mr. Vaughan Hawkins with them), appeared for the Crown.

The COURT, having taken time to consider, delivered judgment allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The question in this appeal is whether, when a tenant for life more than twelve months before his death absolutely and *bona fide* surrenders his life interest to the remainderman, this property is nevertheless, upon the death of the tenant for life, liable to estate duty under the Finance Act, 1894. The facts giving rise to the question are extremely short. By deed bearing date December 21, 1886, Eliza Beech, who had a life interest in certain trust funds, over which she had a power of appointment, appointed the funds, subject to her life interest therein, to her son Howard Beech. In the year 1894 Eliza Beech was desirous of surrendering her life interest in the trust funds for the benefit of her son Howard Beech, and by deed bearing date December 18, 1894, she surrendered her life interest in these funds "to the end and intent that such life interest might merge in the interest in remainder of her son Howard Beech, and that accordingly William Beech and Howard Beech as trustees might thenceforth hold the said trust funds in trust for the said Howard Beech, his heirs, executors, administrators, and assigns to be disposed of as he or they should direct." Upon the surrender of this life interest to Howard Beech he became absolute owner of these funds. Eliza Beech died upon August 27, 1896. These are the facts. The real point in my judgment for determination is, When did the life interest of Eliza Beech pass? Did it pass to her son, the remainderman, at the date of the surrender—viz., upon December 18, 1894—or did it pass to him at the death of Mrs. Beech upon August 27, 1896—i.e., 20 months after the surrender? Lengthened arguments have been addressed to us by the Attorney-General and Sir Robert Reid as to what was the intention of the Legislature when it passed the Act of 1894; but, as to this, I cannot do better than quote the words of the Lord Chancellor (Lord Halsbury) in the House of Lords when dealing with a similar argument addressed to the House upon a taxing Act in the case of "Tennant v. Smith" ([1892] A.C., at p. 154). The Lord Chancellor said:—"This is an income-tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed,' I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this—that, inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases,

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

therefore, under the taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said in *In re Micklethwait* (11 Exch., 456), "It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words." Now, what is it that the Finance Act, by the very words of the Act, levies a duty upon? The governing words of the Act are to be found clearly set out in sections 1 and 2. Section 1 enacts that "In the case of every person dying after the commencement of this part of this Act there shall . . . be levied and paid, upon the principal value . . . of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called estate duty." And section 2, subsection 1, follows up section 1, and enacts that "Property passing on the death of the deceased shall be deemed to include the property following." What this is I will deal with hereafter. This Act, for the first time, imposes a duty upon all real or personal property, settled or not settled, which passes or is deemed to pass upon death. The time at which by the Act the duty is imposed is the moment of death; the property upon which the duty is imposed is the property which passes or is deemed to pass upon death. If no property passes or is deemed to pass upon death, no estate duty is leviable. If it be leviable, then the duty imposed is a duty upon the principal value of the property which passes or is deemed to pass upon death. This is what we decided in Earl Cowley's case ([1898] 1 Q.B., 355), though in that case we held that, as the life estate of the second Earl Cowley had been kept alive until his death, and was then subsisting, it was property which was deemed to pass within section 2, subsection 1 (b), of the Act upon the death of the second earl—a very different case from the present. I now come to section 2, subsection 1. It enacts that "property passing on the death of the deceased shall be deemed to include—(a) property of which the deceased was at the time of his death competent to dispose; (b) property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest. The present case clearly does not fall within section 2, subsection 1 (a), for the owner of the life interest at the time of her death was not competent to dispose of it, for the simple reason that she had absolutely disposed of it more than one year and eight months before her death. Nor does it fall within subsection 1 (b), for the owner of the life interest had already disposed of it one year and eight months before her death, and had no interest ceasing on her death, nor had the remainderman any interest ceasing on her death, for at the date of the death of the owner of the life interest the remainderman had been absolutely entitled to the property for more than 20 months. This life interest had been extinguished and annihilated long before the death of the owner of the life interest, upon which event it is that the estate duty attaches upon the property which then passes. To no extent whatever did a benefit accrue or arise by cesser of the life interest upon the death of the owner of that interest, either to her or to the remainderman, or to any other person. In the face, however, of the clear words of the Act divers arguments were addressed to us by learned counsel for the Crown. It was argued that, as the owner of the life interest had had at one time a life interest in the property, it came within subsection 1 (b), but I would point out that this is not so; for the words are not "had had," as the Crown contended, but, on the contrary, are "had an interest ceasing upon

the death of the deceased," and are not "has had an interest which had ceased before death." Take, for instance, the case of a remainderman dying in the lifetime of the surrenderor after an absolute surrender to him of a life interest. What duty would have to be paid upon the property which passed upon his death—that is, upon the death of the surrenderor, the remainderman? It is obvious to me that duty would have to be paid upon the principal value of the property which passed at the death of the remainderman. And yet, if the Crown be right, another duty would become payable upon the subsequent death of the owner of the life interest; for, upon the hypothesis which the Crown contends for, the life interest passes in such circumstances upon the death of the owner of the life interest. This appears to me with submission to be absurd. Another argument put forward by the Crown was that subsection 1 (b) deals with settlements, and so it does, but where in this subsection, or indeed in any other section, are to be found words showing that property which is non-existent passes or is deemed to pass upon death, and is subject to estate duty? Sections 5 and 7 were referred to, but, in my opinion, they show nothing of the kind. Again, the Crown argued that, if its contention were not correct, after the words "property in which the deceased or any other person" in subsection 1 (b) must be added the words "other than the remainderman"; for if they are not inserted the words "other person" embrace the remainderman. Assume they do, but how does this show that the life interest which has become extinct by the surrender is liable to estate duty? My brother Chitty during the argument answered another suggestion made on behalf of the Crown, which was that, if the Crown were not right in its contention, the case of a surrender of a life interest to a remainderman was the only case in which estate duty would not become payable upon the death of the owner of the life interest. My brother pointed out that this was not so, and he put the case of the cesser of a life interest with a gift over in fee upon the happening of an event which had happened, and the owner of the life interest not dying till years afterwards. Would estate duty become payable upon the death of the owner of the defunct life interest? I say not, but upon the death of the owner in fee it would be that the Crown would get the duty. The real truth of this case is that, after the surrender by the owner of the life interest to the remainderman, it having taken place more than 12 months before the death of such owner, her death, so far as estate duty is concerned, is a wholly immaterial matter, for her life estate had then ceased to exist and nothing passed at her death; see *Radcliffe v. Bewes* ([1892] 1 Ch., 227). The Attorney-General, to use his own expression, stated that, if we decided against him, we should knock the bottom out of the Finance Act, for he argued that our judgment would permit any tenant for life upon his death-bed to surrender his life estate to the remainderman and thus defeat the duty. He argued that section 2, subsection 1 (c), of the Finance Act, which relates to gifts *inter vivos* less than 12 months before death, and which incorporates and amends section 2 of 44 Vict., c. 12, and section 11 (1) of 52 Vict., c. 7, did not apply to the case. That section 2, subsection 1 (c), is a very remarkable piece of legislation no one can deny, and if what the Attorney-General says is the effect of it the Legislature, by the circuitous route it has adopted, has obviously failed to carry out its object; but, if this be so, all I can say is so much the worse for the Crown. The true construction of this composite section is wholly immaterial to the present case, and I give no opinion as to its true construction, though the argument upon it struck me as remarkable, coming as it did from

learned counsel for the Crown. For the reasons above I think the Crown is wrong, and that Eliza Beech's property in the trust funds, which consisted of a life interest therein, and which came to an end 29 months before her death, is not liable to estate duty upon her death as contended for by the Crown, and that this appeal must therefore be allowed with costs.

LORD JUSTICE CHITTY read the following judgment:—I am of the same opinion. Upon the execution of the deed of December 18, 1894, the appellant, Howard Beech, became absolutely entitled in equity in possession to the trust property, upon the principal value whereof the estate duty is claimed by the information. The effect of the deed was to merge his mother's life interest in the immediate reversion then vested in him. The life interest was finally extinguished and ceased to exist. Thenceforth he was the sole owner of the entire beneficial interest in the property. He had all the rights of a beneficial owner. He could have sold or assigned the property or mortgaged it or otherwise disposed of it as he thought fit. He could have required his co-trustee to make it over to himself or his assigns. The merger of the life interest was as complete as it would have been if the property had been land and the estates legal. All these propositions are incontrovertible. They are the result of the simple application of an ordinary and well-established rule of equity to the facts of the case. The ground being thus cleared, the question, as it appears to me, is narrowed down to this—Has the Finance Act, 1894, Part I. (the only part with which we have to deal), kept alive the life interest of Mrs. Beech for the purposes of the Act, so as to render the property liable to estate duty on her death, notwithstanding the merger? It is unquestionably within the competence of Parliament when imposing a tax to modify or abrogate for the purposes of the Act any rule of law or equity which otherwise would be applicable to the subject matter. Whether it has done so or not must always be a question of the true construction of the particular statute under consideration. The right and, indeed, the only method of interpretation is to ascertain the intention of the Legislature from the language and provisions of the Act itself. In construing a statute regard must be had to the ordinary rules of law applicable to the subject matter, and these rules must prevail except in so far as the statute shows that they are to be disregarded: and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition. It is incumbent on the Crown when claiming the tax to make out affirmatively that the case falls within the statute. The principles applicable to the interpretation of a taxing Act are laid down by the Lord Chancellor in the passage already cited. You must see that the tax is expressly imposed; the subject is not to be taxed without clear words, and the Act, like every other Act, must be read according to the natural construction of the words. In construing this particular Act I am unable to derive any assistance from the authorities or the *dicta* on the Succession Duty Act. The two Acts are framed on entirely different lines. The scheme of the Finance Act, Part I., is to be found in section 1, which is more fully developed and explained in the subsequent sections, the most important of which for the present purposes is section 2. The effect of these two sections is to impose the tax on property which passes or is deemed to pass on death. Stated simply, but with sufficient accuracy for the present purposes, section 1 runs thus:—In the case of every person dying after August 1, 1894, there shall be levied and paid upon the principal value of all property, real or personal, settled or not settled, which passes on the death of such person a duty called estate duty at the graduated rates after mentioned. For the

duty to attach under this section it is essential that there be a passing of property on the death of the person so dying. In my judgment it is clear that this case does not fall within the section. No property passed on Mrs. Beech's death. Her life interest had passed more than a year before she died. The property remained unaffected by her death. If the appellant, Howard Beech, had died in her lifetime the property would have passed on his death, and the duty would have been leviable. The fact that she was then alive would have been wholly immaterial. Her subsequent death would have been equally immaterial. Yet to be consistent on this section, it must be said for the Crown that a new or further duty would have been payable on her subsequent death. The claim for the duty is rested substantially on section 2. I pass over subsection 1 (a), which has already been sufficiently dealt with by Lord Justice Smith, and go to subsection 1 (b). The effect of it is as follows:—Property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest. Mrs. Beech had formerly a life interest in the property, but it had ceased more than a year before her death. The words are "ceasing on the death of the deceased." They import, according to their grammatical and natural meaning, that the interest ceases presently on the death. The argument for the Crown alters the words. It attempts to read the words as if they included the case of having previously had an interest which had ceased before the death. In my opinion the interest which ceases must be an interest which ceases on the death. I agree with what Lord Justice Rigby said in "*Cowley's*" case, ([1898] 1 Q.B., p. 375). Where the interest is a life interest it need not be a life interest in the deceased; the deceased may have been merely a *cestui que vie*, the beneficial interest being vested in some other person. The subsection is not confined to life interests, it would embrace any other case of an interest ceasing on the death. But, confining myself for the moment and for the sake of clearness to a life interest, it appears to me that the argument for the Crown requires the insertion of words to the effect that a life interest for the purpose of the subsection shall be deemed to continue down to the death of the deceased notwithstanding it has been previously determined by merger. I cannot find any such words, nor words from which any such implication can be reasonably said to arise. Certainly there are no clear words to that effect. During the argument I put a case to the counsel for the Crown, on which I received no clear or satisfactory answer. Supposing a life interest is limited to a man for his life subject to a condition of cesser if he shall attempt to alienate, and he does attempt to alienate, whereby his life interest ceases on that attempt, or supposing property to be limited to a widow subject to a provision that if she marries again her interest shall cease, and she does marry again, whereby her life interest ceases on her second marriage, do these cases fall within the subsection? In my opinion they clearly would not. Much was said upon opening the door to evasion. Would these be cases of evasion? Certainly not. Indeed, the whole argument on evasion of the Act is fallacious. The case either falls within the Act or it does not. If it does not, there is no such thing as an evasion. If a tax is imposed on using a crest or coat of arms and a man who has previously used them ceases to use them in order to be free from the tax, there is no evasion of the Act in any sense of the term legitimately used. I now ask, What is the difference between the two hypothetical cases

I have put and the case before us? I can see none. In the case before us the general law of merger whereby the life interest ceased was brought into operation by the lawful act of the parties. In the hypothetical cases the life interests cease by the acts of the parties bringing into operation a limitation of cesser to which the law gives effect. Turning back to the subsection, I will deal briefly with the words "or any other person," on which great stress was laid in the argument for the Crown. They carry the case of the deceased being a mere *cestui que vie*. Restricting myself again to the case of a life interest, but merely for the sake of clearness, they include a life interest originally vested in the deceased, which has been assigned or transferred to some other person and is still subsisting at the death. They would include other like cases, but they do not apply where the interest has ceased before the death. The words remaining to be considered are "to the extent to which a benefit accrues or arises on the death of the deceased." They were dealt with by the Court in Cowley's case, and more particularly by Lord Justice Rigby. I agree with what he said in his judgment at pp. 376, 377. He said that the words did not involve any departure from the principle that the Act takes no notice of successions, and that they "only limit the operation of the word 'ceasing' by confining it to cases where something passes and to the extent to which anything does pass." And again, "they are there used . . . as a measure of the extent to which the property in which the interest ceases is to be deemed to pass, and section 7, subsection 7, only shows the way of applying that measure." He afterwards dealt with section 7. I think it unnecessary to add anything on that section. In support of their main contention counsel for the appellants referred to subsection 1 (c), and contended that, if the merger had taken place within a year before Mrs. Beech's death, the gift of her life interest would have brought the case within the Act. In my opinion their main contention did not require this support. For the Crown, however, it was contended that a gift of the life interest would not have fallen within the reach of the statutes mentioned in this complicated section. Legislation by reference to other statutes which are at the same time altered by the enacting statute is a risky method, and sometimes fails in accomplishing the object in view. I will assume that counsel for the Crown are right in their contention, but without expressing any opinion one way or the other on the point. On this assumption the result is simply this. The Legislature contemplated that recourse would be had to methods of attempting to escape from the tax, and closed the door against some of these attempts, but left it open where there was a gift of a life interest in the deceased made more than 12 months before the death. In other words, the Legislature (whether intentionally or not it is beyond our province to inquire) has failed or omitted to hit that particular case. I have dealt only with the main points argued for the Crown. There were some further points raised, but in my opinion they do not affect the real question, and with all due respect to the counsel who raised them I think it unnecessary to notice them in detail. In the judgments delivered in the Divisional Court some observations were made on conveyancers and the rules of conveyancing. I am unable to see the bearing of those observations. Conveyancers did not invent the rules of merger either at law or in equity, nor are they responsible for them. Their function is to understand the doctrine of merger and to apply it practically where it is applicable.

LORD JUSTICE COLLINS concurred.

Q.B. Div. (Lord Russell of Killowen, } 1898.
C.J., Day, Wills, Grantham, Wright, } April 30.
Kennedy, and Channell, JJ.)

ROPER V. KNOTT.*

Criminal Law—Malicious Injuries to Property
Act, 24 and 25 Vic., c. 97—Wilful or malicious damage.

An act done with the knowledge that damage will result is an act of wilful damage.

"Hall v. Richardson" (6 *The Times* L.R., 71, and 54 *J.P.*, 345) disapproved.

This was a case stated by a magistrate which had been argued before a Divisional Court consisting of two Judges, and was then reserved for a special Divisional Court. The question raised was whether a man who takes milk round for his master and waters the milk for his own purposes can be convicted of malicious injury to personal property. The magistrate, relying on the case of "Hall v. Richardson" (6 *The Times* L.R., 71, and 54 *J.P.*, 345), had refused to convict.

Mr. Avery appeared on behalf of the appellant; the defendant was not represented.

The case stated by a metropolitan magistrate gave these facts:—A charge was made against Charles Knott that he did wilfully damage, injure, or spoil four gallons of milk, the property of Robert Roper, contrary to section 52 of the Malicious Injuries to Property Act, 24 and 25 Vic., c. 97. The appellant is a milk salesman carrying on business in Hornsey, and the respondent, who was a milk carrier in his employ, was in the habit of coming to the place of business every morning to fetch milk, which he subsequently sold to the appellant's customers. The respondent was seen to conceal a three-pint can full of water in a garden of a house near the appellant's premises. The respondent was then seen to fetch four gallons of milk in a barrow from the appellant's premises (which in the ordinary course would be sold and delivered by him to the appellant's customers), and bring it opposite to the said garden. He then was seen to pour the three pints of water out of the can into the said milk. The magistrate found that the whole of the said milk, after it had been so watered, was in fact damaged and spoiled, and was thrown away. He also found that the respondent acted in a fraudulent way, and that his object in adding water was to increase the bulk and to put the money into his own pocket by selling and not accounting for the surplus. The question for the Court was whether the respondent could be convicted of the said offence.

Mr. AVORY cited "Hall v. Richardson" (6 *The Times* L.R., 71, and 54 *J.P.*, 345), "Reg. v. Pemberton" (L.R., 2 C.C.R. 119, 43 *L.J.*, M.C., 91), "Hamilton v. Bow" (1888) 52 *J.P.*, 726. He contended that the respondent ought to be convicted. It was no answer for a person doing an act of which the natural consequence would be to damage property that it was not his intention to injure it.

The COURT thought there should be a conviction.

The LORD CHIEF JUSTICE said the question for the Court was whether the magistrate ought to have convicted. Having regard to the case of "Hall v. Richardson," it was quite natural that the magistrate should have decided not to convict. The charge was founded on section 52 of 24 and 25 Viet., c. 97. The facts were that the complainant was a milk seller and the respondent was a man in his employ who dis-

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

tributed the milk. Suspicions had been aroused against the respondent, and he was detected adding water to milk which it was his duty to deliver to the customers in the condition in which it was when he received it. The result of his action was that the four gallons of milk were spoiled, and the master lost about 10s. The respondent had done this with a fraudulent intention, though he had no personal malice against his master. Under these circumstances could the respondent be convicted of an offence within the section? The statute began with enumerating a series of specific cases of damage to realty and personality. Section 51 dealt with cases of injury, for which no punishment was before provided, to an amount exceeding £5 committed "unlawfully and maliciously." Then came section 52, in which the language was different, for it provided that whosoever should "wilfully or maliciously" commit any damage, injury, or spoil upon any real or personal property for which no punishment was before provided should be liable to imprisonment or fine. It was therefore clear that a distinction was to be drawn between acts wilful and malicious and acts wilful but not malicious. Now, was this a case of injury? The finding of the magistrate was an answer to that question, for he had found that the ten gallons of milk had been, in fact, damaged. Was this injury done wilfully? There was no doubt that it was. The respondent did the thing that caused the injury, intending to do it with the fraudulent motive of getting the price into his own pocket. A man did a thing wilfully if he intentionally did the thing that caused the damage either with the intention of doing the damage or intentionally did it knowing that it would cause the damage. This was a case of wilful damage within the section. Coming to the case of "Hall v. Richardson" (6 *The Times* L.R., 71, and 54 J.P., 345) in 1890, it was most natural, under the circumstances of that case, that the magistrate and Court should have been slow to convict, for there the man, who had accidentally spilt some milk and filled up his can with water, had no intention to defraud; but this Court could not shrink from the obligation of considering that case and did not approve of it. There was—first, the cardinal error that there was a confusion between damage to the thing and the consequent loss to the owner, but, in his opinion, the offence was committed even if the wilful damage to the thing did not cause loss to the owner. Secondly, in that case Lord Coleridge seemed to have come to the conclusion that there must be an intention to damage somebody. That, however, was not what the statute aimed at, which was damage to property. Thirdly, the power to give compensation provided by the section was apparently considered by the Judges in that case as showing that the section was limited to cases for which compensation might be awarded. The section, however, did not say so. In this case the appeal must be allowed and the case be remitted to the magistrate.

MR. JUSTICE DAY concurred.

MR. JUSTICE WILLS added some observations on the case of "Gardner v. Mansbridge" (19 Q.B.D., 217), which had been cited on the former occasion, and added, as an explanation of the word "wilfully," that if a man did a thing occasioning damage to property, but not knowing that it would do harm, he could not be convicted within the section.

MR. JUSTICE GRANTHAM concurred in the judgment of the Court. By section 52 it was intended to sweep in a great number of small offences. The change of language from "unlawfully and maliciously" to "wilfully or maliciously" indicated that. There were three questions to ask:—(1) Was there property? Milk certainly was property. (2) Was it damaged? The

magistrate had found that it was? (3) Was the damage done wilfully? The answer was that it was done intentionally for the benefit of the respondent. It was, therefore, done wilfully. All these questions being answered in the affirmative, the case came within the section. He agreed in the observations of the Lord Chief Justice upon the case of "Hall v. Richardson."

MR. JUSTICE WRIGHT, MR. JUSTICE KENNEDY, and MR. JUSTICE CHANNELL concurred.

[Solicitors—C. V. Young and Windsor.]

Q.B. Div. (Wills and)
Kennedy, J.J.) }

1898.
May 2.

THE QUEEN v. BIRD AND OTHERS, EX PARTE NEEDES.*

Licensing Acts—Confirmation of licence—
Licensing Act, 1872, sec. 43—Rules made by
Justices—*Ultra vires*.

This case came on as an argument to make absolute a rule *nisi* for a *mandamus* to the licensing justices sitting as confirmation committee of the City of London to hear William Henry Needes in opposition to the application of Vergilio Guidotti for a full licence in respect of the premises known as 11, Bridge-street, Westminster.

Mr. Scrutton appeared for the applicant Guidotti, and Mr. Candy, Q.C. and Mr. Peter Grain for the objector, William Henry Needes.

The application was made by the objector on the ground that Rule 30 of the Standing Orders of Quarter Sessions for the County of London was *ultra vires*. The rule in question directs that any person who desires to oppose the confirmation of a licence granted by the justices must, within seven days after the grant of such licence, give notice in writing to the applicant and the clerk of the peace of his intention to oppose the confirmation of it. The licence was granted on March 25. The applicant did not take the necessary steps to entitle him to appear before the confirming committee to oppose until April 17, ten days before the day fixed for the sitting of the committee. He then served the proper notice on the applicant and tendered a duplicate copy to the clerk of the peace. The latter declined to receive it on the ground that it was useless unless delivered within the prescribed period of seven days. The applicant had also omitted to enter into his own recognizance and find one surety for £20 to be answerable for the costs of his appearance, which was prescribed by Rule 31 of the standing orders. The confirming committee, in consequence of the failure of the applicant to comply with the rules, declined to hear his opposition.

MR. CANDY, Q.C., argued that the power granted to the justices by section 43 of the Licensing Act, 1872, to make rules did not entitle them to make such a rule as that before the Court. In support of his argument he quoted the following cases:—"Rex v. Norfolk Justices" (5 B. and Ad., 990); "Rex v. Staffordshire Justices" (4 A. and C., 842); "Reg. v. Surrey Justices" (18 L.J., 175); "Reg. v. Pawlett" (L.R., 8 Q.B., 491).

At the conclusion of the arguments, their LORDSHIPS decided that though the objects of the rules might be effected in another way, they were of opinion that the rules as they stood were undoubtedly *ultra vires*, and the rule for a *mandamus* was made absolute.

*Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

Q.B. Div. }
(Ridley, J.) }1898.
May 3.

JUSTICE V. JAMES.*

Receiver—Liability—Rent of premises—Receiver held not personally liable.

The plaintiff in this case was the owner of some stables in Bloomsbury. By indenture dated April 12, 1886, he demised them to Charles Shurey for 13 years subject to the usual covenants, and in April, 1892, Shurey assigned the lease to Purkess and Company (Limited). A debenture-holder's action was brought against the company and on March 30, 1894, the defendant was appointed by the Court of Chancery receiver and manager for the debenture-holders. In August, 1894, the plaintiff wrote to the company asking for the half-year's rent due at the previous midsummer, and the defendant replied by a letter written on the company's notepaper and signed "A. A. James, Receiver and Manager," enclosing the rent. In this action the plaintiff sought to make the defendant personally liable for use and occupation of the premises.

Mr. LUSH WILSON, Q.C. (Mr. George Wallace and Mr. Lucy Smith with him), for the plaintiff, argued that the receiver and manager was personally liable and must look to the assets of the company to recoup him. "Burt v. Bull" ([1895] 1 Q.B., 276), and "Owen v. Cronk" ([1895] 1 Q.B., 265). As between a receiver and manager and any customer the effect of signing as receiver and manager was to warrant that he had funds. A receiver and manager was in the position of an executor carrying on a business and such a person would be personally liable if he entered into possession and paid rent. "*In re Bowes*" (37 Ch.D., 128). Defendant's proper course was to have gone to the Court and produced an account and asked permission to surrender the lease. Form 577 in Palmer's Company Precedents showed that this was the practice.

Mr. BOSANQUET, Q.C. (Mr. R. B. D. Acland with him), for the defendant.—The plaintiff had let the premises for an unexpired period to Shurey, who was still liable. In such a case the owner can only sue two persons—i.e., the original lessee and an assignee who is liable upon the covenants. Two things are necessary for an action for use and occupation—first, that the owner be entitled to immediate possession; and, secondly, that the owner should have allowed the defendant to be in under some sort of contract. Here neither of these conditions was present. "Burt v. Bull" was a case where a receiver and manager had made a contract for goods. Here defendant had made no contract. The defendant was clearly not an assignee under the lease and covenants, and otherwise he could not be sued. 11 Geo. II., c. 19, s. 14, had no effect where there was a deed.

Mr. LUSH WILSON, in reply.—The rule that where a deed exists no action for use and occupation lies only applies to an action against the tenant under the deed, "*Williams v. Heales*" (L.R., 9 C.P., 177). There may be one tenant by deed and another by estoppel.

Mr. JUSTICE RIDLEY said there would be judgment for the defendant. The case rested on the letters asking for and enclosing rent, and on these defendant was said to be estopped from denying his liability. This case was not governed by "Burt v. Bull." There the receiver and manager had entered into a contract; here he had not; he had only, in reply to a demand, paid rent due from the company. Neither did "*Williams v. Heales*" apply. The action was wrongly brought for use and occupation, but it was not a case for amendment, as the interests of justice did not require that the defendant should be made personally liable.

Stay of execution was granted pending appeal.

*Reported by H.O. BUCKLE, Esq., Barrister-at-Law.

No. 23.—VOL. XIV.

Prob., Divorce, and Adm. Div. (The)
Eight Hon. the President, Sir Francis
Jeune, and Gorell Barnes, J.) }1898.
May 3.

ROBINSON V. ROBINSON.*

Divorce—Practice—Appeal—Summary Jurisdiction (Married Women) Act, 1895—Appeal from magistrates—Duty of magistrates' clerk to supply notes of the evidence.

This was an appeal under the Summary Jurisdiction (Married Women) Act, 1895, by Mrs. Elizabeth Robinson from a refusal of the Watford justices on March 22 last to grant her a judicial separation, and a maintenance order against her husband Henry Robinson, on the ground of his persistent cruelty, which had caused her to leave and live apart from him.

Mr. G. M. COHEN was for the wife; Mr. Turrell for the husband.

Mr. COHEN, in opening the appeal, said that he was much hampered by the fact that the magistrates' clerk had refused to give his client a copy of the depositions, and by the fact that apparently the magistrates themselves had taken no note.

The PRESIDENT.—Do you really mean to say that a magistrates' clerk has refused to supply this Court with a copy of the depositions? Perhaps you mean that none were taken.

Mr. COHEN.—They were refused, my Lord.

The PRESIDENT.—Refused?

Mr. COHEN.—Yes. I must ask your Lordships to say that this appeal cannot be properly heard without the depositions, and that it must be adjourned for the magistrates' clerk to supply them at his own expense.

The PRESIDENT.—Have we that power?

Mr. COHEN.—I should submit that a refusal to supply this Court with depositions under this Act amounts to contempt of Court.

The PRESIDENT.—I do not like to say anything at this moment until I know what reasons may be given for the refusal to supply them.

Mr. JUSTICE BARNES.—I see we have a newspaper report of the inquiry supplied to us. If that could be verified in any way—

Mr. TURRELL.—I am content that your Lordships should treat that report as the notes of the evidence. There are no depositions strictly, this not being an indictable offence.

The PRESIDENT.—If I had the power I would compel the magistrates' clerk to produce his notes of evidence.

Mr. COHEN.—I submit that Rule 8, order 59, gives your Lordship power.

The PRESIDENT.—In an early case decided under this Act ("*Harling v. Harling*," 74 L.T., 559, and *The Times*, March 4, 1896) we expressed our opinion that a full note should be taken of the evidence, and that the magistrates' reasons for deciding the case should also be stated. I may add that in every case up to the time we have been supplied with an excellent note.

Mr. COHEN.—Before the case was heard the chairman said, "Cannot this case be settled out of Court?" and after the summons had been dismissed the chairman "expressed the hope that the husband and wife would settle their dispute and live together peacefully. In a few years' time they would, no doubt, laugh together at having brought their trouble for the Bench to settle." The parties were married in April, 1896, and in September, 1897—the wife being then *enroute*—the husband smacked her face and pushed her about so as to cause her to scream. In January last she was delivered of a child, who only lived a few minutes.

*Reported by J. H. MURPHY, Esq., Barrister-at-Law.

The husband wished to have it buried in a box as a stillborn child, and he was very angry because funeral expenses were incurred owing to the child having breathed. In February, before the wife had really recovered from the effects of her confinement, he beat her with a toasting-fork and pulled her out of bed on to the floor because she complained of his coming to bed with his boots on. He further said, "I'm an Englishman," and struck her. He had also said that "he would swing for her" and would have nothing more to do with her. Under these circumstances there could be no doubt that the husband's course of conduct was dangerous to the wife's health, that it was persistent, and that there was a danger that it would be repeated.

MR. JUSTICE BARNES.—Her evidence stands uncontradicted.

THE PRESIDENT.—The wife's cross-examination does not raise any denial or suggest any defence.

MR. TURRELL, for the husband, regretted the absence of the notes of evidence, for which his client was in no way responsible, and submitted that it had not been shown that the husband's conduct caused the wife to leave him and live apart.

THE PRESIDENT.—She did leave him, and before the magistrates her solicitor, in answer to the chairman, said that she would never go back to him.

MR. TURRELL.—All the magistrates said was that until a different class of case was established against the husband they did not consider that a case for granting a judicial separation had been made out under the Act. The husband's case was never therefore heard.

THE PRESIDENT.—Can you resist the case going back to the magistrates?

MR. TURRELL.—I should submit that the magistrates were justified in holding that no case of persistent cruelty causing the wife to leave her husband had been made out.

THE PRESIDENT.—This case comes before us in a most unsatisfactory form, owing to the fact that we have not been supplied with the proper materials for enabling us to hear and determine this appeal. When this Act came into force we stated that the Court should in these cases be furnished with proper notes of evidence, and with the justices' reasons for determining the cases. This I may say we have been supplied with in every case, and although this necessarily imposes a little extra trouble upon the justices and their clerks, I must remind them that the Legislature has under this Act given justices a very important jurisdiction in matters of such vital moment that it has also felt it necessary to allow a full appeal to this Court in both questions of law and fact. In this case we are told that the justices' clerk has declined to supply a note of the evidence. I cannot believe, nay, I decline to believe, that any justices' clerk has refused to supply this Court with a note of evidence. I can only regret that the note taken was of such little value that the justices' clerk must have thought it would be of no assistance to this Court. After dealing with the evidence, his Lordship said that a *prima facie* case had undoubtedly been made out against the husband, yet the justices in their wisdom thought that the summons should be dismissed rather than take the serious step of separating a wife from her husband. After referring to the chairman's remarks at the end of the case his Lordship concluded,—"I need say no more, with all due respect to the justices, than this—they have not decided the matter which they had before them to decide. This case must go back for the justices to decide according to the law of the land."

MR. JUSTICE BARNES.—I entirely agree. I need only say that in my opinion it is essential that the notes of evidence and the justices' reasons for their decision should be taken down at the time, as an appeal lies to this Court on both questions of fact and law.

The case was accordingly sent back to the justices for hearing. An order for the wife's costs was made.

[Solicitors—Frank Budd, agent for Camp and Ellis, Watford; Geo. Reader and Co., agents for Broad and Riggall, Watford.]

Court of Appeal (Lord Halsbury, L.C., } 1898.
A. L. Smith and Collins, L.J.J.) } May 4.
TRINDER, ANDERSON, AND COMPANY V. THE THAMES
AND MERSEY INSURANCE COMPANY.
TRINDER, ANDERSON, AND COMPANY V. THE NORTH
QUEENSLAND INSURANCE COMPANY.
TRINDER, ANDERSON, AND COMPANY V. WESTON,
CROCKER, AND OTHERS.*

Insurance—Marine—Loss by stranding—Negligence of assured—Liability of underwriters.

When the proximate cause of a loss is a peril of the sea, the fact that it was brought about by the negligent navigation of the assured affords no defence to the underwriters.

Decision of Kennedy, J. (13 *The Times* L.R., 502), affirmed.

These were appeals from judgments of Mr. Justice Kennedy, before whom the actions were tried without a jury. The actions were brought in the interest of the owners of the sailing ship Gainsborough on policies of marine insurance effected with the defendants respectively. The action against the Thames and Mersey Marine Insurance Company was on a policy on freight. The action against the North Queensland Insurance Company was on the hull of the Gainsborough, and is reported in 13 *The Times* L.R., at p. 502. The action against Weston, Crocker, and others was on a policy of disbursements. The Gainsborough, while on a voyage covered by the policies, stranded on the island of Oahu, near Honolulu, on August 29, 1896. The master was the owner of forty-two sixty-fourths of the ship, and was one of the plaintiffs in the actions. In another action, "*The Westport Coal Company (Limited) v. McPhail and Others*," brought by the cargo-owners against the ship-owners, which was tried before Mr. Justice Kennedy with a special jury a few days before these actions were tried, the jury arrived at certain findings, which it was agreed should be taken to be findings in these cases. One of such findings was that the stranding was due to the negligence, but not the wilful negligence, of the master in the navigation of the ship. The learned Judge gave judgment for the plaintiffs in each of the actions. The defendants appealed on two grounds—(1) That no notice of abandonment had been given; (2) that the loss had been caused by the personal negligence of the assured.

Mr. Joseph Walton, Q.C., and Mr. T. E. Scrutton appeared for the defendants in each action; Mr. Robson, Q.C., and Mr. Joseph Hurst for the plaintiffs.

THE COURT, having taken time to consider, delivered judgment to-day, dismissing the appeals.

LORD JUSTICE A. L. SMITH read the following judgment in the first case:—This is an action by a ship-owner for a total loss of freight upon a policy of marine insurance covering freight, and the first point taken by the defendants, who are an underwriting company, is that as neither the ship carrying the goods for the carriage of which the freight was to be earned nor the goods themselves were actual total losses, notice of abandonment must have been given by the plaintiff to the underwriters upon freight

to entitle him to recover for total loss of freight. The second point is that, as the stranding of the vessel which brought about the loss of freight sued for was caused by the negligent navigation, though not the wilful act, of the plaintiff the assured (he being part owner and captain of the ship), he cannot recover upon the policy. The facts are as follows:—On May 27, 1896, the plaintiff caused a policy of marine insurance to be effected with the defendants on his and his co-owners' behalf against perils of the sea upon "freight chartered or as if chartered" in the ship *Gainsborough* from Sydney to Newcastle, New South Wales, while there and thence to any port or ports in New Zealand, while there and thence to San Francisco. When the ship was proceeding on her voyage from New Zealand to San Francisco with a cargo of coals, the plaintiff found himself short of water and thereupon justifiably, as it has been held, put into Honolulu for water. Upon nearing Honolulu on Saturday, August 29, 1896, owing, as it has been found, to his negligent navigation, the ship was run upon and became firmly stranded upon a reef and commenced at once to make water. Endeavours were made to get her off by means of towing but without avail, seas were washing over her decks, she was bumping heavily upon the reef and kept going further on, her cargo became wetted by the sea water, and the ship and cargo were in a very critical and perilous position. In these circumstances the plaintiff took the opinion of Lloyd's agent at Honolulu, together with that of the harbour-master there and of a Captain Campbell, and they agreed in advising him that, considering the condition and position of the ship and cargo, they should be at once sold; and upon Monday, August 31, they were accordingly sold, situated as they were, and realized the sum of £374, the purchaser Allen having also to pay some charges to the amount of £43. It has been found that this sale was not justified at the time it took place, but my brother Kennedy, who tried the case, has found that the sale, although premature, must have taken place within a few days of the time at which it did. The ship and cargo remained upon the reef until September 26, when Allen commenced operations in order to get the ship and cargo off, a steam pump having by that time been obtained. Some 200 tons of coals were then jettisoned, and upon October 4 the ship, with the remainder of her cargo in her, was got off. This coal when got out of the ship was sold at Honolulu by Allen for £1,000. Without dealing with the evidence in detail, in my judgment it shows that the sea damage which the ship had sustained—situated, as she was, 2,000 miles from San Francisco, which was the nearest port at which the ship could be repaired to make her a cargo-carrying ship, and then only at a cost which would have exceeded the value of the ship when repaired—was such as would have justified an abandonment of the ship and a claim against the underwriters upon the ship for a total loss. The learned Judge has found that "it was not a practicable thing to carry on the cargo either in the stranded ship or in any other ship, for none could be obtained, and that it could not have been carried on, and no abandonment would have enabled the assurers to do so; that the cargo, although it did not actually perish, was in a condition in which it was not doubtful whether notice of abandonment could give the assurers any advantage, for it was quite clear it would not; that the cargo would have had to be sold at Honolulu, and that the freight by reason of the stranding was an actual total loss, and that there was a destruction of the voyage." These being the findings of the learned Judge, as there was clearly evidence to support them, I see no ground for differing from him. There was no telegraphic communication between Honolulu and San Francisco or anywhere else. Honolulu was, as before stated, 2,000 miles from San Francisco, and this was

the nearest place to Honolulu wherefrom to communicate with England. Had notice of abandonment of freight been given by the plaintiff from Honolulu, as the underwriters upon freight now contend it should have been, it would have taken from five to six weeks before the underwriters could have communicated with Honolulu. The evidence shows that the coal in its wet state could not have been carried on board any ship from Honolulu to San Francisco by reason of its inflammable condition and liability to spontaneous combustion. It could have been dried at Honolulu, but it was proved that the process of unshipping, drying, reshipping, and afterwards conveying coal on to its destination is such that, besides the heavy cost of drying, the coal itself becomes greatly deteriorated and damaged, and, as before stated, the learned Judge has found that the sale of the coal at Honolulu must have taken place within a few days of the time at which it was actually sold. It was argued for the underwriters that as there was no actual total loss of the ship, for she remained a ship after the stranding and is so still, and as there was no actual total loss of the cargo, for it remained coal after the stranding as before though wetted and greatly deteriorated and depreciated in value, the assured could not recover for a total loss of freight unless notice of abandonment of freight had been given to the underwriters upon freight. Now the question of giving notice of abandonment upon a policy covering freight is distinct from the question of giving notice of abandonment upon a policy on a ship, and they must be kept apart. At one time there was a conflict of opinion upon this question of giving notice of abandonment, Lord Abinger in "*Roux v. Salvador*" (3 Bing., N.C., 236) holding that there were cases in which, although the subject matter insured against remained *in specie*, notice of abandonment need not be given; Lord Campbell on the contrary ("*Knight v. Faith*," 15 Q.B., 649) holding that notice of abandonment must be given in all cases except in cases of actual total loss. This controversy was finally, as regards a policy on freight, determined in the case of "*Potter v. Rankin*" (L.R., 6 E. and I., 83), in the House of Lords, in which case the Judges were called in to advise the House as to the necessity of an assured upon freight in all cases giving notice of abandonment in the case of a constructive total loss of ship before he could recover for a total loss of freight. Lord Abinger's view was supported. In "*Potter v. Rankin*" the appellants, the underwriters upon freight, contended that, by the insurance law of England, where the thing insured against existed in kind, however deteriorated or damaged, there could be no total loss without notice of abandonment, and one of the questions asked by the House of the Judges was this:—Was notice of abandonment, either of ship or freight, or of both, necessary to enable the plaintiff to recover for a total loss on a policy on freight? In this case the subject matter of insurance was chartered freight. His Lordship read passages from the opinions of Mr. Justice Brett and Mr. Justice Blackburn and from the judgment of the Lord Chancellor and continued:—It seems to me that in the present case, applying the principles laid down in "*Potter v. Rankin*," the circumstances were such as (a) to authorize an abandonment of the ship on a policy on ship; (b) that there was no chance of an opportunity of the cargo being forwarded in a substituted ship, for no other could be obtained; (c) that this was not a matter of doubt; (d) that the ship herself could earn no freight on the voyage insured; (e) that there was nothing which the underwriters upon freight could have done had notice of abandonment been given to them, and it would have only been an idle ceremony to have done so. His Lordship then referred to the case of

"Kaltenbach v. Mackenzie" (3 C.P.D., 467), and continued:—I am of opinion, therefore, that this first point as to the necessity of there being a notice of abandonment given in this case fails the defendants. The second point taken is that inasmuch as the ship was run upon the reef by the negligent navigation, though not wilful act, of the captain, as he was one of the assured he cannot recover upon the policy. It cannot be doubted that a policy upon ship covering perils of the sea covers a loss brought about by the negligent navigation of the captain and crew, if such loss is immediately caused by a peril of the sea. It was held over 50 years ago in "Dixon v. Sadler" (5 M. and W., 414) that an assured of ship makes no warranty to the underwriters that the master and crew will do their duty during the voyage, and consequently their negligence is no defence to an action on a policy when the loss is brought about by their negligent navigation, if the loss is immediately occasioned by the perils of the sea. Mr. Baron Parke, when delivering the judgment of the Court, cited five cases in support of this proposition commencing as far back as the year 1818 with the case of "Busk v. Royal Exchange Assurance Company" (2 B. and Ald., 73). That the negligent navigation of a ship by a person other than the assured affords no defence to an action upon a policy of marine insurance against perils of the sea, when the loss is immediately occasioned by a peril of the sea, is clear, the reason in my opinion being that what is insured against is a peril of the sea, which is none the less a peril of the sea though brought about by negligent navigation. Is there then any warranty by a part-owner, if he be one of the assured, that he will not personally be guilty of negligent navigation during the voyage covered by the policy? We are not dealing with a loss brought about by the wilful act of an assured. Negligent navigation has never been held to be equivalent to "dolus," or the "misconduct" which is spoken of by Lord Campbell in "Thompson v. Hopper" (6 E. and B., 937), nor is it the negligence referred to by Lord Ellenborough in "Bell v. Carstairs" (14 East., 374). It cannot be doubted that the legal maxim, *In jure non remota causa sed proxima spectatur*, applies when considering what are the particular perils for which an insurer undertakes to be liable on a policy of marine insurance, if such maxim contravenes no principle of insurance law, and is not hostile to the manifest intention of the parties (see per Lord Campbell in "Thompson v. Hopper"). It is not disputed at the bar that negligence of an assured upon a fire policy, whereby the fire was occasioned which caused the loss, affords no defence to the insurer. Why so? Because loss by fire is what is insured against. And so in a marine policy sea perils are what is insured against. The risk undertaken by an underwriter upon a policy covering perils of the sea is that if the subject matter insured is lost or damaged immediately by a peril of the sea, he will be responsible; and in my judgment it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured. In the last case the maxim above referred to does not apply for the reasons pointed out by Lord Campbell in "Thompson v. Hopper," for then not only does the maxim contravene the principles of insurance law and the manifest intention of the parties, but it is qualified by another legal maxim, *Dolus circūitus non purgatur*. I believe that there cannot be found in the insurance law of England a single case to support the proposition now contended for by the underwriters, which is that, assuming the loss has not been occasioned by the wilful

act or default of the assured, but is immediately caused by a peril of the sea, the remote and not the proximate cause is to be looked to. His Lordship referred again to "Thompson v. Hopper," and also to "Dudgeon v. Penbroke" (2 App. Ca., 284), as authorities supporting that which he held to be the law. In conclusion he said that he agreed with the judgment of Mr. Justice Kennedy, and that the appeal must be dismissed with costs.

LORD JUSTICE COLLINS read a judgment to the same effect.

The LORD CHANCELLOR concurred.

LORD JUSTICE A. L. SMITH said that the two other appeals depended upon the case which they had just decided, and that they also would be dismissed.

Court of Appeal (Lord Halsbury, L.C., } 1898.
A. L. Smith and Collins, L.JJ. } May 4.

THE WESTPORT COAL COMPANY (LIMITED) v. MCPHAIL
AND OTHERS.*

Ship—Bill of lading—Exception of negligence of master—Master a co-owner.

An exception in the bill of lading exempting the owners from liability for the negligence of the master will protect the master himself where he is one of the co-owners.

Decision of Kennedy, J. (13 *The Times* L.R., p. 497), reversed.

This was an appeal from the judgment of Mr. Justice Kennedy in an action arising out of the same facts as the above cases. This action was brought by the owners of a cargo of coal shipped on board the Gainsborough against McPhail, the master and part owner, and his co-owners of the ship for breach of the contract contained in a bill of lading to deliver the said cargo. The case is reported in 13 *The Times* L.R., at p. 497. The action was tried before Mr. Justice Kennedy with a special jury. The jury found that the cargo had been lost on the voyage owing to the negligence, but not the wilful negligence, of the master; and that the sale of the cargo by the master after the stranding of the Gainsborough was unnecessary. The bill of lading contained the following exception among others:—"The neglect and default of pilot, master, or crew in the navigation of the ship, collisions, and all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever are excepted." The learned Judge on these findings gave judgment for the plaintiffs against the defendant McPhail, on the ground that the exception was not meant to except persons for their own neglect; and he gave judgment for the other defendants on the ground that they were entitled to the protection of the exception. The defendant McPhail appealed.

Mr. Robson, Q.C., and Mr. Joseph Hurst appeared for the defendant; Mr. Joseph Walton, Q.C., and Mr. T. E. Scrutton for the plaintiffs.

LORD JUSTICE COLLINS read the judgment of the Court as follows:—This is an action by owners and shippers of coal upon a bill of lading signed by the defendant McPhail, who, as master, on behalf of himself and his co-owners of the ship Gainsborough, signed the bill of lading for the coal shipped thereon; and the facts stated in the judgment in the case of "Trinder, Anderson, and Co. v. the Thames and Mersey Insurance Company," as far as material, apply to this case. The following are the material parts of the bill

*Reported by F. G. RUCKEL, Esq., Barrister-at-Law

of lading upon the construction of which this case depends:—"Shipped in good order and condition by the Westport Coal Company on board the good ship Gainsborough, whereof is master for the present voyage A. McPhail, lying in the port of Westport and bound for San Francisco, 1,315 tons of coal to be delivered (subject to the exceptions hereinafter mentioned) in like good order and condition at the aforesaid port. The following are the exceptions, the act of God, . . . barratry, the neglect and default of pilot, master, or crew in navigation of the ship." It was signed "A. McPhail, master." The question is whether these exceptions are such as to cover the negligent navigation of the defendant McPhail, who was master of the Gainsborough and was also interested in the ship as part owner. On the first point made by the plaintiff, we are of opinion that the argument that having regard to the words immediately preceding and following it the word "master" in the exception must be read as not embracing a part owner who acts as master cannot prevail. If the exception is inapplicable to such a person, the other co-owners are not protected; the person who caused the mischief does not come within the description of master against whose negligence they provided, and they have in fact made no contract relieving them from liability for his acts. Mr. Justice Kennedy has held that they are protected, and there is no appeal against his decision. The case of "Jones v. Nicholson" (10 Exch., 28) decides that the relation of owners and captain may exist between part owners and one of their number so as to entitle them to claim against underwriters in respect of his acts on a policy against barratry of master or crew, and certainly it would be a strange result if the exception of master's negligence were wholly nugatory wherever he had an interest as part owner. It is also clear law that a party is not debarred from contracting against liability for his own negligence, and therefore there would be no personal incapacity in a part owner debarring him from setting up the exception of master's negligence even though he were himself the master; and in another case the present defendant has been held entitled to recover against underwriters for a loss brought about by the same negligence that we are now discussing. But though the defendant is, we think, to be treated as the captain within the exception, and though he is not debarred from relying upon it whether he be sued as captain or as owner, it does not follow that it suffices to relieve him from liability in this case. But it is very desirable to see what the precise ground is on which his non-immunity from liability must be placed. It is a well-established rule that exceptions must be strictly construed against the person for whose benefit they are inserted, and this rule has been frequently applied so as not to interpret them in bills of lading as relieving the owner from his obligation to take due care. This rule would debar us from reading into the exception any such words after "master" as would cover part owner's as distinguished from master's negligence. The exception, therefore, must be treated as not excusing a breach of the owner's duty as such. But it is at this point that the real difficulty arises. The captain is excused, the owner is not. But the holder of the bill of lading has given up the right to complain of loss traceable to the master's negligence, and it was the negligence of the master in the sphere of his duty as master which caused the loss, a loss, moreover, against responsibility for which he is certainly protected in his capacity as master by the bill of lading itself, which is signed by him, and in which he is expressly named. The plaintiffs seek to make him liable by viewing him in two different capacities, that is to say,

they distinguish his capacities for the purpose of limiting the exception, but they mix them up again for the purpose of fixing him with liability as owner. But does it follow that because one and the same person is captain and part owner negligence in either capacity is to be deemed negligence in both? Or does not this question involve an examination of what his duty is in each capacity, so as to see whether there was in fact negligence in both? So far as the navigation of the ship is concerned, the duty of the owner as distinguished from the master would be to take due care to appoint a competent person, and therefore the defendant's co-owners in this case, having discharged that duty and being protected against the master's negligence, are not now charged with negligence as owners. Does it make any difference that the master cannot divest himself of his personality as part owner when he is engaged in duties which have been properly delegated to him as master? Tried by the converse case, if the owners had appointed a notoriously incompetent master, whose incapacity had caused disaster, the exception of master's negligence would certainly not have protected them, and it would certainly have been no better protection to that one of their number who had been appointed captain, in respect of that part of his negligence, which would clearly be negligence as owner and not as captain. Moreover, if the negligence of the captain in the proper sphere of his duty is to be deemed a breach of the owners' duty because the captain is also part owner and cannot divest himself of his personality as such, it would follow that the other co-owners are liable. They are not protected against negligence of owners. The same person who, as captain, in their agent is also part owner, and on the hypothesis, was negligent. If, therefore, they have been rightly held excused, it can only be because his negligence as captain is treated as the only negligence which in fact caused the damage. The case has been argued before us on the basis that they are excused as the learned Judge held, and, if it is to be dealt with on that basis, it follows that the only ground on which the present defendant can be held liable while his co-owners are excused is that he is under a personal disability by reason of his negligence, and this ground, where there has been no wilful default, cannot be maintained. Are we then to give effect to the highly artificial reasoning by which it is suggested that the same acts of the same man are within or without the exception according as he is regarded as owner or master, and this though the acts were unquestionably done in the discharge of his functions as master only? It seems to us that it could be simpler and more in accordance with commonsense to hold that the negligence which caused the damage was exclusively master's as distinguished from part owner's negligence within the meaning of the exception. The case of "Jones v. Nicholson" above cited favours this view. There was there no contract by the underwriters to be responsible for a part owner's barratry. Their only contract was against that of captain or mariners, and the argument was that the captain being an owner could not commit barratry. The Court obviously regarded the act done by a captain who was also part owner as an act done by him as captain only and not as part owner, and therefore as coming within the policy. Again in "Earle v. Rowcroft" (8 East, 128), it was contended that a captain who was also supercargo and as such represented the owner must be taken to have assented as supercargo to his acts as captain, and therefore debarred the owner from claiming in respect of them as barratrous. Lord Ellenborough deals with this argument by saying that it only required to be stated to be rejected. The plain commonsense of the matter seems to be that the owners, including the defendant, bargained

to be excused from the consequence of the negligence within the sphere of his duty of the person, whoever he might be, who should be properly charged with the command of the ship. That person was the defendant, and the loss has arisen by reason of the very negligence which they provided against—viz., negligence in the navigation of the ship. This construction involves no addition of words to those in the bill of lading, which as they stand are sufficient and unambiguous. We have pointed out that the logical result of the plaintiffs' contention, involving as it does the proposition that the acts of the defendant being those of one man are inseparable and must be deemed to have been done in both capacities, must be that the co-owners are unprotected and the exception nugatory. There is certainly no reason in commonsense for adopting this artificial contention unless we are forced to do so, for had the same master done the same acts, being one of seven persons formed into a limited company and holding the largest interest in it, he would be protected, while, on the proposed construction, if he were a part owner holding only one share, he would be liable to the full extent of the damage. The appeal must be allowed with costs here and below.

Chan. Div. }
(Wright, J.) }

1898.
May 4.

IN RE AURIFEROUS PROPERTIES (LIMITED).*

Company—Winding up—Set off—Calls in arrear. Two companies, A and B, were in liquidation. Before the liquidation of either, B owed A for calls made and in arrears, while A owed B for money lent.

Held, that there was no set off, but that the liquidator of each company must prove in the winding up of the other for the amount due.

The African Gold Properties (Limited) went into voluntary liquidation in January, 1898, and a supervision order was shortly afterwards made by the Court. In December, 1896, a compulsory winding-up order was made against the Auriferous Properties (Limited). In January, 1896, the Auriferous Company became indebted to the Gold Company in a sum of over £2,000. In January and June, 1896, before the winding up of either company, two calls amounting to nearly £1,500 were made by the Auriferous Company against the Gold Company in respect of shares held by the latter in the former. The liquidator of the Gold Company took out a summons in the winding up of the Auriferous Company, raising the question whether he was entitled to set off the debt due to his company against the calls owing by it to the Auriferous Company.

Mr. George R. Northcote was for the liquidator of the Gold Company and Mr. Howard Wright for the liquidator of the Auriferous Company.

Mr. JUSTICE WRIGHT delivered judgment as follows:—Both the Auriferous Company and the Gold Company are now in liquidation. Before the liquidation of either of them the latter company owed the former for calls made and in arrear, and the former owed the latter for money lent. The question is whether against the claim for the amount of the calls the claim for the money lent can be set off. If the Gold Company had not been in liquidation it could not have set off its claim for money lent against its liability for the amount of the call. That was decided before the Judicature Acts in *Grissell's case* ([1866] L.R., 1 Ch., 528) and in

Black and Co.'s case ([1872] L.R., 8 Ch., 254, 261), with reference to calls made by a liquidator in a winding up under an order of the Court, or (per Lord Selborne) in a voluntary winding up. And since the Judicature Act, 1875, it has been held in the case of "*In re Whitehouse and Co.*" ([1878] 9 Ch. D., 595) that the same rule holds good whether the call is made before or in the liquidation, and whether the liquidation is compulsory or voluntary. The ground of the rule is that all contributions from shareholders enforceable in the liquidation are by the Companies Acts made applicable for the payment of the company's creditors *pari passu* (sections 38, 101, 133 of the Companies Act, 1862), and a person who is a creditor and also a contributory cannot be allowed to do what might amount to paying his own claim in full out of a fund which ought to be distributed rateably (see *Black and Co.'s case* and "*In re Pyle Works*" [1890], 44 Ch. D., 534, 537, 535, where the decision in "*In re Whitehouse and Co.*" is approved, though some of the reasons given by Sir George Jessel are questioned). Whether the same rule would apply if the liquidator sought to enforce the call by action seems not to have been the subject of express decision; but the call, though made and payable before the liquidation, and therefore at one time a debt to the company, is also enforceable by the liquidator by balance order as a contribution to be made in the winding up for *pari passu* distribution, and in this aspect is not a subject of set off in the case of a limited company. But in the present case it happens that the Gold Company is also in liquidation and the question is what is the effect of this. If the Gold Company had been a bankrupt individual instead of being a company in liquidation the liquidator of the Auriferous Company must have enforced his claim in the bankruptcy, and according to bankruptcy law, which even before and apart from the Judicature Act would have allowed the set-off ([1807] "*In re Duckworth*," 2 Ch., 578, where the question arose in the bankruptcy of the creditor-contributory; "*Ex parte Strong*" [1870], 5 Ch., 493, where it arose in the liquidation of the company). Here the creditor-contributory is not a bankrupt individual, but is a company in liquidation, and therefore the particular ground on which "*In re Duckworth*" was decided is not applicable. The liquidator of the Auriferous Company is not driven to proceed in the bankruptcy or to submit to the rules of the Bankruptcy Court, but proceeds in the Chancery Division and is entitled to the benefit of the Companies Acts as there administered. And the simple question is whether section 10 of the Judicature Act, 1875, has introduced into the law of the winding up of companies the bankruptcy rules as to set off, so as to allow a set-off against liability for the amount of unpaid calls in the case of a company constituted with limited liability. It seems to me that this question is decided in effect in the negative by Gill's case ([1879], 12 Ch.D., 755), which was cited with approval in the Court of Appeal in "*In re Washington Diamond Co.*" ([1893], 3 Ch., 95); and that the liquidator of the Auriferous Company is entitled to prove in the winding up of the Gold Company for the whole amount still due upon the shares, leaving the liquidator of the Gold Company to his right of proof in the winding-up of the Auriferous Company for the money lent. It is true that in Gill's case the creditor-contributory was not a company in liquidation, but that circumstance does not prevent it from being in point as a decision that the bankruptcy law of set-off is not imported by the Judicature Act into the law of companies so as to allow a set-off against calls; though for other purposes there may be the same right as in bankruptcy (see in "*Ex parte Theys*" [1884], 23 Ch.D.,

*Reported by R. EWANS, Esq., Barrister-at-Law.

587) to a set-off of cross-claims as existing at the time of the bankruptcy. "*In re Duckworth*" has, therefore, no application. The view which I have taken seems to be consistent with all the decisions on section 101 of the Act of 1862 since the Judicature Act (see *e.g.*, "*Ex parte Felly*," [1882], 21 Ch.D., 492, 500, and "*In re Pyle Works*," 44 Ch.D., at p. 585, per Lord Justice Lindley). I therefore hold that the applicant is not entitled to the set-off which he claims, but has only a right to prove. I think there is some difficulty in reconciling "*In re Duckworth*" with what Lord Selborne said in Black and Co.'s case (at p. 262) with reference to a "statutory trustee," but I do not think the House of Lords would now overrule what was said in Black and Co.'s case.

[Solicitors—W. H. Hudson; Freshfields and Williams.]

Q.B. Div. (Wills and)
Kennedy, J.J.) }

1898.
May 5.

HORTON V. WALSHALL UNION.*

Rating—Rateable value—Gross value—
Deductions.

When once a rate has been allowed the figures of the gross value cannot be increased.

This was a special case stated by the quarter sessions of Stafford raising a rating question.

Mr. Alfred Young and Mr. G. C. Lewis appeared for the rating authority, who were appealing against the decision of quarter sessions; Mr. A. T. Lawrence, Q.C., and Mr. Disturnal for the appellants at quarter sessions.

The appellants below were rated for the Alma Works in the parish of Darlaston. The original gross estimated rental of the premises was £750 and the rateable value £606. Objection, however, had been taken to this before the assessment committee, and the gross estimated rental was reduced by them to £725 and the rateable to £544. This did not satisfy the appellants, who appealed to quarter sessions. At the appeal the appellants accepted the gross estimated rental of £725 as correct, and claimed, in order to arrive at the correct net annual value, to deduct from the £725 the sum of £310, which the appellants alleged represented the average annual expenditure upon repairs, insurance, and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year. The respondents, the assessment committee, having made a re-survey of the premises admitted that £310 was required for insurance, repairs, &c., but they stated that the rent mentioned in the statute was in fact more than that shown in the rate-book as the gross annual value. The rating authority, for the purpose of satisfying the Court that the true net annual or rateable value under 6 and 7 Will IV., c. 96, section 1, was not less than £544, proposed to prove that the gross estimated rental and rateable value were in fact understated in the ratebook and valuation list, and for that purpose proposed to give evidence of the total present structural value of the buildings and such of the plant and machinery as was properly to be taken into account as enhancing the annual value, and to take a percentage upon such structural value, which would give the true rateable value, and to such true rateable value the respondents agreed that £310 should be added to arrive at the gross estimated rental. The respondents did not claim that either the "gross estimated rental" of £725 or the "rateable value" of £544 should be increased, but

that the real point at issue was the net annual or rateable value of the premises, and they claimed the right to call the evidence before mentioned to show that the rate of £54 8s. was not made upon a higher sum than the true net annual value of the hereditament. The quarter sessions rejected the evidence as inadmissible and ordered the rateable value to be reduced and allowed the appeal. The appellants contended that the respondents were precluded from contesting the amount appearing in the valuation list as "gross estimated rental," and that as that amount was admitted by the appellants the only question which the Court had power to decide was what were the proper deductions to be made from the gross value in order to arrive at the rateable value.

Mr. YOUNG contended that the rateable value was the material point in the appeal. The assessment committee might give evidence as to that value without reference to the gross value. He cited "*Reg. v. Wells*" (L.R., 2 Q.B., 542), "*Reg. v. London School Board*" (65 L.J., M.C., 33), "*Reg. v. Inhabitants of Fordham*" (11 A. and E., 73). He also referred to "*Reg. v. Denaby and Cadeby Colliery Company*" (reported *ante*, p. 347).

Mr. LEWIS followed on the same side.

Mr. LAWRENCE and Mr. DISTURNAL both argued for the ratepayer, contending that the gross value could not be increased, and that the rateable value must be fixed by deductions from the gross value.

The COURT upheld the decision of quarter sessions.

MR. JUSTICE WILLS said the case raised a question of importance on rating law. It was one as to which he had felt some difficulty, but at the last he had come to the conclusion that the quarter sessions were right. It was quite true that the real question was as to what sum the rateable value ought to stand at, but what pressed him was this—the whole of the apparatus for rating was statutory. There were elaborate provisions made to enable rating authorities to get their figures right; there were also provisions made by 41 Geo. III., c. 23, for the alterations to be made in the rate-book on appeals; but there was no machinery provided by which the figures of the gross value could be increased after the rate was once allowed. Unless an appellant, who objected to an inequitable assessment, applied to have his premises rated higher the rating authority could not get the figures amended by way of increase under 41 Geo. III., c. 23, s. 1. Here there was no power to alter the figure. It therefore stood. If the Court were to say that the justices were to inquire into a second figure for the rateable value the result would be that the proper relations between the gross value and the rateable value would be disregarded. It could not be that they could order a rate which they knew to be wrong. They must see that the proper deductions were made. This view was consonant with that taken in "*The Denaby and Cadeby Colliery Company*" (reported *ante*, p. 347), and though that case might be said not to be binding because it was a case in which the consultative jurisdiction of the Court was invoked, yet the expression of opinion in that case was right and not wrong. He would add as a makeweight that there was a great convenience in insisting on the finality of the figures of the assessment committee. A case had been put in which there might be a real wrong if a decision the other way were given. For an appellant to quarter sessions, satisfied with the gross value but dissatisfied with the deductions made from it, might be met with the unexpected point that the gross value was not high enough. This would probably involve an adjournment and an inquiry of an expensive description, into which it was very likely the appellant would never have thought of entering had he known that any question about the gross value was to

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

be raised. This view was also more consonant with the language of section 1 of 6 and 7 Will. IV., c. 96, which was the initial statute in these matters, for it clearly started with the gross value as the value from which deductions should be made in order to arrive at the rateable value. It must not be pressed too far, however, for on mentally calculating what the value of premises was to be it often happened that the rateable value was reached first owing to the information in the hands of the person calculating. In the statute, however, the gross value was given as the starting point.

MR. JUSTICE KENNEDY concurred on the same grounds.

MR. JUSTICE WILLS added that the Master had shown the Court an authority in which it had been decided that only one counsel should be heard on a case stated by quarter sessions. The fact that both counsel had addressed the Court in this case must not therefore be taken as a precedent, but he was very glad they had had the assistance of the learned junior counsel in the present case.

[Solicitors—E. Flux and Leadbitter, for Slater and Co., Darlaston; Smiles and Co., for W. Lewis, Walsall, for the appellants.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } May 6.

PASSINGHAM V. KING.*

Principal and Agent—Commission—Sale of public-house—Finding a purchaser—Agreement—Construction.

Decision of Kennedy, J. (*ante*, p. 39), affirmed.

This was an appeal by the defendant from the judgment of Mr. Justice Kennedy at the trial of the action without a jury, reported *ante*, p. 39. The action was brought by the plaintiff, who was a publichouse broker, to recover £100 commission upon the sale of a publichouse. The defendant, who was the owner of a publichouse called the Albert Edward, instructed the plaintiff on December 23, 1896, to find a purchaser for the house, and on December 30, 1896, the plaintiff introduced a Mr. Vine, a licensed victualler, who went down to Brighton to see the defendant, and agreed with him to buy the house for £19,750, and gave him a cheque for £250. This cheque was dishonoured, but the £250 was subsequently paid. Upon January 1, 1897, the plaintiff wrote to the defendant as follows:—"We beg to inform you that our regular commission to a vendor for licensed property is 1 per cent. upon the purchase money, but as we hope to do further business with you over some of your other houses we are willing to reduce our commission *re* the Albert Edward to £100. . . . You will remember that the appointment for signing contract stands for Monday next at 2 o'clock at our office." This was accepted by the defendant. The contract was signed on January 4 by the defendant and Vine, and the purchase was to be completed on February 11. Subsequently the defendant by arrangement with Vine extended the time for completion to May 5, and in consideration thereof Vine paid a further deposit of £250. On February 12 the defendant instructed the plaintiff to prepare the inventory at the Albert Edward. The contract provided that the deposit should be forfeited if the purchase was not completed. The purchase went off, and Vine stated in evidence that he contracted to buy the house as a speculation, and that he did not complete because he could not resell at a profit. The plaintiff

having brought an action to recover the £100 commission, the defendant contended that the agreement was to pay commission only upon completion of the sale, the words "purchase money" in the letter of January 1, 1897, meaning the purchase money actually paid. Mr. Justice Kennedy gave judgment for the plaintiff for £100.

MR. JELF, Q.C., and Mr. F. LOW, for the defendant, referred to "*Hayes v. Tyndall*" (1 B. and S., 296).

MR. C. A. RUSSELL, Q.C., and Mr. CARRINGTON, for the plaintiff, referred to "*Grogan v. Smith*" (7 *The Times* L.R., 132).

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the circumstances were these. The defendant had what he (the Lord Justice) would call a £20,000 publichouse which he wished to sell. He got into communication with the plaintiff, Vine, a licensed victualler, was looking out for a house as a speculation, and he went down to Brighton to see the defendant, and negotiations took place there between the defendant and Vine to which the plaintiff was no party. The result was that Vine contracted to buy the publichouse. Before the contract was signed the letter of January 1, 1897, was written. The first question was, what was the meaning of the words "1 per cent. upon the purchase money"? Did they mean 1 per cent. upon the money contracted to be paid or upon the money actually paid? In his opinion they meant 1 per cent. upon the money contracted to be paid. His reading of the contract was that if the plaintiff found a purchaser whom the defendant was willing to accept, and who would accept the defendant's terms, then the defendant would pay the plaintiff 1 per cent. upon the purchase money. That was his view of the contract. But there was another ground upon which the case could be decided. The defendant knew quite as much about Vine as the plaintiff did. The cheque for the first deposit of £250 was dishonoured, though the money was subsequently paid. In the face of that the defendant entered into further negotiations with Vine and signed the contract to sell him the publichouse. Later on the defendant agreed with Vine to extend the time for completion and took a further sum of £250 from Vine for doing so. In these circumstances, he was of opinion that the defendant had taken up the negotiations himself and taken them out of the hands of the plaintiff and had accepted Vine as the purchaser, and that, therefore, commission was payable.

LORD JUSTICE CHITTY delivered judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred in the result. He agreed with the second ground stated by Lord Justice A. L. Smith. He did not think that the plaintiff had done everything to entitle him to commission; but he thought that the defendant by his subsequent conduct had waived the right which he otherwise would have had to call upon the plaintiff to do certain things as a condition precedent to commission becoming payable. As regards the construction of the contract, in his opinion the words "purchase money" in the letter did not mean the price fixed by the contract. They meant the purchase money which became payable upon completion, and if through default of the purchaser the purchase was not completed no commission would be earned. However, it being the duty of the plaintiff to introduce a person willing and able to complete the purchase, in this case the defendant lost his right to insist upon the plaintiff doing that by taking the matter out of the plaintiff's hands and carrying it on himself.

[Solicitors—Percy C. Ray, for the plaintiff; Layton, Son, and Lendon, for the defendant.]

* Reported by W. F. BARRY, Esq., Barrister-at-Law.

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Collins, L.J.J.) May 7.

MARKS V. FROGLEY AND OTHERS.*

Army—Volunteer—"Subject to military law"
—False imprisonment—Liability—Army Act,
1881 (44 & 45 Vict. c. 58), secs. 41, 45, 158, 176.
Decision of Kennedy, J. (*ante*, p. 181, and
[1898] 1 Q.B. 396), reversed.

This was an application by the defendants, other than Frogley, for judgment or a new trial in an action tried before Mr. Justice Kennedy and a special jury, reported *ante*, p. 181. The action was brought by a member of the Bedfordshire Volunteer Corps to recover damages for assault and false imprisonment. The jury found a verdict for £300 damages against three defendants—Arthur Cooper, a lance-corporal, and Thomas Lovelock and George Albert Short, privates in the same corps as the plaintiff. The defendant Frogley was a superintendent of the Herts County Police, and upon the findings of the jury judgment was given in his favour, and no question now arose as to him. Mr. Justice Kennedy gave judgment for the plaintiff against the three abovenamed defendants for £300. The facts are fully stated in the judgment of Lord Justice A. L. Smith. The arguments upon this appeal were reported in *The Times* of March 28 and 31.

Mr. J. Lawson Walton, Q.C., Mr. R. D. Muir, and Mr. George Humphreys appeared for the defendants; Mr. A. J. Tassell appeared for the plaintiff.

The COURT, having taken time to consider, delivered judgment, allowing the application and entering judgment for the defendants.

LORD JUSTICE A. L. SMITH read the following judgment:—This is an action for false imprisonment brought by the plaintiff, who was a private in the Bedfordshire Regiment of Volunteers, against three of his comrades in the same regiment (a lance-corporal and two privates), and also against a police superintendent of the Herts County Constabulary. The superintendent has succeeded in the action, for he showed to the satisfaction of the jury that he had reasonable cause for suspecting that a felony had been committed by the plaintiff, but as the other three defendants were unable to show that a felony had in fact been committed, for the plaintiff had been acquitted at quarter sessions, it was held by the learned Judge who tried this case that, as the three defendants were mere civilians when they did what is complained of, they were consequently undefended, and they have had damages assessed against them by the jury to the amount of £300. The three defendants, with the aid of the War Office, appeal, and the questions are whether they have a good defence to this action upon the ground that they were not civilians but were soldiers under military law when they did the act which is charged against them, and, if not, whether the damages are so excessive that a new trial should be ordered as regards them. The material facts are these. Upon Saturday, August 8, 1896, the plaintiff and the three defendants were quartered with their regiment, the 2nd Bedfordshire Volunteers, in camp at Shorncliffe, training and exercising there with a portion of her Majesty's regular forces. The Volunteer regiment had gone into camp on the previous Saturday under an order of the War Office dated April 22, 1896, "for the formation of the Home Counties Volunteer Brigade at Shorncliffe, August 1 to August 8, 1896." It will be noticed that by the order this camp, as it has been called, began on Saturday, the 1st, and ended on Saturday, August 8, 1896. Upon the morning of Satur-

day, August 8, 1896, whilst the regiment was still in camp, the plaintiff was accused by some of his comrades of having stolen certain articles belonging to them. Captain Foote, of the Royal Inniskillings, who was adjutant of the regiment and in charge of the Volunteer battalion, was called up to the tent where the felony was supposed to have been committed, and, having investigated the matter, ordered the plaintiff under arrest and into the custody of one of the Volunteers present, to be taken to the Shorncliffe Railway Station with the baggage guard of the regiment; and he ordered that the plaintiff should be taken under escort and arrest in the special military train which on that day was about to take the regiment to Boxmoor Station; and he also ordered that upon arrival there the plaintiff should be taken under arrest and handed over to the police authority at Hemel Hempstead, which is about two miles from the Boxmoor Station and is the plaintiff's home. Under the order of Captain Foote the plaintiff was placed under arrest and into the custody of one of the Volunteers of the regiment, and was so taken to the Shorncliffe Station with the baggage guard of the regiment, the plaintiff as well as the Volunteer who had him under arrest being in uniform and under arms. Shortly after the plaintiff reached the Shorncliffe Station the regiment under arms and under command arrived there with the three defendants in the ranks. They were then told off and ordered by their superior officer, pursuant to the order of Captain Foote, to escort the plaintiff under arrest in the special military train about to start for Boxmoor, and upon arrival there to take him under arrest to Hemel Hempstead and hand him over to the police authorities there. This order the three defendants obeyed, both they and the plaintiff being all the time in uniform and under arms. The regiment, which had formed up in marching order in camp at Shorncliffe, was not dismissed until after its arrival at the Boxmoor Station, and the three defendants were not dismissed until the orders of Captain Foote had been carried out and the plaintiff handed over to the police authority at Hemel Hempstead, to which place they had marched the plaintiff from Boxmoor Station in uniform and under arms by a side road from the station. The learned Judge, against whose judgment, as also against the verdict of the jury as to damages, the three defendants appeal, has entered judgment for the plaintiff for £300, having first amended the statement of claim, which claimed £200, by altering the claim into one for £300, the result being that these three defendants, who are working men and of the same rank of life as the plaintiff (he being a working tailor and the others journeymen painters and a carpenter), have been mulcted in the sum of £300 for simply obeying the orders of their superior officer. If they had disobeyed those orders they would, I apprehend, have found themselves in a perilous position by reason of section 21 of the Volunteer Act, 1863, and of section 20 of the Army Act, 1881. I now proceed to inquire whether the law is such as to sanction a judgment for false imprisonment at all, no matter for what damages, against the three defendants in the above circumstances. There can be no possible doubt that upon the morning of August 8, 1896, Captain Foote, in the camp at Shorncliffe, gave a lawful order concerning "a soldier" engaged in military service for a military offence. The offence for which the plaintiff was placed under arrest was cognisable by either military or civil authority. That the plaintiff, when the order was given, was a soldier subject to military law is beyond dispute. Section 176 of the Army Act, 1881 (44 and 45 Vict., c. 58), and Article 374 of the Regulations for the Volunteer Forces are conclusive as to this. But it is argued for the plaintiff that, although this might be so, the order to the three defendants given at the Shorncliffe Station by

their superior officer pursuant to the order of Captain Foote to escort the plaintiff under arrest with his regiment from Shorncliffe Station to Hemel Hempstead was illegal, because the plaintiff and the three defendants had then ceased to be subject to military law and had become civilians, which, it is said, they became immediately they left the camp, and that, therefore, the three defendants could only justify imprisoning—that is, escorting the plaintiff under arrest pursuant to orders from Shorncliffe Station to Hemel Hempstead—by proving that a felony had, in fact, been committed, and that they had reasonable cause for suspecting that the plaintiff had been guilty of it, and this fact the three defendants had failed to establish. Now, first of all, did these four men—that is, the plaintiff and the three defendants—become civilians either when they left the camp in the circumstances in which they left it or when they left the Shorncliffe Station with the regiment, all being in uniform under arms, and under command in the military train? It has been held by the learned Judge that upon the true construction of the statutes they became civilians when they left the Shorncliffe Camp, and it is argued that, as Captain Foote had only a jurisdiction limited to such time as military law existed, the three defendants cannot justify under an order which, though good so far as the primary arrest was concerned, was bad so far as it ordered the keeping of the plaintiff under arrest, for, as to this, it was in excess of jurisdiction. In my opinion the War Office order of April 22, 1896, above referred to, covered and included the whole of Saturday, August 8, 1896. It was argued that it did not. Inasmuch as it must be conceded that the order covered some part of the day, what part of it did it cover if it did not cover the whole day? No answer was given to this. In my opinion the order covered and included the whole of Saturday, August 8, in the same way as it covered the whole of Saturday, August 1, 1896. So soon as the Bedfordshire Volunteers fell in under arms and under command on that day as a regiment to proceed to the camp at Shorncliffe to take part in military training there with Regulars, in my opinion from that time they became subject to military law, and remained so subject until they were dismissed upon Saturday, August 8, 1896. I can find in the War Office order no fraction or part of a day as distinct from the whole day as being only covered by the order, but, on the contrary, I find that, by section 573 of the Regulations for the Volunteer Forces, an additional allowance of 4s. per day is granted to a Volunteer private to cover time occupied in joining and quitting camp, which points to the day being entire. If the Bedfordshire regiment of Volunteers had remained in camp at Shorncliffe the whole of the 8th, during the whole of that day it would have formed part of the Home Counties Volunteer Brigade at training and exercise with Regulars, even though during that day the Regular forces might have been leaving the camp, and the camp itself was being dismantled. If all the Regulars had left the camp on the morning of the 8th, leaving the Bedfordshire Regiment still in camp, can it be said that the regiment did not continue under military law whilst it remained in camp? I heard no suggestion in argument that the regiment became a regiment of civilians whilst in camp; then what becomes of the argument of the learned counsel for the plaintiff that the regiment became a regiment of civilians, though under arms and under command, the moment it became a unit by itself. If the regiment had been dismissed in camp and each Volunteer had had to find his own way to his home as best as he could, this would have been another matter, but is not the present case. By section 176 of the Army Act, 1881, it is enacted that "persons subject to military law as soldiers are non-commissioned officers

and men belonging to the Volunteer forces of the United Kingdom when they are being trained or exercised with any portion of the Regular forces," and by Article 374 of the Regulations for the Volunteer Forces it is provided that "Volunteers become subject to military law when they join a camp with Regular forces or are assembled for training or exercise with any portion of the Regular forces." The question arises, When did this Volunteer regiment begin to and cease to be trained or exercised with a portion of the Regular forces? In my judgment each member of this regiment became subject to military law when he fell in and formed up at Boxmoor with his comrades as a regiment under arms and under command upon Saturday, August 1, 1896, in order to train and exercise with Regular forces at Shorncliffe, and that the subjection did not cease so long as it continued to be a regiment under arms and under command—that is, until it and its component parts were dismissed from being any longer under arms upon August 8. In my judgment the training or exercise of a regiment under arms and command to carry out efficiently what is called "entraining" and "detraining" is a military exercise, and constitutes part and parcel of the forming as well as the unforming of a camp, and is as much a military training or exercise as the formation of a regiment into square or of a company in fours, or the bringing about of any other military manoeuvre. I cannot agree with the learned Judge that the plaintiff and the three defendants became mere civilians upon leaving Shorncliffe Station as a regiment under arms in the special military train, but I should add that it does not appear that the War Office order of April 22, 1896, was called to his attention as it has been to our's in this Court. But there is another section of the Army Act, 1881, which, in my judgment, is fatal to the plaintiff's case. It is section 158. By it it is enacted that "where an offence under this Act has been committed by any person while subject to military law such person may be taken into and kept in military custody and tried and punished for such offence, although he or the corps or battalion to which he belongs has ceased to be subject to military law, in like manner as he might have been taken into and kept in military custody, tried, or punished if he or such corps or battalion had continued so subject." This section, to my mind, obviously means where an offence is alleged to have been committed, and indeed the learned counsel for the plaintiff had to admit that it would be absurd to construe the section in any other way, for otherwise the jurisdiction under it to try could only arise if, after trial, the prisoner be convicted, which, with all respect to the draftsman of the section, is ridiculous. It is clear that the plaintiff whilst subject to military law was taken into and placed in custody for an offence under the Act. But it is said that this only applies to and justifies the keeping in military custody, and not the keeping in civilian custody, which the defendants are charged with having done in the present case after leaving Shorncliffe Station. I have already said what I have to say about the continuance of military law in this case. But it is argued that military custody means the custody of a Regular soldier only, which custody is defined by section 45 of the Army Act, 1881, thus:—"Military custody means according to the usages of the service, the putting the offender under arrest or putting him in confinement"; and by Article 29 of the Queen's Regulations, "military custody in the case of a private soldier means confinement under charge of a guard, picket, patrol, or sentry, or of a provost marshal"; and it is said that military custody therefore means the custody by a Regular soldier. In considering what is military custody when dealing with a volunteer section 21 of the Volunteer Act must be looked to as well as the

Army Act, 1881. This section, in addition to empowering the commanding officer of a volunteer corps to discharge from the corps any volunteer . . . for disobedience of orders while doing any military duty with his corps enacts that "if any volunteer while under arms or on march or duty with the corps . . . or while wearing the clothing or accoutrements of such corps or going to or returning from any place of exercise or assembly of such corps disobeys any lawful order of any officer . . . or is guilty of misconduct, the officer in command . . . may order the offender . . . if an officer into arrest, and if not an officer, into custody of any volunteer belonging to the corps, but so that the offender be not kept in such arrest or custody longer than the time prescribed by this section." Now is this civil or military custody? There can be but one answer. It is not civil; it is therefore military. I can see no sense or reason for holding that the custody in which the plaintiff was from Shorncliffe Camp to Hemel Hempstead police-station was not military custody, which in my judgment it was, and consequently section 158 of the Army Act, 1881, also avails the three defendants. There is also another ground upon which it appears to me, if it were necessary to resort to it, that this case ought to be decided adversely to the plaintiff, and it is this. By section 43 of the Army Act, 1881, it is enacted under the heading of "Redress of Wrongs" as follows:—"If any soldier thinks himself wronged in any matter . . . by any soldier he may complain thereof to his captain, and if he thinks himself wronged by his captain in respect of his complaint not being redressed, or in respect of any other matter, he may complain thereof to his commanding officer; and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to the General or other officer commanding the district or station where the soldier is serving; and every officer to whom complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of." For the reasons above given in my opinion the plaintiff and the three defendants were soldiers under military law between Shorncliffe Camp and Hemel Hempstead, and this section therefore applies to the plaintiff. I find in the judgment of Mr. Justice Lush in "*Dawkins v. Lord Paulet*" (L.R., 5 Q.B., at p. 121), some remarks in connexion with the Articles of War, of which this section is the equivalent, which appear to me to be such sound sense and good law that I will repeat them. He says:—"Can it be reasonably inferred that any other mode of redress or measure of redress was intended by the Act than that which is specified in the article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself which we cannot remedy. The plaintiff has no reason to complain for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or the other." This statement of Mr. Justice Lush applies to the present plaintiff, and if there were no other ground adverse to him I think it suffices to put an end to this unseemly action against the three defendants, and I entirely agree with what that learned Judge said. I need not refer to passages which may also be found in the judgment of Mr. Justice Willes in the case of "*Keighly v. Bell*" (4 F. and F., 763) and

in "*Dawkins v. Lord Rokeby*" (4 F. and F., 886), showing that the civil Courts cannot be invoked to redress grievances arising between persons both subject to military law. For the reasons I have given I think that the plaintiff's action fails. In regard to the damages being excessive, I need say nothing except that in my judgment as against these three defendants they were so excessive that I think a new trial should have been ordered upon this ground, if it were necessary to have done so. I do not doubt that the jury have heaped upon the shoulders of the three defendants damages which Frogley, the police superintendent, might possibly have had to bear and for which the three defendants were not liable, had he not succeeded, as he did, under his plea of justification. But what I might have to say as to this, in the view I take of this case, is now immaterial. For the reasons above in my opinion the appeal should be allowed and judgment entered for the three defendants with costs here and below.

LORD JUSTICE CHITTY read a judgment to the same effect.
LORD JUSTICE COLLINS agreed.

Upon the plaintiff's undertaking not to appeal from the judgment, the defendants did not press for the costs of the appeal.

[Solicitors—Lathom, for the plaintiff; J. N. Mason and Co. for Sworder and Longmore, Hertford, for the defendants.]

Q.B. Div. (Lord Russell of Kil- } 1898.
lowen, C.J., Hawkins, Day, } May 7.
Wills, and Wright, JJ.)

KIRSHENBOIM V. SALMON AND ANOTHER.*

Merchandise Marks Act, 1887—False Trade Description—"Hand-made" cigarettes—Materiality of false description.

The fact that the purchaser got something as good and valuable as the thing purported to be sold affords no ground for finding that a trade description is not false in a material particular.

This was a special case stated by Mr. Franklin Lushington, stipendiary magistrate at Bow-street, which was argued before Mr. Justice Wright and Mr. Justice Darling on March 17 and was then reserved for the consideration of a special Court.

Mr. Corrie Grant appeared for the appellant; Mr. Avory for the respondents.

The question raised was whether selling cigarettes with a label describing them as "guaranteed hand made," when they had in fact been made by machinery, but were in every way as good, was an offence under section 2 (2) of the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28). The magistrate had dismissed the information. The purchaser applied to him to state a case, and on his refusal had obtained an order from the Court for a special case to be stated. The material facts appear in the judgment.

Mr. CORRIE GRANT, after reading the case, was stopped by the Court.

Mr. AVORY said the magistrate had to find as a fact whether the false trade description was false in a material particular. Here he had found it was not.

The LORD CHIEF JUSTICE said the magistrate had explained his finding. If that was accepted as sufficient, would it not follow that a person could sell American hams for York hams and defend himself on the plea that they were just as good? If the magistrate had merely found as a fact that the false description was not material, the Court might not have been able to go behind it.

Mr. AVORY said that that was what the magistrate had first found, and it was only when the Court had ordered him to state a special case that he inserted the explanation. A magistrate must decide whether the false trade description was material. Further the respondent had established his defence under the statute, for he had "acted innocently" within the meaning of section 2 (2), for it was found that he acted without an intent to defraud. He cited "Stairey v. Chilworth Gunpowder Company" (24 Q.B.D., at p. 96).

MR. JUSTICE WILLS pointed out that the magistrate had not found that it made no difference in the market value whether the cigarettes were hand made or machine made.

Mr. AVORY cited "Gridley v. Swinburn" (5 The Times L.R., 71, 1888).

In the result, the COURT remitted the case to the magistrate to convict.

The LORD CHIEF JUSTICE said the charge was preferred under section 2 (2) of the Merchandise Marks Act, 1887 (50 and 51 Vict. c., 28). That statute provided that it should be an offence if a person sells any goods to which a false trade description is applied. The case found these facts. The respondent sold to the appellant for 2½d. ten cigarettes in a packet to which a printed label was affixed bearing these words, "Ten cigarettes guaranteed hand made by experienced workmen." The ordinary price for ten cigarettes made by hand of the same quality of tobacco would have been 2½d. In other words, one halfpenny more for each packet of ten. The appellant, who was a member of the Amalgamated Cigarette and Tobacco Cutters' Union, bought the cigarettes for the purpose of ascertaining whether they were hand made or not, with a view to eventual legal proceedings. The respondent admitted that they were not hand made. The magistrate found that the description was a trade description and that it was false, and that it was applied by the respondents. The case then explained that the cigarettes were made for the respondents by a newly-invented and improved machine called Barron's machine, that the same quality of tobacco, paper, and starch were used in their making as would have been used if they had been made by hand, and that they were at least as good as those made by hand. It also found that there was no intention to defraud buyers, but that in using these labels the respondents were actuated merely by a spirit of petty economy that prompted them to utilize the remaining stock of labels which they had already paid for. The magistrate held that a false trade description had been applied, but he found that under the circumstances set out it was not "false in a material respect" under section 3 (1). If he had contented himself with finding as a fact that this description, though false, was not false in a material respect, the Court could not have questioned it. But what he had done, and quite rightly, was to give his grounds and reasons for arriving at that conclusion. He had applied to the case what might be called the doctrine of equivalents, in that though the buyer did not get what he asked for or what the thing purchased purported to be yet he got something which was just as good. Could that doctrine be applied? The general scheme of section 2 was this—it enumerated various things which should be offences against the Act. It then provided how the person charged could defend himself. If the charge was under 2 (1) he could meet it by proving that "he acted without intent to defraud." When the charge was under 2 (2) there were two ways. If the charge was made in respect of goods obtained from some one else with the label on them he might show that he had taken all precautions and had no reason to suspect the truth of the description: and, secondly, wherever the goods came

from, if "otherwise he had acted innocently." The onus was on the respondent to prove his defence when once facts had been established against him which *prima facie* brought him within the Act. It was to be observed that the Act was intended to protect buyers, not merely as to the number, weight, and quantity of the goods sold, but also as to their mode of manufacture. That brought one to the question of the materiality of the description. If the doctrine of equivalents was applicable to such a case, hams, butter, cheese, cigars, and almost anything else might be sold under a wrong description, and the defence would be at once raised that the article sold was as good as that asked for. The Legislature could never have contemplated such a thing as that. Moreover, there were some people who, rightly or wrongly, preferred hand-made to machine-made cigarettes. All this showed that it was impossible to say that the magistrate was right in holding that because the thing sold was just as good as that asked for the respondent should not be convicted. That could not be supported. A man was entitled to know what he was buying, and entitled to have supplied to him the article for which he had asked and paid. The second point to be considered was whether the respondent had acted innocently. That, however, the learned Judge could not accept. The respondent had done the thing deliberately with the object of saving the expense of printing new labels. The matter must go back to the magistrate who would, of course, exercise his own discretion as to what the punishment should be.

MR. JUSTICE HAWKINS concurred, and would only add that the materiality of the trade description could not be made dependent on the evidence as to the quality of the goods supplied.

MR. JUSTICE DAY concurred.

MR. JUSTICE WILLS was of the same opinion. The magistrate had found that there was a difference of 20 per cent. in the price of machine-made and hand-made cigarettes. How was it possible to say that was immaterial? It showed that some portion of the public did not think that the machine-made cigarettes were as good as the others.

MR. JUSTICE WRIGHT also concurred.

[Solicitors—Radford and Frankland, for the appellant; Lewis and Lewis, for the respondent.]

Court of Appeal (Lindley, M.R.,
Rigby and Collins, L.J.J.)

1898.
May 9.

THE BIRMINGHAM BREWERIES (LIMITED) v. JAMESON.*
Landlord and Tenant—Lease—Covenant by lessee to buy beer of landlord—Assignment of lease and reversion—Construction of agreement.
Decision of Byrne, J. (*ante*, p. 223), reversed.

This was an appeal by the defendant from a decision of Mr. Justice Byrne, dated February 11 last, and reported in *The Times* of the following day; *ante*, p. 223. By a lease dated November 5, 1889, and made between Alfred Hood, therein described as of "The Brewery, Nechells, Birmingham, in the county of Warwick, brewer (hereinafter called 'the lessor')," of the one part, and John S. Nock, therein described as of "100, Nechells-park-road, Nechells, Aston-juxta-Birmingham, beer retailer (hereinafter called 'the lessee')," of the other part, the lessor demised unto the lessee a beerhouse at 87, Guildford-street, Lozells, for 14 years from June 21, 1889. The lease contained the following covenant:—

*Reported by E. SCRATCHLEY, Esq., Barrister-at-Law.

"And the lessee hereby covenants with the lessor . . . that he, the lessee, his executors, administrators, lessees, tenants, and assigns, and all other persons for the time being carrying on the business of a beer retailer or publican upon the said premises will and shall during the said term of years hereby granted deal exclusively with the lessor or his firm of Messrs. Hood and Sons or his or their successors in business for all beers, ales, porter, stout (except bottled stout), and other like articles which shall be sold or consumed upon the said hereby demised premises or shall be brought thereon to be so sold or consumed; and will not nor shall during the said term on any pretence whatsoever purchase, take in, or receive, or have in his or their possession, or directly or indirectly sell or dispose of, or permit the sale, disposal, or consumption, in or upon the said premises of any such articles other than such as shall have been purchased or taken of the lessor or his firm or his or their successors in business, provided that he or they shall be willing to supply the same at the price and terms usually charged by the lessor or his firm to his or their tenants." The lease also contained a declaration that "where the context allows, the expressions 'the lessor' and 'the lessee' used in these premises include, besides the said Alfred Hood, his executors, administrators, and assigns, and besides the said John Sidney Nock, his executors, administrators, and assigns." The lease was afterwards assigned to the defendant, John Jameson, who carried on the premises the business of a beer retailer and publican. A. Hood, in 1894, assigned the reversion expectant on the lease to a company, which, in 1896, assigned such reversion to the plaintiff company. Messrs. Hood and Sons were still carrying on their business at the brewery at Nechells. The defendant had refused to deal exclusively with the plaintiff company for his beers, whereupon that company brought the present action for an injunction to restrain him from buying his beers elsewhere. He was willing to buy his beers from Messrs. Hood and Sons. The question in dispute was whether the covenant compelled him to deal only with the plaintiff company. Mr. Justice Byrne was of opinion that on the true construction of the covenant the plaintiff company had the right to compel the defendant to buy from them exclusively. His Lordship accordingly granted the injunction asked for. From that decision the defendant now appealed.

Mr. A. T. Lawrence, Q.C., and Mr. Thomas Douglas were for the appellant; Mr. Dunham was for the respondents.

Their LORDSHIPS reversed the decision of Mr. Justice Byrne and allowed the appeal.

The MASTER of the ROLLS, in giving judgment, said that it was not possible to say that this case was a very clear one, and he was not surprised that the learned Judge in the Court below had felt some doubt when deciding it. In some respects it was very like the case of "Clegg v. Hands" (44 Ch. Div., 503), and in some very like the other case which had been cited of "Doe v. Reid" (10 B. and C., 849). The Court, however, had not to find out which of those cases the present one was most like, but what was the construction to be placed upon the lease now before it. As to that his Lordship found that the construction was different from that put upon the lease by Mr. Justice Byrne. His Lordship then dealt with the facts of the case and read the material provisions of the lease, and continued. The Court was asked by the respondents' counsel to insert after the word lessor in the covenant the words "his executors, administrators, and assigns," having regard to the interpretation clause in the lease. His Lordship confessed that he did not see any reason for doing that. The context did not

require it. If he did insert it, he would be converting a clause which was reasonably plain into one which would be extremely difficult to understand. It would produce a great deal of mischief if the Court adopted the construction argued for on behalf of the respondents. It was plain what the meaning of the covenant was—namely, that the lessee was to buy exclusively the beer of the Nechells Brewery; that was to say, from the lessor or his successors in business. It was to protect his business. Taking that view there was no difficulty about it. Otherwise you got yourself into inextricable difficulty, rendering the covenant extremely embarrassing in its effect. The context did not allow of the insertion of the words "executors, administrators, and assigns," if sense was to be made of the covenant. His Lordship would not say anything about "Clegg v. Hands," or "Doe v. Reid," except to the extent that the problem which the Court had now to deal with was not that which was discussed in "Clegg v. Hands." There the lessor had not severed his business from the reversion. Again, "Clegg v. Hands" did not overrule "Doe v. Reid"; and if the present case were compared with those authorities it would be found rather nearer "Doe v. Reid" than "Clegg v. Hands." But it was not necessary to discuss that matter. The appeal must accordingly be allowed with costs.

LORD JUSTICE RIGBY delivered judgment to the same effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Ward, Bowie, and Co., and Lane, Clut-terbuck, and Co., Birmingham; Hurrell, Christopher, and Co.]

Q.B. Div. (Wills and }
Kennedy, JJ.) }

1898.
May 9.

PAYNTER V. WATSON.*

Metropolis—Building—Rebuilding premises—
Jurisdiction of County Council—London
Building Act, 1894, secs. 41 and 43.

This was a special case stated by a metropolitan police magistrate raising a new question under the London Building Act, 1894, section 43, as to the right of an owner of premises to rebuild them in a different manner to the old buildings without first obtaining the leave of the London County Council.

Mr. Macmorran, Q.C., and Mr. Poyser appeared for the appellant; Mr. Avory and Mr. Daldy for the respondent.

The appellant was Major George Paynter; the respondent was the district surveyor of the district of St. George's, Hanover-square north. The case was stated on an appeal to the magistrate from a notice of objection served by the district surveyor under section 150 of the Act. The appellant had served a building notice under section 145 on the district surveyor, and had annexed thereto the plans and sections of the new buildings which he proposed to erect on the site of Nos. 12 and 13, Grafton-street. These plans showed that the new buildings would not cover any ground that was uncovered before, but the arrangement of the upper floors was such that a certain amount of the old existing air space would be occupied by the new buildings, which were to be higher and to contain more cubic feet than the old. The magistrate found that the plans of the proposed new buildings did deviate in certain respects, and particularly in regard to the height, from the plans of the old buildings, and he held that the word "deviate" in section 43 (2) applied not only

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

to the ground covered by the old buildings, but also to that of the buildings in respect to height and width and depth on the several floors, and he therefore affirmed the surveyor's objection. The London Building Act, 1894 (57 and 58 Vict., cap. cxxiii.), section 43 is as follows:—

"When any person intends to erect a domestic building . . . abutting upon a street on the site of domestic buildings existing at the commencement of this Act,

"(1) It shall be lawful for such person, before commencing to erect the intended domestic building, to cause to be prepared plans showing the extent of the previously existing domestic building in its several parts . . . and to cause such plans to be submitted to the district surveyor, who shall (if reasonably satisfied with the evidence of their accuracy) certify the same under his name, and such certificate shall be taken to be conclusive evidence of the correctness of the plans. Such person may then erect the intended domestic building, but so that no more land shall be occupied by the newly-erected building than was occupied by the previously existing domestic building as so certified. If such person fail to submit such plans, . . . and the district surveyor, or the tribunal of appeal, refuse to certify the accuracy of the same, such person shall on rebuilding be bound by the preceding provisions of this part of this Act.

"(2) If a person erecting the intended domestic building shall desire to deviate in any respect from the plan or plans certified by the district surveyor, it shall be lawful for him to apply to the Council, who shall sanction such deviation on such conditions as they may think fit."

Mr. MACMORRAN said that the magistrate was wrong and contended that the owner was within his rights so long as he covered no more or different ground with the new buildings than the old buildings covered. He did not argue that section 43 gave an unqualified right to rebuild. It was only intended to give the rebuilder dispensation for the requirements of section 41 (2) as to amount of air space to be left for the benefit of the neighbouring houses. The "plan" referred to in the section meant only a ground plan. He referred to section 47 and said that that would apply. The gist of the difficulty was this—that the appellant said that he could build on the old area to any height subject to section 47. The County Council, on the other hand, said that not only the ground area must be the same but the cubic content.

Mr. AVORY, on behalf of the district surveyor, pointed out that Part V. of the Act, in which part this group of sections was to be found, was headed "Open spaces about buildings and height of buildings." By section 41 all new buildings were to leave air space from the ground upwards. Under the law before this it was enough to leave air space from the ceiling of the ground floor. As, under the old law, the ground floor did not necessarily have air space, it followed that if a person re-erecting old premises chose to build up straight above the ground floor no air space would be left at all.

The COURT supported the decision of the magistrate.

Mr. JUSTICE WILLS said he had in this case no doubt and had not had any during the argument. All depended on what was meant by "the plans showing the extent of the previous existing domestic building in its several parts" in section 41 (1). It would be the most extraordinary synonym for ground plans possible. It was clear that a complete set of plans was intended. If a person chose to rebuild an old house exactly as it was he might get the protection of this section. The cardinal condition of the section was that no ground previously uncovered should be covered.

But if a person desired to deviate in any respect, and not in one respect only, then he was subject to the jurisdiction of the County Council. The general purview of the Act was the limitation of private rights over property for the general good. It could not be doubted that the magistrate had put the right construction on the section. If the building owner desired to alter his old buildings he must submit to the discretionary sanction of the County Council.

MR. JUSTICE KENNEDY concurred.

[Solicitors—Sandilands, for the appellant; W. A. Blaxland, for the respondent.]

Q.B. Div. (Lawrance and
Ridley, JJ.)

1898.
May 9.

SIR HENRY HAWKINS AND OTHERS V. BLACK.*

Practice—Writ of summons—Indorsement of residence—O. 4, r. 1.

Mr. CAVANAGH appeared in support of an application by the defendant in this action to have the writ of summons set aside on the ground of irregularity. He said that the action was brought to recover possession of a set of chambers in the Temple, which, as stated in the indorsement on the writ, were let by the plaintiffs to the defendant under an indenture dated February 1, 1896. The plaintiffs were five gentlemen who were thus described on the writ:—"The Honourable Sir Henry Hawkins, the Honourable Sir Alfred Wills, Edmund Macrory, Sir Charles Hall, and the Honourable Sir Walter George Frank Phillimore"; but nothing appeared on the writ showing who they were, or what they were. The short point was whether the plaintiffs' residence was properly described in the writ as required by Order 4, rule 1. The indorsement of address on the writ stated that the writ was issued by a firm of solicitors, whose address for service was given, and who were described as "solicitors for the said plaintiffs, who reside at the Treasury, Middle Temple-lane, in the City of London." The affidavit made by the defendant in support of the application, after stating that he was called to the Bar in 1884 by the Honourable Society of the Middle Temple and that he obtained possession of the chambers in question in 1885, and that the writ in this action was served upon him on April 29, 1898, proceeded as follows:—"Since service of the said writ I have called at the address given therein as the address of the plaintiffs—to wit, the Treasury, Middle Temple-lane, in the City of London—and from inquiries there made, as well as from personal inspection, not one of the plaintiffs, as far as I could discover, sleeps, or lives, or in any sense resides, or ever did sleep, or live, or reside there. The said Treasury consists of an office and a few rooms where business of one kind or another, chiefly of a counting-house character, is carried on by clerks and agents of the said society; but there is no vestige of sleeping accommodation nor of any of the necessities requisite for living or residence in the place. On the afternoon of Monday, May 2, 1898, between the hours of 1.30 and 3.30 p.m., I called at the said Treasury, but did not find any of the plaintiffs there, and, so far as I can ascertain, they only go there occasionally, and have no private property of their own there upon which an execution could be levied." Order 4, rule 1, required that "the address of the plaintiff" should appear on the writ; and in the case of "Stoy v. Rees" (24 Q.B.D., 748) the Court of Appeal held that these words were not satisfied by merely stating the place where the plaintiff carried on business, but that it was necessary to state where he resided. No

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

doubt there were authorities which allowed a special construction to be put on this rule in cases where an action was brought by a firm or a corporation. The present plaintiffs, however, were not a firm nor a corporation, but a voluntary society or fellowship. An analogous case to this would be where the plaintiffs were the trustees of a charity or a school, and no one would suggest that in such a case it would be sufficient to give as the plaintiffs' address the place where they held their meetings or where their clerk transacted their business.

Mr. J. E. BANKES, for the plaintiffs, contended that there was no irregularity in the writ. The rule said that the address of the plaintiff must be given. The form in the schedule to the rules spoke of the residence of the plaintiff. But it was clear that there were cases to which the form could not apply—e.g., the case of a corporation, which could not reside anywhere. The plaintiffs were in fact the trustees of the Middle Temple, and they were suing in that capacity. The defendant had failed to produce any authority which showed that the form must be followed in cases where plaintiffs sued in a representative capacity. He submitted that the rule itself had been sufficiently complied with.

MR. JUSTICE LAWRENCE said he thought there was no irregularity in the writ at all. So far as appeared from the writ itself the plaintiffs were a body of persons carrying on business in a particular place, and part of their business was to let out chambers in the Temple. It was not necessary to consider whether they were trustees or whether they were a corporation. The only question was whether, in such circumstances, it was requisite to give the private address of each of the plaintiffs. He thought that a distinction was rightly drawn between the case of private persons and that of persons in such a position as the present plaintiffs. It seemed to him that there was no necessity to give their private addresses. The application therefore failed.

MR. JUSTICE RIDLEY delivered judgment to the same effect.

House of Lords (Lords Herschell, } 1898.
Macnaghten, and Morris) } May 10.

RAYNES V. BALLANTYNE AND ANOTHER.*

Ship—Charterparty—Construction—Exemptions from liability—Negligence of master.

Decision of Court of Appeal (*ante*, p. 2) affirmed.

This was an appeal from a decision of the Court of Appeal, dated October 26, 1897, reversing that of Mr. Justice Kennedy, dated May 15, 1897. The case is reported *ante*, p. 2. The action was brought by the appellant for damages to his pier at Llysfaen owing to the defendants' alleged negligence in the management of the steamship *Bessie Barr* at such pier on December 7, 1896. The appellant stated that the *Bessie Barr* was loaded, or ordered to be loaded, with too great a weight of limestone in the after-hold of such vessel before there was any weight in the forward part, whereby such forward part broke away from the pier and caused the after part to beat and work against the pier. The appellant also alleged that such matters were done by the master of the *Bessie Barr* after warning. The respondents denied the warning and negligence, and alleged that if there was any negligence it was excepted by the terms of their contract of charterparty with the appellant, which was

dated February 19, 1895, originally for three calendar months, but subsequently extended by agreement between the parties, and it was the charterparty under which the *Bessie Barr* was hired on December 7, 1896. By the said charterparty the respondents agreed to place the *Bessie Barr* at the disposal of the appellant at Raynes Stage, Llandulas (being the stage the damage to which was complained of in the action), or at such safe wharf or place where she might always safely lie as the appellant might direct. The charterparty embodied the following negligence clause:—"It is agreed that the following additional exceptions and conditions shall apply to this contract. The act of God, perils of the sea, fire on board in hulk, or craft, or on shore. Barratry of the master and crew, enemies, pirates, and thieves, arrest and restraint of Princes, rulers, and people, collisions, strandings, and other accidents of navigation excepted. The owner is not to be responsible for loss or damages of any kind arising from the neglect, default, or error in judgment of the pilots, master mariners, engineers, stevedores, workmen, or other persons employed in, on, or about the ship. Not answerable for any loss or damage arising from explosion, bursting of boilers, breaking of shafts, or any latent defect in the machinery or hull not resulting from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager." While the *Bessie Barr* was at the said stage damage was occasioned to the same by the after part of the said vessel beating and working against it, and an action was brought by the appellant against the respondents to recover the amount of the said damage. At the trial at Liverpool, before Mr. Justice Kennedy and a special jury, the following answers were given by the jury to the following questions left to them by the Judge:—1. Was the damage to the pier caused by the neglect of the defendants' servants?—Yes. 2. If so, what are the damages?—£450. On May 15, the Judge, after hearing arguments on the question raised by the defendants under the charterparty, gave judgment for the plaintiff for £450 and costs. Upon appeal the Court of Appeal (Lords Justices A. L. Smith, Rigby, and Collins) gave judgment reversing the judgment of Mr. Justice Kennedy, holding that the respondents were exempted by the terms of the charterparty from liability for the negligence found by the jury. The question was whether the neglect of the master found by the jury ought or ought not to have been regarded as a tort independent of the charterparty.

Mr. Pickford, Q.C., and Mr. Gardner Horridge appeared for the appellant; Mr. Joseph Walton, Q.C., and Mr. Carver, Q.C., for the respondents, were not heard.

LORD HERSCHELL, in moving the dismissal of the appeal, said the whole question turned upon the construction of the charterparty. By that contract it was agreed that the respondents should let and the appellant hire a certain steamship for the term of three months, and the ship was to be placed at the disposal of the charterers. The captain was appointed by the owners, but was to be under the directions of the charterers. The effect of that contract was to place the vessel at the complete disposal of the charterers within the limits specified in the charter, and subject to the same limits the master was bound to obey the orders of the charterer, although no doubt he was still the servant of the shipowner. Consequently, apart from the clause, the owner would be responsible for any negligence of the master, although the owner had no voice to control the master, who was carrying out the charterer's instructions. The purpose of the clause was clearly to relieve the owner from responsibility if any damage should arise from the master's negligence whilst the charterparty was in force. There was

*Reported by J. EYER THOMPSON, Esq., Barrister-at-Law.

nothing to take the case out of the wide and general words used, and the case came within the reasons which might fairly be attributed as actuating the parties in entering into this contract.

LORD MACNAGHTEN and LORD MORRIS concurred.

[Solicitors—Pritchard, Englefield, and Co., for the appellant; Wm. A. Crump and Son, for the respondents.]

House of Lords (Lord Halsbury, L.C.,
Lords Herschell, Macnaghten, and
Morris) 1898.
May 10.

COMMISSIONERS OF INLAND REVENUE V. TOD.*

Revenue — Stamps — Conveyance on sale — *Ad valorem* duty — Decree under Heritable Securities (Scotland) Act, 1894—Stamp Act, 1891, secs. 54, 57, and 62.

Decision of Court of Session (34 Scottish Law Reporter, 704) reversed.

This was an appeal from a judgment, dated June 16, 1897, of the First Division of the Court of Session as the Court of Exchequer in Scotland upon a case stated under the Stamp Act, 1891, by the appellants, at the request of the respondent, Mr. David Tod, of Eastwood Park, Renfrewshire. The case is reported 24 Court of Session Cases (4th series), 934; 34 Scottish Law Reporter, 704. The question was whether the instrument submitted by the respondent for the opinion of the appellants was chargeable as a conveyance on sale with the *ad valorem* stamp duty specified in the first schedule of the Stamp Act, 1891. The Commissioners were of opinion that the instrument amounted to a conveyance or transfer on sale, as these words are used in the Act, and accordingly assessed and charged the duty graduated *ad valorem*. This view was reversed by the Court of Exchequer in Scotland, and their Lordships held that the instrument should be assessed with the fixed stamp duty of 10s., chargeable on a conveyance or transfer other than a conveyance or transfer on sale. The instrument was the extract of a decree, pronounced pursuant to the provisions of the Heritable Securities (Scotland) Act, 1894. The respondent, as a creditor under a bond and disposition in security, in the exercise of his power of sale, exposed the subjects—certain real estate, or “heritable subjects,” in Glasgow—by public roup, and, failing to find a purchaser, applied to the sheriff for decree in the form of Schedule D annexed to the Act. After certain procedure, the sheriff gave decree as asked, finding that the debtors in the bond had forfeited their right of redemption; that their right was extinguished; and that the respondent had right to, and was vested in, the subjects as absolute proprietor. The main purpose of the Heritable Securities Act was to confer on heritable creditors in Scotland a right of foreclosure, and enable them to become proprietors of the subjects over which their security extended. At common law a creditor selling the subjects could not become a purchaser. Hence it was provided that, on such a decree as was here obtained being pronounced and an extract thereof being recorded in the Sasine register, the creditor should have right to “the lands disposed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree,” and the lands should be disencumbered of all posterior securities and diligencies. The instrument as to which the present question arose stated as follows:—“At Glasgow,

the 26th day of January, 1897, in an action in the Sheriff Court of the county of Lanark, at Glasgow, at the instance of David Tod, pursuer, against David Lamont Rodger, residing at 11, Rylett-eressent, Shepherd’s-bush, London, heir-at-law of David Rodger, writer in Glasgow, and as such heir of provision in trust for the firm of Murdoch and Rodger, writers in Glasgow, and Ebenezer Erskine Scott, chartered accountant, Edinburgh, as trustee for the creditors of the said Murdoch and Rodger and of James Murdoch, writer, Glasgow, and the said David Rodger, defenders; the sheriff in absence found and declared that the defenders had forfeited the right of redemption reserved to the granters in a bond and disposition in security for the sum of £22,000 sterling, dated the 10th, and recorded in the Division of the General Register of Sasines applicable to the county of the Barony and Regality of Glasgow the 11th, both days of September, 1873, granted *quoad* the personal obligation by the said Murdoch and Rodger and James Murdoch and David Rodger, the individual partners of the said company or firm of Murdoch and Rodger, and *quoad* the disposition in security by the said James Murdoch and David Rodger, the only partners of the said firm of Murdoch and Rodger and trustees for said company or firm and partners thereof, in favour of the pursuer, and that the said right was extinguished as from and after the said date hereof, and that the pursuer had right to and was vested in,” [certain heritable subjects in Glasgow, particularly described in the said bond and disposition in security] “as absolute proprietor thereof, but subject,” as therein mentioned, “at the price of £27,000 (the sums due under the said bond and disposition in security at the term of Whitsunday, 1896, being £28,483 2s. 2d., and decreed; and granted warrant to record this extract decree in the Register of Sasines.” Section 54 of the Stamp Act, 1891, enacts:—“For the purposes of this Act the expression ‘conveyance on sale’ includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf, or by his direction.” Section 57:—“Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or encumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.” The appellants contended that by the instrument in question the absolute property of the security subjects was transferred to the respondent for a price, and on a sound construction of the Stamp Act, 1891, and particularly of sections 54 and 57, the instrument was a transfer on sale within the meaning of the Act.

There appeared for the appellants the Attorney-General, the Lord Advocate, the Solicitor-General for Scotland, and Mr. A. J. Young, of the Scottish Bar; for the respondent, Mr. H. Aitken, of the Scottish Bar, and Mr. E. F. Spence, of the English Bar.

LORD HERSCHELL moved that the judgment appealed from be reversed and the appeal allowed. After stating the facts his Lordship said there was no doubt that by the decree of the sheriff property, or an interest in property, was transferred to the respondent or vested in him. The question was whether it was so transferred or vested “upon the sale thereof” within the meaning of the 54th section of the Stamp Act, 1891. Before the Act of 1894, although the creditor might be willing to purchase—that is, to acquire the entire title to the

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

property, he could not do so; he was not under the power of sale empowered to become the purchaser. But under that Act he might become the proprietor after exposing the lands held in security to sale. It was to be observed that the effect of the bond and disposition was only to create a real burden upon the land—the title in the land subject to that real burden remaining in the original proprietor. But after the decree the title was completely vested in the creditor, who thus became the proprietor. Now when, after such exposure for sale and sale, the creditor applied to the sheriff for his decree, the sheriff might consider that the property had not been exposed under the best possible conditions, and might order another sale and himself fix the upset price. If he did not order another exposure it must be on the ground that he regarded the price paid by the creditor as the highest obtainable. Having come to that conclusion the sheriff declared that the debtor had forfeited his right of redemption, and that “the petitioner has right to and is vested in the lands described in the said bond, and disposition in security . . . as absolute proprietor” at the price paid, which is stated in the decree. Did not that in substance and effect amount to a declaration that the creditor should be treated as the purchaser of the lands which were to be adjudged to him as purchaser? The effect was the same whether the decree was made after the first exposure for sale or the sheriff directed that the property should be re-exposed. It was impossible to say in either case that the property was not vested “upon the sale thereof” according to either of the modes prescribed, and that being so the *ad valorem* duty attached. The Crown did not ask for costs, as the Inland Revenue Commissioners did not at first take the view of the Act which had for the first time been presented in this case. But the respondent must repay to the Crown the costs awarded to him in the Courts below. As the Commissioners had for some time acted on a view which was contrary to that which had been successfully argued before their Lordships, it might be desirable for the Legislature to intervene to give validity to transactions carried through on the former construction and to enforce the *ad valorem* duty only in cases subsequent to this decision. His noble and learned friend the Lord Chancellor, who had been obliged to leave, desired to express his entire concurrence with the motion.

LORD MACNAGHTEN also thought that the transaction under consideration was in reality a sale, and that the sheriff's decree was, in the words of the Stamp Act, a decree by which the property was vested in the creditor “upon the sale thereof.” An analogy had been suggested between the English rule by which the Crown did not claim *ad valorem* duty on foreclosure decrees of legal mortgages and the Scotch law on the subject. On that he could express no opinion, but would reserve consideration of the question when a case under the English practice came to their Lordships' House.

LORD MORRIS concurred, and said that this was clearly a vesting of property on sale whichever of the alternative courses prescribed in section 8 of the Heritable Securities (Scotland) Act, 1894, was followed. The appeal was allowed without costs.

[Solicitors—F. C. Gore, for the appellants; Lindo and Co., for the respondent.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.) May 10.

WHITE V. TURNBULL, MARTIN, AND CO.*

Ship—Charterparty—Construction—Broker's

commission—“Commission payable on all hire earned”—Rescission of charterparty.
Decision of Bigham, J. (*ante*, p. 45), affirmed.

This was an appeal from the judgment of Mr. Justice Bigham in favour of the defendants at the trial of the action without a jury, reported *ante*, p. 45; 3 Com. Cas., 13. The action was brought to recover commission in respect of a time charterparty entered into through the agency of the plaintiff between the defendants, who were the owners of the steamship *Elderslie*, and the Jamaica Fruit Importing Company as charterers. The *Elderslie* was fitted with refrigerating machinery. The charter was for a period of 12 months, the hire being at the rate of £1,050 per month, payable monthly in advance, and the charter provided that a commission of 5 per cent. should be paid to the plaintiff “on all hire earned,” and that payment of the hire was to be suspended or reduced in certain cases, as, for instance, in the event of loss of time from breakdown of machinery. The first two months' hire was duly earned and commission was paid to the plaintiff. The third month's hire was duly paid in advance, but during the currency of that month the charterers rescinded the charter, alleging that certain warranties as to the condition of the ship contained in the charter had been broken by the defendants. In an action between the defendants and the charterers, which was tried before Mr. Justice Mathew in July, 1897, judgment was entered by consent after a trial occupying several days, by which the cancellation of the charter was confirmed, and £700 of the £1,050 hire paid in advance was ordered to be returned to the charterers. The plaintiff in the present action claimed commission on the £1,050 paid in advance and on a like sum for each of the remaining nine months of the charter. The defendants paid into Court £17 10s., being commission on the £350 not returned without a denial of liability, and a further sum of £35, being commission on the £700 returned with a denial of liability. Mr. Justice Bigham held that it had not been shown that the charter had come to an end through any default of the defendants, and gave judgment for them. The plaintiff appealed.

Mr. J. Lawson Walton, Q.C., and Mr. J. E. Bankes appeared for the plaintiff; Mr. Joseph Walton, Q.C., and Mr. D. C. Leek for the defendants.

The COURT, without calling upon counsel for the defendants, dismissed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether the plaintiff was entitled to commission under this charterparty. It appeared that the charterparty, when it was first presented to the defendants, the shipowners, was a printed document in the ordinary form which was generally used by the plaintiff. It consisted of many clauses, and at the end came the terms as to the commission to which the plaintiff was entitled. These terms, as printed, provided for the plaintiff receiving commission on the estimated amount of freight. The words providing for this, however, were struck out, and instead thereof were inserted words providing for commission on all hire earned. It was clear that this alteration was intended to introduce a limitation on the obligation to be put on the shipowners. The plaintiff admitted that he could not recover the commission which he claimed in the action as commission on freight which had been actually earned, because the freight had not been earned. But he contended that there was an implied term in the charterparty that the defendants would do nothing to prevent the plaintiff from earning his commission, or, in other words, that they would keep the charterparty running for 12 months and would perform all their obligations under it. In

his opinion it was impossible to import any such implied term into the charterparty. He entirely agreed with the judgment of Mr. Justice Bigham, and he thought that the appeal must be dismissed.

LORDS JUSTICES CHITTY and VAUGHAN WILLIAMS delivered judgment to the same effect.

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) May 10.
OXLEY V. WILKS.*

Defamation—Libel—Newspaper—Payment into Court under Lord Campbell's Act—6 and 7 Vict., c. 96, sec. 2—Judgment, how entered.

This was an appeal from the judgment of Mr. Justice Darling at the trial of the action with a jury. The action was brought for a libel published in a newspaper. The defendants put in a plea under section 2 of Lord Campbell's Act, 6 and 7 Vict., c. 96, and at the same time paid the sum of £5 into Court. At the trial Mr. Justice Darling at first left the case generally to the jury, and they returned a verdict for the plaintiff for £5. The learned Judge then left specific questions to the jury, in answer to which they found that there was no malice on the part of the defendants, that there was negligence on their part, that they had made a sufficient apology, and that the damages were £5. The learned Judge held that the defendants had failed to establish the whole of their plea, inasmuch as the jury had found that there was negligence, and he accordingly directed judgment to be entered for the plaintiff. The defendants appealed.

Mr. F. S. COOPER (Mr. Rawlinson, Q.C., with him) appeared in support of the appeal, and contended that the defendants were entitled to judgment. Payment into Court was now governed entirely by the Rule of the Supreme Court—viz., by Order 22. That part of section 2 of Lord Campbell's Act which related to payment of money into Court was repealed by the Civil Procedure Acts Repeal Act, 1879. The jury having by their verdict found that the sum paid into Court by the defendants was sufficient, the defendants were, under the present rules, entitled to judgment. If it were not so the defendants were in a worse position than they would have been in if they had simply paid the same sum into Court admitting liability, under Rule 1 of Order 22, and had not relied on Lord Campbell's Act at all; which would seem to be an absurd result, considering that Lord Campbell's Act was undoubtedly passed in the interest of newspaper proprietors.

Mr. Candy, Q.C., and Mr. Arthur May appeared for the plaintiff.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said this was an action of libel against a newspaper. The defendants pleaded a plea under Lord Campbell's Act, and they set out the four ingredients necessary to raise that plea—viz., that there had been no malice on their part, and no negligence, that they had made a full apology, and that they brought a sum of money into Court by way of amends. Those four matters were all necessary to make the plea a good plea. At the trial the case was fought on that plea, and the jury found that the defendants had proved three of the necessary ingredients, but that they had failed to prove one—viz., that they had acted without negligence. The defendants therefore failed to establish the plea which they set up. They now sought to turn round and treat the payment of £5 into Court as a payment into Court under the Judicature Rules,

and argued that under those rules they were entitled to judgment. In his opinion it was not open to them to do that. He thought that the judgment of Mr. Justice Darling was right, and that the appeal must be dismissed.

LORDS JUSTICES CHITTY and VAUGHAN WILLIAMS delivered judgment to the same effect.

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.J.J.) May 11.

KERRY V. MAORI DREAM GOLD MINES (LIMITED).*

Company—Directors—Inequitable transaction—Unfairness to one set of shareholders—Injunction granted.

This was an appeal from an order of Mr. Justice North (reported in *The Times* of April 7) refusing a motion by the plaintiffs, who were holders of vendors' shares, suing on behalf of themselves and all other fully paid up shareholders, to restrain the defendants, the Maori Dream Gold Mines (Limited) and its directors, Lord Kilmorey and others, till the trial of the action, from carrying into execution a purchase of shares in another company authorized by one of certain resolutions passed by the company on February 28. The ground of the motion was that the terms were unfair to one set of shareholders, and that the majority were induced to vote for the resolutions by a transaction in the nature of a bribe. The resolutions in question authorized the directors (1) to abandon their own mine; (2) to purchase 10,000 fully-paid shares of £1 each in the Waihi Gladstone Gold Mining Company (Limited) for £8,000; and (3) to invest the remaining funds of the company as they might think expedient. The notice convening the meeting was dated February 18. It was accompanied by a circular stating that the directors had obtained an independent report to the effect that it was advisable to abandon their mine, and that two of the directors of the Maori Dream Company, Messrs. R. D. Wilkinson and H. C. Parkes, were on the board of the Waihi Gladstone Company, and it was proposed to nominate another director to represent the interests of the shareholders of the Maori Dream Company. On the same February 18 Mr. Parkes, who was a promoter of the Maori Dream Company, and the vendor to the Waihi Gladstone Company, sent a circular to all the shareholders of the Maori Dream Company (other than holders of vendors' shares) referring to the proposed meeting, saying, "In order to give each shareholder in the Maori Dream Gold Mines (Limited) who has subscribed for his shares in cash an opportunity of getting value for not only the money already paid upon such shares, but also for that which remains to be paid, I have agreed with the directors of that company to give to each of such shareholders, so soon as his shares in that company have been paid in full, one fully-paid share in the Waihi Gladstone Gold Mining Company (Limited) in exchange for each fully-paid share held by such shareholder in the Maori Dream Gold Mines (Limited). In order to give effect to this arrangement I have agreed with the directors to transfer a sufficient number of fully-paid shares in the Waihi Gladstone Gold Mining Company (Limited) to trustees, who will be empowered to make the exchange above-mentioned." The circular pointed out that it was intended to benefit cash subscribers of shares in the Maori Dream Company and not holders of vendors' shares, and that in the event of the Maori Company being wound up the cash shareholders would have to pay up in full and any overplus would be participated

*Reported by F. G. RUCKER, Esq., Barrister-at-Law

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

in by the holders of vendors' shares which were fully paid up. At the meeting the resolutions were passed by a majority of eight to five of those present; no poll was demanded; it was, however, in evidence that the directors had the command of votes of those present and proxies to the number of over 48,000, while the holders of vendors' shares who opposed the resolution had somewhat over 25,000 votes available. Mr. Justice North, being of opinion that there was no sufficient reason why these resolutions should not be carried out, refused the motion. The plaintiffs appealed.

Mr. Vernon Smith, Q.C., and Mr. George Henderson were for the plaintiffs; and Mr. Warrington, Q.C., and Mr. Gore Browne for the defendants.

The COURT allowed the appeal.

The MASTER of the ROLLS said that it was impossible to regard the circular issued by Mr. Parkes as something independent of the resolution to buy the 16,000 shares. It was obvious that that circular was part of the transaction, that transaction being that the company was to buy the shares for £8,000, and that Mr. Parkes, as part of the transaction, should, by agreement with the directors of the Maori Company, give certain advantages to the holders of cash shares in that company. Plainly that transaction could not stand, because the company had no right to stipulate for an advantage to one set of shareholders against another. The arrangement taken as a whole was one which it was not competent for the shareholders to carry out. There would, therefore, be an injunction to restrain the defendants till the trial from carrying out the resolution to buy the shares, and the appeal would be allowed with costs, to be paid to the plaintiffs in any event.

LORDS JUSTICES RIGBY and COLLINS concurred.

[Solicitors—Templeton and Cox; Burn and Berridge.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.J.J.) } May 11.

SOUTH AFRICAN REPUBLIC V. LA COMPAGNIE FRANCO-BELGE DU CHEMIN DE FER DU NORD.*

Practice—Discovery—Documents.

Application for discovery of documents refused on the ground that they were not relevant to the action.

This was an appeal from a decision of Mr. Justice North refusing an application by the defendant company for the common order against the plaintiffs for discovery of the documents relating to the matters at issue in the action. The defendant company was constituted in Belgium in 1892 for the purpose of acquiring and working a concession to make a railway in the Transvaal. In June, 1894, the company applied to the Government of the Republic for its assent to the issue of debentures for £1,000,000, and proposed that the proceeds of the issue should be deposited in the joint names of Mr. Van Blokland, the Commissioner in Europe of the Republic, and a trustee named by the company, so that all moneys required for the construction, &c., could only be drawn on the joint signatures of the two trustees. This was acted upon and large sums arising from the debentures were placed in two London banks in the joint names of Van Blokland and Baron Oppenheim, the company's trustee. Van Blokland having died in 1896, Baron Oppenheim, as the surviving trustee, claimed the right, on behalf of his company, to draw out the moneys standing in the joint names. Thereupon the South African Republic commenced the present action for a declaration that the funds ought to be held by two trustees and that the

plaintiffs were entitled from time to time to nominate a trustee on their behalf; payment of the funds to the trustees when constituted; and an injunction to restrain the defendant company from dealing with the funds in the meantime. The defendants, by their defence, complained that the plaintiffs had, through their trustee, persistently declined to allow the funds in question to be applied to the purposes for which they were deposited, and submitted that it would be inequitable that the funds should be again placed under the control of the plaintiffs except upon the terms of the plaintiffs agreeing to observe the arrangement whereby the same were placed in joint names and to carry out the terms of the concession. The object of the defendants in applying for discovery was to enable them to make good these allegations. Mr. Justice North pointed out that the scope of the action was confined to the appointment of a new trustee and the protection of the funds in the meantime. There being no claim to administer the funds he did not see how the documents of which the defendants required production were relevant to the action. He therefore dismissed the application. The defendants appealed.

Sir Edward Clarke, Q.C., Mr. Vernon Smith, Q.C., and Mr. Whinney were for the defendants; Mr. Waggett was for the plaintiffs.

The COURT dismissed the appeal.

The MASTER of the ROLLS did not think that the Court ought to accede to this application. This was another instance of the difficulty which people got into by entering into contracts with foreign Governments. The plaintiffs were applying for the appointment of a trustee of a fund in this country. There was really no defence to the action, limited as it was in that way, and no necessity for any discovery. But the suggestion was that the plaintiffs had departed from the arrangements under which the fund was paid in and that as they were a foreign Government and incapable of being sued in this country the Court as a condition of appointing a new trustee ought to put them upon terms to observe that arrangement. But, in his Lordship's opinion, the Court ought not to accede to an application for an order on the plaintiffs to make an affidavit of documents which would not be of the slightest use to any one for the purposes of the trial of this action.

LORD JUSTICE RIGBY agreed. It was said that the Transvaal Republic in the time of the last trustee had so acted that they could not be trusted to appoint a new trustee or to have the trust carried out out of Court. But in an action of this kind there was no ground for inquiring into the past administration of the trust, and an ordinary plaintiff would not be subjected to terms such as were now proposed. This Court was asked to assume against a foreign State a jurisdiction which it would not assume against a person who was entirely amenable to its jurisdiction. This application was made because the plaintiffs were a foreign State and could not be sued here. That seemed to his Lordship to be the very reason for not exercising this jurisdiction against them.

LORD JUSTICE COLLINS concurred.

[Solicitors—Harwood and Stephenson; Clarke, Rawlins, and Co.]

Court of Appeal (A. L. } 1898.
Smith and Chitty, L.J.J.) } May 11.

LUMSDEN V. BURNETT.*

Distress—Income-tax—Sum unpaid not exceeding £20—Charges of collector—Man in constructive possession—7 & 8 Geo. IV., c. 17.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

This was an appeal from a decision of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrence), reversing a judgment of the Judge of the Lambeth County Court. The action was brought by the plaintiff against the defendant, who was a collector of Queen's taxes, to recover damages for an alleged illegal distress for income-tax, and also to recover the sum of 15s. paid by the plaintiff under protest in respect of the expenses of a man alleged to have been in possession of the plaintiff's goods for six days. In January, 1897, a notice was left at the plaintiff's house in the usual form on yellow paper, stating that the sum of 13s. 4d. was due from him for income-tax. Without any further demand for payment being made on the plaintiff, a levy was executed on April 29, when the defendant, accompanied by another man, went to the plaintiff's house with a notice of distress. The only person in the house was the plaintiff's daughter, a girl about 14 years of age. The defendant produced a printed document called a power to re-enter, to which he obtained the girl's signature. This document was in form a request to the defendant to withdraw from the house, and an authority to him to re-enter at any time for the purpose of holding possession of the goods therein, and an undertaking not to remove any of the goods. The defendant left the notice of distress with the girl, and went away with the other man, whom he had intended to leave in possession if it had been necessary. On the same day the plaintiff, having heard what had happened, went to the defendant's office and tendered the sum of 13s. 4d. The defendant refused to accept this sum, and demanded in addition 3s. for the levy fee. Two days later, on May 1, the plaintiff tendered 16s. 4d., when the defendant demanded three days' possession money at half-a-crown a day, under the provisions of 57 Geo. III., c. 93, and 7 and 8 Geo. IV., c. 18. The plaintiff refused to pay possession money on the ground that no man had been in possession. The period of five days mentioned in section 86 (4) of the Taxes Management Act, 1880, having expired, the defendant, on May 4, commenced to remove some of the goods, and thereupon the plaintiff, under protest, paid the sum of £1 11s. 4d., being the amount of the tax, the levy fee, and 15s., the costs of a man in possession for six days. The plaintiff then brought this action, and at the hearing the County Court Judge gave judgment in his favour for £3 15s.—being £3 for damages for illegal distress, and 15s. in respect of possession money illegally charged. The Divisional Court, on appeal, reversed the judgment of the County Court Judge. The plaintiff appealed.

Mr. Bowen Rowlands, Q.C., and Mr. Addington Willis appeared for the plaintiff; Mr. Macmorran, Q.C., and Mr. Lincoln Reed for the defendant.

The COURT, having taken time to consider, delivered judgment, allowing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The amount in dispute in this appeal is insignificant, but the point raised is of some practical importance, and the case has acquired the name of "The Walking Possession Case." It raises the question whether a collector of income-tax, when he distrains upon the goods of a taxpayer for unpaid income-tax which does not exceed £20 (in this case amounting to the sum of 13s. 4d.), is entitled to levy upon the taxpayer, in addition to the tax due, 2s. 6d. a day for a man in possession, amounting in this case to 15s.—i.e., six days at 2s. 6d. per day, when in truth and in fact the man has not been really in possession, but at the most has been in constructive possession of the goods distrained. The facts are these. In the early part of January, 1897, the tax-collector, who is the defendant, left with the taxpayer, who is the plaintiff, a printed document which the plaintiff himself designated as being the "customary demand note."

It is a document headed in large type, "Income-Tax, House Duty, and Land Tax payable on or before the 1st January, 1897." The document states the amount of duties payable for the year 1896-97 by the taxpayer, which in the present case was duty under Schedule D at 8d. in the pound, amounting in all to 13s. 4d. At the foot of this demand note, in large type, are the words, "This notice must be produced at the time of payment or sent with the remittance." Although the plaintiff was served with this demand for payment of income-tax, he wholly disregarded it, and did not pay the 13s. 4d. due and demanded. Time went on without the tax being paid, and on April 29, 1897, the tax-collector, accompanied by a man, went to the plaintiff's premises armed with two printed documents, the one being a document headed "Queen's Taxes, Arrears Warrant," which, when filled up as it subsequently was, gave the taxpayer notice that the collector had upon that day seized and distrained upon the taxpayer's goods and chattels for income-tax, Schedule D, 13s. 4d., due upon January 1, 1897, and also that, unless that amount, together with the charges attending the distress, was paid within five days from April 29, 1897, the goods and chattels seized would be sold according to law. The charges mentioned in this document, in addition to the tax of 13s. 4d., were "levy, 3s.," "man, 2s. 6d. per day." The "inventory of goods seized" was thus filled in—"Shop, eight pair trousers." The other printed document which the collector then took with him to the plaintiff's house was the following:—"To Mr. H. E. Burnett, 24, Queen's-road, S.E."—this is the name of the defendant, the collector—"or whom it may concern,—I hereby authorize you to re-enter at any time upon the premises. . . . by force or as you may think fit, and to break open doors or windows for the purpose of taking possession under your warrant of distress; and I also undertake not to move away or allow to be moved away from the said premises any of the goods and chattels which are now therein until the amount levied for, together with all costs and charges of maintaining the levy, are duly paid and settled. And in the event of the man now in possession quitting the said premises temporarily or from any cause whatever previous to the removal by you of the said goods from the above-mentioned premises or the distraint being otherwise satisfied, it shall not be considered in any way an abandonment of the levy. I also undertake not to replevy the said goods and chattels, and not to bring any action or actions at law against you or either of you, or prefer any indictment, for any of your proceedings in this matter. Dated this 29th day of April, 1897." The only person the tax-collector and his man found upon the plaintiff's premises upon April 29, 1897, was the taxpayer's daughter, a child about 13½ years of age, whose signature the tax-collector then obtained to the printed document above-mentioned, having first demanded the tax of 13s. 4d. from her. This child had no authority whatever from her father, the plaintiff, to sign this document, then for the first time produced by the tax-collector, and, indeed, the father never knew of this document, nor that his child had signed it, till long afterwards, when the tax-collector was insisting that the taxpayer should pay him 2s. 6d. per day for the man having been, as he alleged, in possession for six days, amounting to the 15s. then claimed by him. Upon this April 29, 1897, the collector, accompanied by the man as before stated, distrained upon the eight pair of trousers in the shop, and left the document headed "Queen's Taxes, Arrears Warrant" filled up as before mentioned upon the plaintiff's premises. The collector and his man then left the plaintiff's premises, taking with him the document signed by the plaintiff's child,

neither the collector nor the man remaining in possession of the goods distrained, though it appears that during the six days the man daily returned to the neighbourhood to keep, as he said, watch on the premises, and to see that nothing was removed; and this man also stated that sometimes he was in possession of two houses in one day. It seems to me, for reasons hereafter, that the findings of fact of the learned County Court Judge, if they be findings of fact, are wholly immaterial to the decision of this case. If material, I could not agree with some of them, for in my opinion they are not only founded upon no evidence at all, but are directly contrary to the undisputed evidence in the case. For instance, the County Court Judge in his judgment states that no demand for the tax due was made upon the taxpayer other than the demand upon the child upon April 29, 1897, ignoring altogether the service of the demand note on or about January 1, 1897, and the continued and deliberate non-payment by the plaintiff of the tax due till the distress was made upon April 29, 1897. Again, this continued non-payment the County Court Judge holds to be no evidence of a refusal to pay, for he holds that there was "no refusal to pay the tax in the sense intended by the Act of Parliament," whatever that may mean. The County Court Judge also states that the defendant levied a distress which was in the first instance improper; and that he afterwards abandoned it by not having a man in possession in such a way as to make it continuous possession. We held in this Court not long since in the case of *"Bagshawes (Limited) v. Deacon"* (not reported), after full argument and discussing amongst other authorities "*Ackland v. Paynter*" (8 Price, 95), "*Swann v. Earl of Falmouth*" (8 B. and C., 456), and "*Eldridge v. Stacey*" (15, C.B., N.S., 458), that, where a sheriff goes out of possession, and the point arises as to whether he has abandoned possession or not, the question always is one of fact, and is whether the sheriff by going out of possession as he did has abandoned the possession. A sheriff in some circumstances may go out of possession and again re-enter without having abandoned possession, and the question always is whether what he has done amounts to an abandonment of possession. Although the document signed by the child in this case clearly does not bind the plaintiff and is no evidence against him, yet it is strong evidence to show that the collector did not abandon possession, and his employing and paying a man to go and see that the goods distrained were not removed affords corroborating evidence, if it were needed, that he went out with the intention of returning and not of abandoning possession. But these findings of the County Court Judge are immaterial to the real question he had to try, which is the right of the collector, apart from agreement, to levy upon the plaintiff for the 15s. for the man said to have been in possession when the distress was for an amount not exceeding £20. This question has to be decided upon the statute regulating distresses for income-tax not exceeding £20, which appears to have been altogether overlooked by the County Court Judge, and is not alluded to by the Divisional Court, who decided the case upon the question whether there had been an agreement by the taxpayer to pay the 2s. 6d. per day, whether the man was in real possession or not, of which, in my opinion, with submission to the Divisional Court, there was not a tittle of evidence. I am not aware of any Act of Parliament regulating the charges to be made when the sum distrained for exceeds the sum of £20, but from text books of repute I find that for such expenses the general practice appears to be to charge 1s. in the pound for the levy and 3s. 6d. per day for the man in possession. But there is an Act of Parliament which regulates what

is to be charged by a collector for distress for income-tax when such unpaid tax does not exceed £20, and this is the Act of 1827 (7 and 8 Geo. IV., c. 17). The matter stands thus:—By the Taxes Management Act, 1880 (43 and 44 Vict., c. 19), section 86, subsection 1, it is enacted that "If a person refuses to pay the sum charged upon him by virtue of the Tax Acts or this Act on demand made by the collector . . . such collector may and he is thereunto authorized and required for non-payment thereof to distrain . . . the person so charged by his goods and chattels . . . without any further authority from the Commissioners for that purpose than the warrant to such collector delivered on his appointment." By subsection 4 it is enacted that every distress levied by a collector shall be kept for the space of five days at the costs and charges of the person so refusing to pay; and, by subsection 5, if such person does not pay the respective sums of money so due within the five days, the distress after appraisal may be sold by the collector for payment of the said money, and the overplus coming by the said distress (if any there be) after deducting the said money and also the costs and charges of taking, keeping, and selling the said distress, shall be restored to the owner. The question arises, What are these costs and charges? This brings me to the Acts of 1817 and 1827. By the Act of 1817 (57 Geo. III., c. 93), after reciting that "divers persons acting as brokers and distraining on the goods and chattels of others . . . have of late made excessive charges to the great oppression of poor tenants and others," it is enacted that "from and after the passing of this Act no person whatsoever making any distress for rent where the sum demanded and due shall not exceed the sum of £20 for and in respect of such rent . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold or from the tenant distrained upon . . . any other or more costs and charges for and in respect of such distress or any matter or thing done therein than such as are fixed and set forth in the schedule thereunto annexed and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge whatever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done." In this schedule, which is headed, "Schedule of the limitation of costs and charges on distress for small rents," is set forth as follows:—"Levying distress, 3s.; man in possession per day, 2s. 6d." Ten years afterwards, in the year 1827, by the Act of 7 and 8 Geo. IV., c. 17, all the provisions of the Act of 57 Geo. III., c. 93, which related to distraining for rent not exceeding £20 were extended to any distress or levy made for . . . assessed taxes, or other rates and taxes . . . whatever . . . where the sum demanded and due for such taxes should not exceed the sum of £20. What, then, are the charges which can be made for a distress for income-tax, when an amount not exceeding £20 is due? It is clear that in such a case by the statute the charge for a man in possession may be made of 2s. 6d. per diem, but only if the act for which the charge is made has been really done—i.e., if the man charged for has really been in possession. In the present case at the most the man charged for at 2s. 6d. per day has but been in constructive possession, and it is impossible to hold that constructive possession is the same thing as real possession, for the one is a reality and the other is not. For instance, how can there be real possession by one man of two, six, eight, or ten houses upon the same day? The thing is impossible. As, however, the statute 7 and 8 Geo. IV., c. 17, is a statute in favour of a taxpayer owing income-

tax not exceeding £20, I do not see why such a taxpayer may not agree with a collector, if the former desires neither to pay the tax due nor to suffer the inconvenience of having a man in real possession, to pay the 2s. 6d. per diem to the collector, even though the man does not remain in real possession, but unless such an agreement is made I am clear that the collector cannot claim the 2s. 6d. per day if the man does not remain in real possession. It is for these reasons I think, there being no agreement to the contrary, that the tax-collector cannot charge 2s. 6d. per day for the man who has not been really in possession of the goods distrained, when the income-tax due amounts, as in this case, to less than £20. I think, therefore, that this appeal must be allowed with costs to the appellant here and below.

LORD JUSTICE CHITTY read a judgment in which he expressed the same opinion.

[Solicitors—A. H. Williams, for the plaintiff; H. M. Ody, for the defendant.]

Chan. Div. } 1898.
(North, J.) } May 11.

IN RE THE RUSSELL INSTITUTION—FIGGINS V. BAGHINO.*
Literary Institution—Dissolution—Surplus funds
—Distribution amongst shareholders—Literary
and Scientific Institutions Act, 1854, sec. 30.

This was a summons taken out by the trustees of the Russell Literary and Scientific Institution, one proprietor being made defendant for the purpose of representing the others. The institution has been carried on from the year 1808, when it was founded, at a building in Great Coram-street, Russell-square, till last year, when, shortly before the time it would have expired, the lease was surrendered, resolutions were passed for dissolving the society, and the library and other assets were disposed of, with the result that there was in the hands of the trustees a sum of about £1,600, and the question for the decision of the Court was whether this sum was divisible among the proprietors of the institution or whether it came within the operation of the 30th section of the Literary and Scientific Institutions Act, 1854, which provides:—
“If upon the dissolution of any institution there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution, to be determined by the members at the time of the dissolution, or in default thereof by the Judge of the County Court aforesaid, provided, however, that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company.” The Russell Institution was founded in the year 1808. A lease of the premises in Great Coram-street for 98 years from the Duke of Bedford was assigned in consideration of 200 shares in the institution and a money payment to trustees to be used and disposed of in such manner as by the rules and regulations of the institution for the time being in force should be ordered and appointed. The rules of the institution as originally framed provided for a capital divided into 700 £25 shares. A portion of the capital was appropriated to preliminary expenses, fitting up the rooms, and the purchase of a library. A portion of the income of invested funds was to be accumulated. When the interest of the whole capital should be sufficient to defray current expenses inde-

pendently of current subscriptions, a portion of the revenue was to be appropriated to dividend amongst the proprietors. The rules provided for the transfer of shares by a proprietor and the transmission of shares on the death of a proprietor. The rules provided for a library and lecture-hall and a news-room. Annual and life subscribers were admitted to the benefits of the institution. In the year 1843 an Act was passed, 6 and 7 Vict., c. 36, exempting from the payment of public rates societies established exclusively for the purpose of science, literature, or the fine arts, provided that such societies were supported wholly or partly by annual contributions and no dividend or bonus were payable among members and the society were certified in manner provided. In the year 1847 new rules of the Russell Institution were made with a view to bringing the institution within the exemption from rating. No dividends had ever been paid to proprietors, and it was provided that no dividend, gift, division in bonus, in money or otherwise, should be made unto or between any of the members, and the institution was certified. Proceedings were brought in the Court of Queen's Bench to try whether the institution was exempted from payment of rates under the Act of 1843, and the judgment of the Court was given by Lord Campbell in January, 1854, against the institution, the Court holding that its objects were not confined to science, literature, and the fine arts exclusively. In the year 1857 the new rules of the society were made, which provided that the society should consist of proprietors and life and annual subscribers. One rule provided that proprietors should be interested in the property of the institution in proportion to the number of shares they held.

Mr. SWINFEN EADY, Q.C., and Mr. ELGOOD, for the trustees, submitted to the Court that the money in hand was not divisible among the proprietors, but was devoted by section 30 of the Literary and Scientific Institutions Act to some kindred institution to be determined in manner provided by the Act. They relied on the authority of a decision of the late Lord Justice Kay when a Judge of first instance upon a petition to wind up a similar institution (“*In re the Bristol Athenæum*,” 43 Ch.D., 236; 6 *The Times* L.R., 88). His Lordship dismissed the petition, holding not only that the society in question was not only not subject to the provisions of the Joint Stock Companies Acts as to winding up, but also giving his opinion that it was not in the nature of a joint stock company.

Mr. H. T. TERRELL, Q.C., and Mr. DOUGLAS, for the defendant, argued that the society was not within the Literary and Scientific Institutions Act at all, and that, if it were, it was exempted from the operation of section 30, because it was in the nature of a joint stock company.

The arguments were completed on the 25th ult. His Lordship said that he would have given judgment at once, but he was told that there was a somewhat similar case in which Mr. Justice Stirling had reserved judgment, and he would take an opportunity to discuss the matter with Mr. Justice Stirling.

His LORDSHIP gave judgment. He intimated that Mr. Justice Stirling was of the same opinion as he was as to the construction of the 30th section of the Act. In the first place, he held that the institution was a literary and scientific institution within the provisions of the Act of 1854 and capable of being dissolved under that Act, and he pointed out that the members of the institution had themselves taken this view. There remained the question whether the institution was within the exemption contained at the end of section 30 as being in the nature of a joint stock company. On this part of the case, though he agreed with Lord Justice Kay that the petition in the

*Reported by D. PITCAIRN, Esq., Barrister-at-Law.

case "*In re the Bristol Athenæum*" was properly dismissed—the only point necessary for decision in that case—with great deference he differed from the opinion the learned Judge had gone on to express that the institution in question was not in the nature of a joint stock company, for the reason there was no provision for payment of dividend or bonus to members. His Lordship referred to provisions of the earliest Joint Stock Company Act, of the existing Act of 1862, and the Amendment Act of 1867, which, in his opinion, applied to such an association as the present, and finally held that the proprietors are entitled to the surplus assets in proportion to the number of shares held by them respectively.

[Solicitors—F. B. Moyle, for the plaintiff; Carthew and Wheeler, for the defendant.]

Q.B. Div. }
(Hawkins, J.)

1898.
May 11.

THE HORSEY ESTATE (LIMITED) V. STEIGER AND PETRI-
FITE (LIMITED).*

Landlord and Tenant—Lease—Proviso for re-
entry—Construction—Liquidation of company.

This was an action to recover possession of premises known as 31, Orchard-place, Blackwall, by way of forfeiture under the terms of a lease.

Mr. Christopher James and Mr. B. A. Cohen appeared for the plaintiffs; Mr. Boome and Mr. Timins for the defendant Steiger; and Mr. Clarke Williams for the defendants Petrifite (Limited).

On November 4, 1889, the trustees of the will of Thomas Horsey, deceased, demised to John Donnelly and a registered company the piece of land in question for a term of 21 years. The lease contained covenants by the lessees for rent and repairs, and a covenant not to assign or underlet without the consent of the lessors. There was also a proviso for re-entry on failure to pay rent or to observe the other covenants of the lease, "Or if the lessees shall become bankrupt or enter into liquidation for the benefit of, or compound with, his creditors, or, being a company, shall enter into liquidation whether compulsory or voluntary." On August 1, 1894, the lessors assigned to the plaintiffs. On December 13, 1895, the lessees assigned (with the assent of the lessors) to the defendants. The assent of the lessors was expressly limited to this assignment. On January 26, 1897, Petrifite (Limited) went into voluntary liquidation for the purpose of reconstituting the company and increasing its capital, and a new company was formed and registered on September 27, 1897, under the same name, to carry out the objects of the old company. By an agreement dated December 2, 1897, the original Petrifite (Limited) assigned to the new company their rights and property, including their right and interest in the leasehold premises 31, Orchard-place, for the residue of the term, subject to the covenants of the lease. No actual assignment of the lease was ever made. Notice was thereupon served upon the original lessees and the present lessees under section 14 of the Conveyancing Act, 1881, preparatory to taking proceedings to enforce the right of re-entry. One of the questions was whether the liquidation of the original Petrifite (Limited) was a ground of re-entry.

MR. JUSTICE HAWKINS, in the course of a considered judgment, after reciting the facts, said that he agreed in the contention made by the learned counsel for the defendants that provisos for re-entry ought to be construed strictly, which after all, according to his Lordship's idea, meant but little more than this—that

the right of re-entry must be determined by the intention of the parties so far as they were expressed in the lease. It certainly did not mean that those whose duty it was to construe it should endeavour to adopt any possible interpretation, however forced and unreasonable, with the mere object to defeat the forfeiture. In "*The Corporation of Bristol v. Westcott*" (12 Ch.D., 466), Sir George Jessel, M.R., pointed out various considerations which must be applied for the purpose of construing a clause in a lease which it is impossible to deal with literally, but where, nevertheless, the intention of the parties can be collected from the language of the covenants. In the same case Lord Justice Cotton said:—"Although it is a question of forfeiture we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, and then see whether upon that ascertained meaning a forfeiture has been incurred." These words exactly expressed his Lordship's view. The same view was expressed in "*Varley v. Coppard*" (L.R., 7 C.P., 505). Construing this proviso fairly, it was not necessary that each of the lessees should be bankrupt or in liquidation before the right of re-entry could arise. The words of the proviso were—"If the lessees shall become bankrupt," but it was clear that the word "lessees" in the plural could not be literally so construed. Such a construction would render the forfeiture impossible, for a registered company could not become bankrupt, nor could the words "or enter into liquidation, &c., for the benefit of his creditors" apply or be intended to apply to the registered company, or to any but the individual lessee. This part of the proviso fairly construed could only mean "if the individual lessee shall become bankrupt or compound with his creditors," and could have no relation whatever to the company. The proviso then continued, "or being a company shall enter into liquidation" the lessors might re-enter. This clearly could not refer to the individual lessee. The reasonable meaning to be attached to this proviso was, reading it sensibly:—"If the individual lessee becomes bankrupt or the company enters into liquidation the right of re-entry shall accrue." If that was the meaning of the parties there was no reason why the proviso should not be enforced. The reason and probability for such a construction was that when the lease was granted the lessors had the responsibility of the two lessees named in the lease or others who, by the assent of the lessors, might succeed them as lessees, and it could not be doubted that both parties contemplated the continuance of this state of things during the continuance of the term. The provisions of the lease were framed with this object, but such intentions would be defeated if the company ceased to exist by reason of its liquidation, whether for one reason or another, as it practically would do at the commencement of the winding up (see section 181 of the Companies Act, 1862, and per Jessel, M.R., in "*General Share and Trust Company v. Wetley Company*," 20 Ch.D., 267), or if by bankruptcy the responsibility and ability of the individual lessee to discharge the obligations of his lease were destroyed. There was no ground for limiting the term "liquidation" to a liquidation in the nature of bankruptcy or for the benefit of creditors. The liquidation of a company, whether for one purpose or another, must result in the extinguishment of the company. As applied to the individual lessee the meaning of the term liquidation is limited to a liquidation by reason of pecuniary embarrassment. The right of the plaintiffs to re-enter followed upon the entering into liquidation of the original Petrifite (Limited); and upon that ground the plaintiffs were entitled to judgment. His Lordship also held that, in the circumstances of the case, there had been no breach of the covenant not to assign or underlet without the assent of the lessors.

Q.B. Div. (Wright and }
Phillimore, JJ.) }

1898.
May 12.

COUNTY COUNCIL OF CUMBERLAND V. THE COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamps—Agreement as to payment to local authority in respect of roads—Stamp Act, 1891, sched. I.

This was a case stated by the Commissioners of Inland Revenue pursuant to the 13th section of the Stamp Act, 1891 (54 and 55 Vic., c. 39), raising a question as to what stamp ought to be put on a document which was an agreement between a county council and an urban authority as to the amount to be paid by the county council to the authority, which had claimed to retain the main roads in their district.

Mr. William Russell appeared for the county council; the Solicitor-General and Mr. Danckwerts for the Crown.

On December 2, 1897, an instrument was presented on behalf of the county council of Cumberland (hereinafter called the appellants) by their solicitors to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument was an agreement made on November 26, 1897, between the county council of Cumberland and the urban district council of Frizington, whereby the annual payment to be made by the county council to the urban council in respect of the year ending March 31, 1898, in pursuance of section 11 (2) and (3) of the Local Government Act, 1888, towards the cost of maintenance and repair and reasonable improvement connected with the maintenance and repair of all main roads within the urban district, was to be the sum of £314. The urban council had under the power conferred by section 11 (2) claimed to retain the powers and duties of maintaining and repairing the main roads in the said agreement mentioned. The appellants claimed that the instrument came within the following heading in the first schedule to the Stamp Act, 1891—viz., "Agreement or contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways, 6d.," inasmuch as by section 3 of the Local Government Act, 1888, there was transferred to the county council "all business done by the quarter sessions, or any committee appointed by the quarter sessions, in respect of the following matters (subsection 8) :—Bridges and roads repairable with bridges, and any powers vested by the Highways and Locomotives (Amendment) Act, 1878, in the county authority; and the appellants contended that the agreement was made pursuant to the powers vested in them by a Highway Act—namely, the Act of 1878, and was therefore chargeable with a duty of 6d. only. The Commissioners, however, were of opinion that the agreement came under the heading "Deed of any kind whatsoever not described in the schedule," and assessed the duty at 10s.

MR. RUSSELL said that this was a test case. He commented on the different Highway Acts, and urged that this agreement could properly be described as coming within them.

The COURT, however, upheld the decision of the Commissioners.

MR. JUSTICE WRIGHT, in giving judgment, said the agreement did not come within the terms of the schedule to the Act of 1891. It was made pursuant to the Local Government Act, 1888, and not pursuant to the Highway Acts. It

was not an agreement "relating to the making, maintaining, or repairing of highways," for the agreement contained provisions for improving the main roads, and it had been decided that improving roads was different from maintaining or repairing them. (See "Leek v. Staffordshire," 20 Q.B.D., 794.)

MR. JUSTICE PHILLIMORE concurred. He did not think that this was an agreement "relating to the making, maintaining, or repairing of highways." It was an agreement as to the amount of payment to be made to the urban authority. The duty must therefore be assessed at 10s. and not at the smaller sum.

[Solicitors—The Solicitor for Inland Revenue, for the Crown; Ullithorne, Currey, and Currey, for the appellants.]

Q.B. Div. (Wright and }
Phillimore, JJ.) }

1898.
May 13.

FARMER AND CO. V. THE COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamps—Agreement for sale of lands in New South Wales—Mortgage—Stamp Act, 1891, sec. 59 (1)—"Equitable estate or interest."

This was a case stated by the Commissioners of Inland Revenue pursuant to the 13th section of the Stamp Act, 1891 (54 and 55 Vic., c. 39), raising the question whether an English agreement for the sale of lands in New South Wales, the lands being subject to a mortgage, required an *ad valorem* stamp. On February 12, 1897, an instrument was presented on behalf of Farmer and Company by their solicitors to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The appellants, being dissatisfied with the assessment of the duty, applied to the Commissioners to state a case.

Mr. Scrutton appeared for the appellants; the Solicitor-General (Sir R. Finlay, Q.C.) and Mr. Danckwerts appeared for the Crown.

The instrument is an agreement under the hands of Sir William Farmer and John Pope of the first part, and under the seal of the appellants of the second part. It is dated February 8, 1897, and is an agreement by which the parties of the one part agree to sell to the appellants the respective properties referred to in the schedule. It was made and executed in England and was admitted by the appellants to be liable to duty according to the assessment of the Commissioners, if the Court is of opinion (1) that the property was an equitable estate or interest in property within the meaning of section 59 (1) of the Stamp Act, 1891, and (2) that the exception in favour of estates or interests in lands, tenements, hereditaments, or heritages locally situate out of the United Kingdom does not apply to equitable interests in such property. The said premises consisted of certain freehold properties in Sydney, New South Wales. The price which the appellants apportioned to the said premises was the sum of £98,000. The said premises first described in the schedule were at the date of the agreement subject to a mortgage to secure the sum of £40,000 (with interest at 5 per cent.), and the premises secondly described in the schedule were subject to a mortgage to secure a sum of £18,000, and the premises were sold subject to these mortgages. The said indentures of mortgage respectively were executed in Sydney, New South Wales. The law in force in New South Wales other than the statutory law is the law of England. The appellants contended

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

that by virtue of a provision contained in section 25 of the colonial statute, 26 Victoria, No. 12, the mortgagor of the said property, notwithstanding the said mortgage, had a legal and not an equitable interest in the said property, and consequently that the agreement for sale was the sale of a legal interest in land, and not a sale of an equitable estate or interest in any property within the meaning of the 59th section of the Stamp Act, 1891. The provision in question is in the following terms:—"All mortgages of real or personal estate shall hereafter be deemed at law as now in equity pledges only of the property thereby mortgaged and nothing in any such mortgage shall prevent the title of any mortgagor or person claiming and being in possession from being deemed a good title at law, subject to such pledge as against all persons other than the mortgagee and those claiming under him, provided that nothing in this enactment contained shall interfere with or prejudice the legal rights and remedies of mortgagees and those claiming under them for the preservation and enforcement of their securities." They further contended that an equitable interest in land situate abroad was not an equitable interest in any property whatsoever within the meaning of section 59 of the Stamp Act, 1891. The Commissioners were of opinion that, notwithstanding the said statutory provision, the interests agreed to be sold were equitable estates or interests in the said property and were within the words of section 59 of the Stamp Act, 1891. They accordingly held that the agreement was liable to *ad valorem* conveyance duty in respect of the said properties, and accordingly assessed such duty at the sum of £490, being 10s. per cent. on the sum of £98,000, the apportioned amount of the total consideration applicable thereto. The instrument has been stamped in conformity with the assessment.

Mr. SCRUTTON contended that the Commissioners were wrong. If they were right it followed that though an agreement for a sale of lands situate in New South Wales was free from an *ad valorem* duty, yet if there was a mortgage on them the duty applied. An equity of redemption was an interest on land. The land in question being situate in the colony, and the mortgagor under the New South Wales statute being deemed to have a good title at law to accept against the mortgagee, this amounted to a mere sale of lands situate out of Great Britain. That being so, this transaction was within the exemption as a sale of an estate or interest in lands or property locally situate out of the United Kingdom. Further, it was not an equitable interest that was being sold, for the *lex loci* must be considered, and under the New South Wales statute it was not an equitable interest, but a legal interest over them. The New South Wales statute was a bar to any one but the mortgagee or those claiming under him being able to say that the mortgagor had not the legal estate. The Commissioners, therefore, could not deny the legal estate of the appellants. He cited "*Norman v. Peck*" (4 N.S.W., L.R., 42) and "*Re Ferguson*" (3 N.S.W., L.R., 43).

The SOLICITOR-GENERAL said that this was a contract for the sale of an equitable interest. The business was done in England, and would be enforced in the Courts here. The section of the New South Wales statute only dispensed with the necessity of joining the mortgagee in legal proceedings. It was only a rule of convenience, like section 25 (5) of the Judicature Act, 1873.

The COURT upheld the decision of the Commissioners.

MR. JUSTICE WRIGHT said the question turned on the construction to be put upon section 59 of the Stamp Act, 1891 (54 and 55-Vict., c. 39), which was as follows:—"Any contract or agreement made in England or Ireland . . . for the sale of any equitable estate or interest in

any property whatsoever or for the sale of any estate or interest in any property except lands, tenements, hereditaments or heritages or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or marketable securities or any ship, vessel . . . shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance or sale of the estate, interest, or property contracted or agreed to be sold." The first branch of the section made agreements for sale of equitable interests liable to *ad valorem* duty. The second branch of the section did not put down the first branch. Was this a sale of an "equitable interest"? In English law it would be without doubt. It had been said that the New South Wales statute altered the position. The decisions that had been cited, however, did not support that view. In the case of *R. Ferguson* it was decided by the Court in New South Wales that as regarded title evolution the statute made no difference. That section was of a kindred character to section 25 (57 of the Judicature Act, 1873) (36 and 37 Vict., c. 66), which entitled a mortgagor in possession to sue for rent or damages for trespass, &c.

MR. JUSTICE PHILLIMORE was of the same opinion. He thought that the first paragraph of section 59 of the Stamp Acts of 1891 affixed a duty on the sale of equitable interests. The second passage in the section did not detract from that provision. As to the effect of the New South Wales statute, he was not sure that he would have taken the same view of it if it had been untouched by authority, but he could not say that he disagreed of the decision in "*Ex parte Ferguson*," and that case was adverse to the appellant's contention. The New South Wales statutory provision was very nearly to the same effect as that in the Judicature Act, 1873, section 25 (5). It was not quite the same, however, for probably the sale of the equitable interest of the property in Sydney carried some legal rights with it. The appeal must be dismissed, with costs.

[Solicitors—W. Shepheards, for the appellant; The Solicitor for Inland Revenue.]

Judicial Committee of the Privy Council } 1898.
(Lords Watson, Hobhouse, Macnaghten, } May 14.
Morris, Davey, and Sir R. Couch)

IN RE COLCHESTER GRAMMAR SCHOOL.*

Endowed Schools Acts—Scheme of Charity Commissioners—Persons "directly affected"—Right to petition—Endowed Schools Act, 1869, secs. 19 and 39.

This was a petition of appeal to her Majesty in Council, presented under the 89th section of the Endowed Schools Act, 1869, against a scheme for the administration of the Colchester Grammar School.

Mr. Cyril Dodd, Q.C., and Mr. J. Scott Fox were counsel for the petitioners; Mr. Yelverton for other parties interested; and Mr. Cozens-Hardy, Q.C., and Mr. Vaughan Hawkins for the Charity Commissioners.

LORD HOBHOUSE, in delivering their Lordships' judgment, said the two petitioners described themselves as inhabitants and ratepayers of Colchester and as parents of sons attending the school. They alleged that they were directly affected by the scheme and felt aggrieved by it and by the provisions for the school contained therein, and by the decision of the Charity Commissioners on which the scheme was founded, given on or about March 31, 1894, that the endowment in question did fall within the provisions of section 19 of the Endowed Schools Act. They prayed that the scheme

might be remitted to the Commissioners with such declaration as the nature of the case might require. For the purpose of deciding the appeal it was not necessary to state in detail the origin or history of the endowment. It was effected by Royal charters, one of King Henry VIII. and one of Queen Elizabeth, conveying lands to the Corporation of Colchester for the maintenance of a free grammar school and for general town purposes. Power to make statutes was vested in the Bishop of London and the Dean of St. Paul's, who had done so at intervals. The statutes now in operation were made by those dignitaries in the year 1844. There was also a body of trustees for the property of the school established by the Court of Chancery in 1698, and filled by appointments from time to time. Both before and after the passing of the first Endowed Schools Act there had been discussion with the view of framing a new scheme for the school. Some years ago the Charity Commissioners prepared a draft scheme, which was opposed on the ground that it contained provisions which, if the endowment fell within section 19 of the Act of 1869, it ought not to contain except with the consent of the governing body. That raised the question whether the endowment did or did not so fall, and the Commissioners thought it necessary to decide that question. On March 31, 1894, the secretary of the Commissioners addressed a letter to the town clerk of Colchester, which, so far as it related to and raised the present question, was as follows:—"I am directed by the Charity Commissioners to state for the information of the town council that, owing to their failure to obtain the consent of the several governing bodies of the above-named endowment to the terms of the compromise proposed in the published draft scheme, the Commissioners have been constrained to determine the question whether the endowment does or does not fall within the provisions of section 19 of the Endowed Schools Act, 1869, and they are of opinion that the endowment does so fall. The consequence of this decision is that, apart from consent, the Commissioners are precluded by statute from introducing into the scheme any provision respecting the religious instruction or attendance at religious worship of the scholars (other than a provision giving exemption to day scholars on whose behalf it is claimed from attending prayer or religious worship or lessons on a religious subject) or respecting the religious opinions of the governing body or masters. The following clauses of the scheme will therefore be struck out—viz., clauses 2, 31, 52, 53 (except so much as secures the exemption above referred to), and words will be inserted disclaiming (subject as above mentioned) all interference with subsisting legal requirements respecting the religious instruction or attendance at religious worship of the scholars or the religious opinions of the governing body or masters. . . . With these amendments the Commissioners propose to submit the scheme in due course to the Education Department. I am, however, to point out that clauses 2, 31, and 53 (in its entirety), as to which there appears to be no controversy, can be retained if the several governing bodies assent to the scheme with such retention. In order to afford opportunity for the expression of such assent, the Commissioners will wait for a period of four weeks before submitting the scheme to the Education Department." After some further negotiations, provisions either identical with or to the same substantial effect as the opposed clauses were agreed to. The Charity Commissioners then issued a new draft to which the several governing bodies signified their consent in a formal way. That draft was the scheme now under appeal. The petitioners contended that, as the decision of the Commissioners announced in their letter of March, 1894, with reference to sec-

tion 19 was expressly made subject to appeal by that section, they had a right to challenge it, and, if it was found to be erroneous, to require the scheme to be remitted to the Commissioners for revision. The Commissioners objected that it was improper to enter on the question whether the endowment fell under section 19, first, because the petitioners were not persons directly affected within the meaning of section 39, and, secondly, because, assuming that the judgment of the Commissioners was wrong, the scheme was still within their jurisdiction as to all its provisions, and therefore the petitioners could not be aggrieved by the decision. Their Lordships thought that the petitioners failed to meet those preliminary objections. To a certain extent the two objections were mixed up together, because it could not be determined who was directly affected without examining the scheme to see what interests it affected. Their Lordships would first deal with the second of the objections. Though section 19 was very familiar to all engaged in those discussions, it would be convenient to extract the expressions relevant to the present contention, which, so far as their Lordships knew, was quite a new one. "If . . . any person . . . directly affected by such scheme feels aggrieved by the scheme on the ground (1) of any decision of the Commissioners in a matter in which an appeal to her Majesty in Council is given by this Act, or . . . (3) of the scheme being one which is not within the scope of or in conformity with this Act, such . . . person . . . may . . . petition her Majesty in Council . . . praying her Majesty to withhold her approval from the whole or any part of the scheme." The petitioners did not any longer contend that they could bring their case within head (3) of the grounds of appeal, because, as before stated, on either view of the applicability of section 19, the scheme, having received the consents required by that section, was in conformity with the Act. They were therefore driven to contend that they had a right to appeal from the declared opinion of the Commissioners that section 19 was applicable, and, if they succeeded, to have the scheme remitted on the speculation that the Commissioners might alter their minds on points which in either view of section 19 were within their competence. It would be very unfortunate if the Act had given an appeal on an abstract matter of that kind, not involving any illegality or irregularity. Certainly their Lordships could not find any warrant for it in the words of the Act. The persons entitled to appeal must be aggrieved, not by the abstract decision, but by the scheme on the ground of the decision—that was, by some practical result of the decision taking effect in the scheme. It was true that section 19 said that the opinion of the Commissioners was subject to appeal, and so it was, but only "as mentioned in this Act"—that was, as mentioned in section 39, and the right of appeal there given was an appeal against the scheme, and did not arise till the scheme had been approved by the Education Department. Moreover, if the opinion of the Commissioners was overruled, the remedy was to make a declaration to that effect and to remit the scheme in order that it might be brought into conformity with the declaration (section 43). But this scheme contained nothing which was not in conformity with the declaration prayed for by the petitioners. The Commissioners and the Education Department might consistently with such a declaration approve of the very scheme now under appeal. Her Majesty in Council could not properly be asked to pronounce a decision quite barren of legal result. In point of fact, so far as the scheme deviated from the strict lines to which the Commissioners were confined by section 19, it was in favour of the views of the petitioners. The only clause which they pointed to as embodying a grievance,

to them was clause 33, which required the master, who by the existing statutes of 1844 must be in holy orders, should henceforward be a member of the Church of England. But it was within the discretion of the Commissioners to make that less stringent provision with the consent of the governing bodies, which, as before mentioned, had been given. The result was that, in the judgment of their Lordships, the petitioners were not aggrieved by any part of the scheme which rested on the disputed decision of the Commissioners, and that they could not, even if they had a *locus standi* for any appeal, ask for a review of that decision. Whether or no they had such a *locus standi* was the subject of the first preliminary objection, and was a question of considerable importance in the working of those Acts. The right of appeal on legal grounds was carefully limited by section 39 as regarded both the subjects of appeal and the persons who were entitled to appeal. The petitioners had no right unless they were directly affected by the scheme. They did not show how they were directly affected except by describing themselves in the terms above stated. That description was not supported by evidence, but it might be taken for the purpose of the argument as being accurate. The school was for those who belonged to Colechester, and in a sense all who belonged to the place had an interest in and were affected by a scheme for such an important institution as its school. It was manifest that such an interest as that was not within the meaning of the term "directly affected." That term pointed rather to a personal and individual interest as distinct from the general interest which appertained to the whole community among which the endowment worked. But it was said that they had boys who were at the school and that they were directly affected through those boys. Assuming that what affected the boy affected the parent, did those boys fall within the class of persons mentioned in section 39 as directly affected by the scheme? The scheme did not turn any boy out of the school nor remove the school away from him, nor in any way deprive him of the benefits of the education he was receiving. It was not alleged that the boys were on the foundation of the school. They appeared to be ordinary pupils attending it. But, even if they were on the foundation and if they were interfered with, what right of appeal would they have? Section 13 of the Act, which dealt with vested interests, provided only for the vested interests of boys who were on the foundation when the Act passed—i.e., on August 2, 1869. Section 39 gave a right of appeal to persons whose vested interest was not treated as required by the Act. It was clear that even boys on the foundation, if they had come upon it later than 1869, had no right of appeal given to them on the ground that their own interests were affected. It would be extravagant to hold that it was intended to give them a right of appeal against the scheme on other grounds, because they were persons directly affected, when they could appeal in their own personal interest. Yet their Lordships were asked to affirm a more extravagant proposition—viz., that the parent of every boy who happened to be at school when the scheme was approved had a right of appeal against any appealable matter which was not in conformity with his views. In the Hemsworth School case (12 App. Ca., p. 444) the scheme complained of removed the site of the school from Hemsworth to Barnsley. A petition of appeal was presented by inhabitants of Hemsworth whose children were at the school. It was held that inhabitants as such had no *locus standi* for appealing; they could only appeal in respect of some vested interests of their boys, and the vested interests saved by the Act had been spent many years before. That

decision accorded in principle with the previous decisions in the cases of *In re Shaftoe's Charity* (3 App. Ca., p. 872) and *Sutton Coldfield School* (7 App. Ca., p. 91), and it was even more closely applicable to the present case. Indeed, so far as the facts of the present case constituted any distinction, they were less favourable to the right of appeal than those of the Hemsworth case, for the removal of the school did affect the interests of the Hemsworth boys in a material sense, only it was not the sense contemplated by the Act in sections 13 and 39. The argument, perhaps, was not presented as it had now been presented for the petitioners, but the decision clearly governed the present case. The petitioners had no such right as they claimed. They might at due times make representations to the Education Department or to the Houses of Parliament, but they could not appeal to the Queen in Council. The Commissioners asked for costs, but costs had never been given to them in such cases, and their Lordships did not see any reason to depart from the usual course. They would humbly advise her Majesty to dismiss the petition.

[Solicitors—Shepheard, for the petitioners; Farrer and Co., for the Commissioners.]

Judicial Committee of the Privy Council } 1898.
(Lord Halsbury, L.C., Lords Mac- } May 14.
naghten and Morris, and Way, C.J.)

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES v. LOVE.*

Privy Council Appeals—New South Wales—
Statutes of Limitation—*Nullum tempus occurrit regi*—9 Geo. III., c. 16.

This was an appeal from a judgment of the Supreme Court of New South Wales of February 18, 1896.

Mr. Arthur Cohen, Q.C., Mr. Vaughan Hawkins, and Mr. A. R. Butterworth were counsel for the appellant.

The LORD CHANCELLOR, in delivering a considered judgment, said,—This is an appeal by the Attorney-General for New South Wales against the judgment of the Supreme Court of the colony pronounced on February 18, 1896, overruling a demurrer to the defendant's plea to an information of intrusion to recover certain lands in the parish of Concord and county of Cumberland in the said colony. The question involved is whether the English *Nullum Tempus* Act, 9 Geo. III., c. 16, is in force in the colony and applies to land which has never been granted out or dealt with by the Crown. It does not appear to be denied that the lands in question (described by their abutments and containing 13½ acres) were, and had ever since the original settlement of the territory of New South Wales been, waste lands belonging to and vested in the Crown. The defendant by his plea dated April 10, 1895, averred that one Edward J. Keith more than 60 years before the filing of the information entered on and thenceforward held possession of the lands as his own property; that he conveyed his interest therein to William Love, who settled the same in trust for himself and his wife, Susannah Love, and the survivor of them for life, and after the decease of the survivor on the defendant, Emily Susannah Love, absolutely; that the foregoing persons had, from the entry of Edward J. Keith to the present time, held continuous possession of the lands adversely to her Majesty and without payment of rent to her, and had themselves since the said entry taken and enjoyed the rents, revenues, issues, and profits of the land; and that her Majesty's title to the land did not first accrue within 60 years next before the filing of the informa-

*Reported by W. J. SOULBY, Esq., Barrister-at-Law.

tion. The plea did not aver that the lands had not been in charge of the Crown within the said 60 years. On May 20, 1895, the applicant replied traversing the allegations of the plea, and also demurred thereto on the grounds (1) that the Act 9 Geo. III., c. 16, is not in force in New South Wales; (2) that, assuming it to be in force, it does not apply to lands which have never been dealt with by the Crown; (3) that the period of 60 years was not alleged to have run out before the date of the Constitution Act, 1855; (4) that the plea showed no title in the defendant. Joinder in demurrer having been delivered, the demurrer came on for hearing before the full Court (consisting of Chief Justice Darley and Justices Windeyer and Simpson), by whom judgment was pronounced on February 18, 1896, in favour of the defendant, overruling the demurrer, Mr. Justice Simpson stating that he felt very considerable doubt about the matter. Their Lordships have no doubt that the judgment accurately describes the importance of the question here raised to the colony. The learned Judges say:—"The earlier grants issued by the Crown were vague in the extreme, and that it would be in the present day impossible to ascertain from the description in the grants to what lands they applied." And it is clear that the inferences which the learned Judges draw from that state of facts is accurate, "that the holders would not be able to show upon the face of the instrument a title, and have to rely upon possession." Their Lordships do not think that the learned Judges at all exaggerate the mischief and confusion which would arise in the transfer of property if the holders could not depend upon the operation of the statute in question. Two arguments appear to have been suggested against the application of the Act to the particular colony under 9 Geo. IV., c. 83, which *prima facie* applied the Nullum Tempus Act to the colony in question as much as if it had in terms re-enacted it for that colony. Section 24 of that Act provides:—"That all laws and statutes in force within the realm of England at the passing of this Act (that is to say, in 1828) shall be applied in the administration of justice in the Courts of New South Wales"; and it is sought by construction to limit the words "all laws and statutes" by introducing into the section the words "having relation to procedure," or some equivalent expression. At least, that is the only intelligible mode in which the argument can be supported, because the words which do occur in the section—"in the administration of justice"—would certainly include a limitation of the time within which actions can be brought, and their Lordships are of opinion that the language of the section cannot be limited so as to exclude the statute, which for the reasons pointed out by the learned Judges were and are so important in the administration of justice in the colony. The second argument is not very intelligible, since the words upon which reliance is placed are words which in the statute thus applied (9 Geo. III., c. 16) except from the operation of the statute lands in respect of which the Crown has been answered by rents, revenues, issues, or profits thereof within the space of 60 years next before the issuing or commencing of such action, information, &c., as shall at any times have been duly in charge or stood *in super* of record within the space of 60 years. The provision is intelligible enough, and what, in substance, it means is that if the Crown is not actually in possession, but if in the Crown's accounts some person is charged with the rent which he had not paid and still stands as a Crown debtor in the Crown books, and that condition of things has existed within the 60 years, the title by that condition of things, although the possession may have been for 60 years, was not adverse, because during that period something was payable to the Crown which had not been paid. It

is not suggested here that the person in possession filled that character; but the argument appears to be that because there is no such administration in the colony as involves the peculiar form of Crown accounting thus described, the remedial operation of the statute cannot apply. Their Lordships are unable to accept any such suggestion. There is no allegation here of any equivalent record against the person who held possession for 60 years, and if no modification or limitation such as Section 24 of the Act authorizes has been made so as to apply such a mode of accounting to the Crown as might have an equivalent effect, the only result would be that there is nothing upon which the exception preserving the Crown's right could operate, but certainly would not cut down the enacting part of the statute or establish that it was inconsistent with the laws of England. For these reasons their Lordships are of opinion that the judgment of the Supreme Court was right, and they will humbly advise Her Majesty that this appeal should be dismissed accordingly.
[Solicitors—Light and Galbraith, for appellant.]

Chan. Div. }
(Stirling, J.) }

1898.
May 14.

IN RE JONES—CLEGG V. ELLISON.*

Literary Institution—Dissolution—Surplus funds—Distribution amongst members—Institution in the nature of a joint-stock company—Literary and Scientific Institutions Act, 1854, sec. 30—Construction.

This was an application by way of summons by Mr. Edwin Clegg on behalf of himself and all other the shareholders of the Sheffield Botanical and Horticultural Society, asking that the defendants, the trustees and committee of management of the society, might be ordered to sell the property of the society pursuant to resolutions passed and confirmed at meetings of members of the society held on April 28 and May 10, 1897, and to distribute the proceeds of sale in accordance with those resolutions. The application was opposed by the Attorney-General, who insisted that the property of the society, after satisfaction of its debts and liabilities, ought not to be distributed among the members of the society, but ought, under the provisions of the Literary and Scientific Institutions Act, 1854, to be given to some other institution of a like character. The society was established under a deed dated October 15, 1844, the general effect of which was that the real estate of the society was vested in trustees, and the personal estate in the committee of management; that every person who paid to the funds of the society £5 and executed the deed became a member and entitled to one share in the society, which share was transferable by him or his legal personal representatives; that each member was liable to pay an annual subscription of 15s., and was entitled to admission for himself and his family to the gardens of the society, but was not entitled to any dividend or bonus, but was, upon a dissolution, entitled to a share of the profits of the society after the payment of debts and liabilities. The gardens which formed the property of the society were conveyed to trustees for the society by a deed dated June 20, 1845. The property at the time of the conveyance was subject to a mortgage for £3,000, which had since been paid off. The purchase money and the mortgage debt were paid and discharged out of the funds of the society contributed by the members. Recently the gardens had not been carried on with financial success, and resolutions had been passed that the society should be dis-

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

solved, and that its property should be sold to a public body, known as the town trustees of Sheffield, at a price sufficient, after payment of debts and liabilities and costs, to pay to each member the sum of £5 for every share held by him. It was, however, admitted that the value of the property probably exceeded such an amount. The Literary and Scientific Institutions Act, 1854, was passed on August 11, 1854. Section 30 provided that "If upon the dissolution of any institution there shall remain, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution, to be determined by the members at the time of the dissolution, or, in default thereof, by the Judge of the County Court aforesaid; provided, however, that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company." The plaintiffs and the defendants, the trustees and managers, contended that the society fell within the exception to section 30, or, in other words, was an institution which had been founded and established by the subscriptions of shareholders in the nature of a joint stock company. The contention on behalf of the Attorney-General was, first, that the members were not shareholders in the proper sense of the term; and, secondly, that the society was wanting in one of the necessary elements of a joint-stock company—namely, that it should be carried on for the purposes of gain.

The case was argued last sittings, when Mr. Upjohn, Q.C., and Mr. Ingle Joyce appeared in support of the application; Mr. John Dixon for the defendants, the trustees and managers; and the Attorney-General (Sir R. Webster, Q.C.) and Mr. R. J. Parker for the Crown.

MR. JUSTICE STIRLING, in giving judgment, said that, as regarded the first point contended for by the Attorney-General, it appeared to him that it was not well-founded. The suggestion was that the payment of £5 mentioned in the deed of constitution was merely in the nature of an entrance fee; but that was to attribute too little force to the language of the deed. The contributor of £5 was to be considered as having a share in the society, which was transferable, and entitled the holder to certain benefits in the way of enjoyment during the continuance of the society, and to participate in the distribution of the property upon dissolution. Although, if the argument of the Attorney-General was well founded, any such participation was forbidden by the statute of 1854, still it was to be borne in mind that that prohibition was not in force at the date of the deed, and the provisions of clause 2 might be taken into consideration in ascertaining whether or not the members were shareholders. In his Lordship's opinion they were. The other contention was much more serious. In the first place, the society was not founded for purposes of profit. Clause 2 distinctly prohibited any dividend, division, or bonus. The language followed that of section 1 of the Act, 6 and 7 Vict., c. 36, under which societies established for purposes of science, literature, or the fine arts were exempted from rates on certain terms, of which two were that the society should be supported wholly or in part by annual voluntary contributions, and should not, and by its laws might not, make any dividend, gift, division, or bonus in money unto or between any of its members. That afforded a reason for the prohibition of dividends found in the deed of constitution. Still the prohibition constituted a prominent feature in the deed, and the other clauses relied upon appeared to be provisions as to management and not to affect the result. The question then arose whether the absence of any purpose of profit

precluded the application of the proviso at the close of section 30. That proviso was not that the clause "shall not apply to any institution which shall be a joint stock company," but "shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company." That appeared to mean that such an institution was not to be actually in all respects a joint stock company, but to be such as, without being a joint stock company, should in some respects partake of the nature of such a company. If it were asked what elements of a joint stock were more particularly contemplated by the Legislature, his Lordship would say these—first, the existence of a joint stock or common property; secondly, the contributions of members as the source of such property; and, thirdly, the holding of that property by numerous persons in transferable shares. All these ingredients existed in the constitution of the society. No doubt joint stock companies were ordinarily formed for the purpose of profit, but many associations existed which were not formed for that purpose, to which it would be hard to deny the nature of joint stock companies. Under the Companies Act of 1862 it appeared to be clear that a joint stock company might be formed for other purposes than those of profit. His Lordship referred to sections 6 and 21 of the Act of 1862 and section 23 of the Act of 1867, and, continuing, said that section 4 of the Act of 1862 prohibited the formation of any company consisting of more than 20 persons for the purpose of carrying on any business that had for its object the acquisition of gain by the company or by the individual members thereof unless registered as a company under the Act. Upon that section it had been repeatedly held that associations of more than 20 persons might exist which did not require to be registered, and were not made illegal by the Act of 1862; see, for example, "*Smith v. Anderson*" (L.R., 15 Ch.D., 247), "*Crowther v. Shorley*" (32 W.R., 330), and "*Re Siddall*" (L.R., 29 Ch.D., 1); yet it would be difficult to deny to those associations the nature of joint stock companies. The Joint Stock Companies Registration Act of 1844 (7 and 8 Vict., c. 110) applied only to joint stock companies established for the purpose of profit, and it had been repeatedly held—see "*Reg. v. Whitmarsh*" (15 Q.B., 600), "*Bear v. Bromley*" (18 Q.B., 271), and "*Moore v. Rawlins*" (6 C.B., N.S., 289)—that associations which very closely resembled joint stock companies did not require registration under that Act. On behalf of the Attorney-General some observations of Lord Justice Kay in "*In re Bristol Athenæum*" (L.R., 43 Ch.D., 236) were properly relied on. The actual decision in that case was that the Bristol Athenæum, an association possessing a constitution somewhat similar to that of the Sheffield society, could not be wound up as an unregistered company under section 199 of the Companies Act, 1862, and with it his Lordship did not differ. Incidentally, however, Lord Justice Kay did express the opinion that the Bristol Athenæum was not a joint stock company, and therefore not within the proviso of section 30 of the Act of 1854. No one could be more sensible than his Lordship of the weight due to anything which fell from the learned Lord Justice, but he had, while preparing his judgment, been informed by Mr. Justice North that he had recently in a case (reported *ante*, p. 406) before him independently arrived at a similar conclusion with regard to the construction of section 30 to that which his Lordship had endeavoured to express. On the main question, therefore, he thought that the applicant was entitled to the order which he asked for.

[Solicitors—Pilgrim and Phillips, agents for Watson, Esam, and Barber, Sheffield; The Solicitor to the Treasury.]

Chan. Div. }
(Romer, J.) }

1898.
May 14.

NORTH METROPOLITAN TRAMWAYS CO. V. THE LONDON
COUNTY COUNCIL.*

Practice—Costs—Solicitor and client costs—
Public Authorities Protection Act, 1893.

This case raised the question whether, when judgment has been obtained by a public authority in an action brought against it and costs have been given in its favour, such judgment carries costs as between solicitor and clients as of course under section 1 of the Public Authorities' Protection Act, 1893. It appears that the action was brought against the defendants for an injunction to restrain an alleged trespass on the plaintiffs' tramways. The defendants contended that they were entitled to acquire and purchase the tramways under the provisions of section 43 of the Tramways Act, 1870. At the hearing Mr. Justice Romer dismissed the plaintiffs' action with costs. The defendants brought in a bill for taxation as between solicitor and client, and the Taxing Master so taxed it, acting in pursuance of the Public Authorities' Protection Act. The plaintiffs objected to such taxation on the ground that an order for taxation of costs as between solicitor and client ought to have been asked for at the hearing.

MR. JUSTICE ROMER, who had reserved judgment, said that the Taxing Master was right. Judgment was in substance obtained by the defendants with costs. The question was one of substance and not of form. Although nothing was said in the judgment how the costs were to be taxed, and it would have been better to have said so, yet the omission did not deprive the defendants of the benefit of the Act. In cases in the Queen's Bench like the present he had found that the costs were taxed as between solicitor and client although nothing was said in the order.

Mr. J. Tanner appeared for the defendants; and Mr. F. Richardson and Mr. A. H. Carrington for the plaintiffs.

[Solicitors—Hugh C. Godfray; W. A. Blaxland.]

Q.B. Div. (Lord Russell of Killowen, }
C.J., Sir Francis Jeune, Chitty, L.J., } 1898.
Wright, Darling, and Channell, J.J.) May 14.

COPPEN V. MOORE.†

Merchandise Marks Act, 1887—False trade description—"Scotch" hams—Liability of employer for offence committed by servant.

This was a special case stated by the Justices of the borough of Richmond, Surrey. The facts are fully stated in the judgment of the Lord Chief Justice. The question raised was an important one under the Merchandise Marks Act, 1887—namely, whether the appellant was liable to be convicted under the Act for the act of his servant done in the course of his employment. The Justices held that the appellant had not taken all reasonable precautions against committing an offence against the Act, and convicted him. The case came originally before a Divisional Court composed of Mr. Justice Wright and Mr. Justice Darling, when the question was considered of such importance that it was reserved for a specially constituted Court. The case was, therefore, heard before the present Court, and the arguments, which were heard some weeks ago, were reported in *The Times* of April 5.

Mr. Asquith, Q.C., and Mr. H. D. Bonsey appeared for the appellant; Mr. Jelf, Q.C., and Mr. A. J. David appeared for the respondent.

The COURT, having taken time to consider, delivered judgment to-day affirming the conviction.

The LORD CHIEF JUSTICE read the judgment of the Court:—This is a case stated by Justices who summarily convicted the appellant of an offence against the Merchandise Marks Act, 1887 (50 and 51 Vict., c. 28). The appellant was charged under section 1, subsection (2), with having sold goods to which a false trade description was applied. The facts were as follows:—On September 4, 1897, the respondent, at the London Supply Stores, 42, George-street, Richmond (one of several places of business of the appellant), asked the salesman at the door of the shop for a small English ham. The salesman pointed to a number of hams on a shelf, and said they were Scotch hams. In fact they were long-cut American hams. The salesman stated the price, 8½d. per lb., and the respondent said he would take one, which was then produced. The salesman then passed the ham selected through the open window to a shop assistant inside, saying, "Weigh up, Scotch ham, 8½d." The respondent, before paying, asked the assistant to make him out an account, and put on it "Scotch ham," "as he had bought it as such." The assistant at first handed the respondent an invoice without the word "Scotch" on it. The respondent did not accept it so written, but told the assistant to put in the word "Scotch," "as he had bought it as such." The assistant then did so, and handed the invoice to the respondent, who then paid the price, 8s. 5½d. Upon this being done, the respondent asked the assistant whether he still said it was a Scotch ham, when the assistant admitted it was not, but was an American ham. The salesman, in like manner, was asked, and he at once admitted it was an American ham. On the part of the appellant, evidence was given that he had sent a notice to all his branch places of business, including that in question, in the following terms:—

"Marshall-street, Feb. 25th, 1897.

"Most important.

"Please instruct your assistants most explicitly that the hams described in the list must not be sold under any specific name of place or origin, that is to say, they must not be described as 'Bristol,' 'Bath,' 'Wiltshire,' or any such title, but simply as breakfast hams.

"To Mr. Bedford, Richmond.

"Please sign and return.

"H. W. COPPEN."

The ham in question would come within the category of breakfast hams. Evidence was given that the terms of this notice were communicated to the manager and assistants, and the appellant stated that he had no reason to believe that his instructions were not being carried out. It is now necessary to consider the statute in question and its application to the facts proved. Section 2 is the important section. Subsection (1) deals with the forging of any trade mark and with the false application to goods of any such mark or of any false trade description, and enacts that, subject to the provisions of the Act, an offence shall have been committed by such forging or application unless the party charged proves that he acted without intent to defraud. Subsection (2) enacts (omitting words immaterial in this case) that every person who sells any goods to which any false trade description is applied shall be guilty of an offence against the Act unless he proves—(a) that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade description; and (b) that on demand duly made he gave all information in his power with respect to the persons from whom he obtained such goods; or (c) that otherwise he acted innocently. By section 3 it is enacted that "trade description" shall mean any description, statement, or other indication, direct or indirect, as to (among other things) the place or country in which

*Reported by R. B. SCHOMBERG, Esq., Barrister-at-Law.

†Reported by A. F. JENKIN, Esq., Barrister-at-Law.

any goods were made or produced. Later in such section it is enacted that the expression "false trade description" shall mean a trade description false in any material respect as regards the goods to which it is applied. By section 5 subsection (1) it is enacted that a person shall be deemed to have applied a trade description to goods who applies it to the goods themselves or uses a trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade description. In "*Budd v. Lucas*" ([1891] 1 Q.B., 408) it was decided that where certain casks of beer were delivered accompanied by an invoice in which the casks were falsely described as "barrels" (which word had acquired the character of a trade description) it was held that an offence under section 2 subsection (1) of the Act in question had been committed, although the invoice containing the false trade description was not physically attached to the casks. I think this case was well decided; in other words, I think that it is not necessary to constitute the offence that there shall be any physical connexion between the false trade description and the goods to which it is applied. It was admitted that the description "Scotch ham" was a trade description and it was found that it was applied to the ham sold by the appellant's *employés*, and it was admittedly false. It was not contended that it was not material. In these circumstances it is clear that an offence against the Act was committed by the salesman and by the assistant of the appellant. But the question which the Court is now called upon to decide is whether the appellant also is not personally liable to be convicted. This was the question argued before us. The appellant's contention was that the charge here preferred was a criminal charge and that the general principle of law applied—*nemo reus est nisi mens sit rea*. There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exception. Apart from statute exceptions have been engrafted upon the rule; for example, in the case of "*Reg. v. Stephens*" (L.R., 1 Q.B., 702) the defendant was held liable on indictment for obstructing navigation by throwing rubbish into a river from a quarry owned by the defendant but managed by his son, although it was proved that the men employed at the quarry had been by order prohibited from doing the acts complained of. No doubt in that case the fact that the proceedings were only in form criminal was adverted to by the Judges who decided it, but the fact remains that the defendant was criminally indicted. But by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. Amongst such cases are "*Mullins v. Collins*" (L.R., 9 Q.B., 292) where a licensed victualler was convicted of an offence under the 16th section of the Licensing Act of 1872 for supplying liquor to a constable on duty, although this was done by his servant without the knowledge of his master. Again in "*Bond v. Evans*" (21 Q.B. D., 249), where a licensed victualler was convicted of an offence against the 17th section of the same Act where gaming had been allowed in the licensed premises by the servant in charge of the premises, although without the knowledge of his master. The decisions in these and in other like cases were based upon the construction of the statutes in question. The Court, in fact, came to the conclusion that, having regard to the language, scope, and object of those Acts, the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master and may even have been

expressly prohibited by him. The question then in this case comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servant in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In my judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act. Take the facts here and apply the Act to them. To begin with, it cannot be doubted that the appellant sold the ham in question although the transaction was carried out by his servants. In other words, he was the seller although not the actual salesman. It is clear also, as already stated, that the ham was sold with a "false trade description" which was material. If so, there is evidence establishing a *prima facie* case of an offence against the Act having been committed by the appellant. But it is only a *prima facie* case. The burden of proof is shifted upon the appellant, and he might meet successfully that *prima facie* case if he is able, where the charge is under the first subsection of section 1, to prove that he acted without intent to defraud; or, where the charge is under subsection 2 of section 1, if he is able to prove (a) that he had taken all reasonable precautions against committing an offence against the Act and had no reason to suspect the genuineness of the trade description in question, and (b) that on demand he had given full information, or (c) if he is able to prove that otherwise he acted innocently. It seems clear that clauses (a) and (b) of subsection 2 apply to cases where goods in question are in the possession of the accused for sale or are sold with the forged trade mark or false trade description already stamped upon them or otherwise applied to them, and not to a case like the present, where the false trade description is applied upon the occasion and as part of the terms of sale; and in the latter case the accused must rely for his exculpation upon clause (c)—namely, by showing that he had acted innocently. In the present case there was ample evidence to justify the conclusion of the magistrates that the appellant was *prima facie* guilty of the offence charged, and that *prima facie* case has not been met in the manner required by the Act. The magistrates, indeed, have affirmatively found—in the terms of clause (a)—that the appellant had not, in fact, taken all reasonable precautions against committing an offence against the Act, but I have already pointed out that that clause does not directly apply to the facts of this case. This finding is, therefore, not strictly relevant, although it suggests an important element in determining whether the accused is innocent; but what is material to note is that the magistrates do not appear to have been asked to find, and certainly they do not in fact find, that the appellant acted innocently within the meaning of clause (c). There was evidence before them that the American hams in question were dressed so as to deceive the public; and this probably explains the reason of the affirmative finding to which I have adverted and the absence of the finding that the appellant had acted innocently within the meaning of clause (c). In answer, then, to the question which alone is put to us—namely, whether, upon the facts stated, the decision of the magistrates convicting the appellant was in point of law correct—my answer is that, in my judgment, it was. When the scope and object of the Act are borne in mind, any other conclusion would, to a large extent, render the Act ineffective for its avowed purposes. The circumstances of the present case afford a convenient illustration of this. The appellant, under the style of

the "London Supply Stores," carries on an extensive business as grocer and provision dealer, having, it appears, six shops or branch establishments, and having also a wholesale warehouse. It is obvious that, if sales with false trade descriptions could be carried out in those establishments with impunity so far as the principal is concerned, the Act would, to a large extent, be nugatory. I conceive the effect of the Act to be to make the master or principal liable criminally (as he is already by law civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing, where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this—that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act. The result, therefore, is that the conviction will be affirmed, and with costs. I wish to add that the form in which this case is stated is not satisfactory. It does not throughout clearly distinguish between what was merely evidence and what was proved to the satisfaction of the magistrates. It is important that it should be borne in mind that when a case is submitted to the Court it ought to state clearly what the facts proved were, and not merely what the evidence was.

[Solicitors—Neve and Beck, for the appellant; W. Moseley, for Weekes and Co., Birmingham.]

Q.B. Div. (Lord Russell of Killowen,
C.J., Sir Francis Jeune, Chitty, L.J.,
Mathew, Wright, Darling, and Chan-
nell, J.J.) } 1898.
May 14.

KRUSE V. JOHNSON.*

Local Government—By-law—Validity.

Following by-law held valid:—"No person shall sound . . . any musical instrument . . . within 50 yards of any dwelling-house after being required by any constable or by an inmate of such house, or by his or her servant, to desist."

Mathew, J., dissented.

Judgment was given in this case affirming the conviction, Mr. Justice Mathew dissenting. It was a special case stated by the Justices of the Bearsted Division of the county of Kent raising the question whether a by-law made by the County Council of Kent was valid. The case was argued some weeks ago, and a report appeared in *The Times* of April 5.

Mr. Robson, Q.C., and Mr. Hohler were counsel for the appellant; and Mr. Dikeus, Q.C., and Mr. A. Gill were for the respondent.

The case was considered to be of such great importance that it was heard by a specially constituted Court. The facts are sufficiently stated in the Lord Chief Justice's judgment. It is only necessary to add that the appellant was on the occasion in question conducting an open-air religious service in the parish of Leeds in Kent.

The LORD CHIEF JUSTICE delivered the following judgment:—"The County Council of Kent, claiming to act under their statutory powers, made the following by-law:—"4. Playing musical instruments, &c.—No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within 50 yards of any dwelling-house after being required by any constable, or by an inmate of such house

personally, or by his or her servant, to desist." The appellant was summoned before the magistrates for offending against this by-law, when it was proved that on October 17, 1897, he persisted in singing in a public highway within 50 yards of a dwelling-house, after having been required by a police-constable to desist. It was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to such occupier. The occupier had not, on the day in question, set the constable in motion, but he had on previous occasions complained to the police of the appellant's singing. The magistrates convicted the appellant, and against that conviction the present appeal is brought. The question reserved for this Court is whether the by-law is valid. If valid the conviction is to stand. It is objected that the by-law is *ultra vires* on the ground that it is unreasonable and therefore bad. It is necessary, therefore, to see what is the authority under which the by-law in question has been made, and what are the relations between its framers and those affected by it. But first it seems necessary to consider what is a by-law. A by-law of the class we are here considering I take to be an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not to do, as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation (see "*Edmonds v. the Watermen's Company*," 24 L.J., M.C., 124, 1855). In the present case we are dealing with a by-law made by a local representative body—namely, the County Council of Kent, which is created under the Local Government Act, 1888 (cap. 41), and which is endowed with the powers of making by-laws given to municipal corporate bodies under the Municipal Corporations Act, 1882 (cap. 50). Section 16 of the Local Government Act, 1888, provides that a county council shall have the same power of making by-laws in relation to their county as the council of a borough have in relation to their borough; and it further provides that section 187 of the Public Health Act of 1875 shall apply to such by-laws. I will take these statutes in the order of time. Section 182 of the Act of 1875 (cap. 55) provides that all by-laws made by a local authority under that Act shall be under their common seal and may be altered or repealed by a subsequent by-law, but no by-law shall be repugnant to the laws of England or to the provisions of the Act. Section 183 gives power to impose penalties. Section 184 provides that by-laws shall not take effect until confirmed by the Local Government Board, which may allow or disallow them, and, before their confirmation, notice of intention to apply for confirmation must be advertised, and for a month at least before such application a copy of the proposed by-laws must have been kept at the office of the local authority for the inspection of ratepayers, and the clerk of the local authority is bound to furnish on application a copy of the proposed by-laws, or a part of them, to any ratepayer on certain payment being made. Section 23 of the Act of 1882 provides that the council of a borough may from time to time make such by-laws as to them seem meet for the good rule and government of the borough and for the prevention and suppression of nuisances not already punishable in a summary manner, and they may by such by-laws appoint such fines, not exceeding £5, as they deem necessary for the prevention of offences against the by-laws. It is under this authority that

the by-law in question was framed. What are the checks or safeguards under which this very wide authority of making by-laws is exercisable? The same section 23 further provides that no by-law can be made unless two-thirds of the whole number of the council are present, and, when so made, it shall not come into force until the expiration of 40 days after a copy thereof has been fixed on the town-hall and it shall not come into force until the expiration of 40 days after a copy sealed with the corporate seal has been sent to the Secretary of State; and if within those 40 days the Queen, with the advice of her Privy Council, disallows a proposed by-law or part thereof, such by-law or such part shall not come into force, and the Queen may within the 40 days enlarge the time within which the by-law shall not come into force. We thus find that Parliament has thought fit to delegate to representative public bodies in towns and cities, and also in counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards; there must be antecedent publication of the by-law, with a view, I presume, of eliciting the public opinion of the locality upon it, and such by-laws shall have no force until after they have been forwarded to the Secretary of State. Further, the Queen, with the advice of her Privy Council, may disallow the by-law wholly or in part, and may enlarge the suspensory period before it comes into operation. I agree that the presence of these safeguards in no way relieves the Court of the responsibility of inquiring into the validity of by-laws where they are brought in question, or in any way affects the authority of the Court in the determination of their validity or invalidity. It is to be observed, moreover, that the by-laws having come into force they are not like the laws, or what were said to be the laws, of the Medes and Persians—they are not unchangeable. The power is to make by-laws from time to time as to the authority shall seem meet, and if experience shows that in any respect existing by-laws work hardly or inconveniently the local authority, acted upon by public opinion, as it must necessarily be, of those concerned, has full power to repeal or alter them. It need hardly be added that should experience warrant that course the Legislature, which has given, may modify or take away the powers they have delegated. I have thought it well to deal with these points in some detail, and for this reason—that the great majority of the cases in which the question of by-laws has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, “benevolently” interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body

legislating under the delegated authority of Parliament, to the subject matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any by-laws so made under such conditions on the ground of supposed unreasonableness. Notwithstanding what Chief Justice Cockburn said in “Bailey v. Williamson” (3 L.R., Q.B., 124, 1873)—an analogous case—I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely, it is not too much to say that, in matters which directly and mainly concern the people of the country who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of Judges as to what was reasonable—in the narrow sense of that word—the cases in the books on this subject are no guide, for they reveal, as, indeed, one would expect, wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested. So much for the general considerations which it seems to me ought to be borne in mind in considering by-laws of this class. I now come to the by-law in question. It is admitted that the county council of Kent were within their authority in making a by-law in relation to the subject-matter which is dealt with by the impeached by-law. In other words, it is conceded—and properly so—that the local authority might make a by-law imposing conditions under which musical instruments and singing might be permitted or prevented in public places. But it is objected that they have no authority to make a by-law on that subject in the terms of this by-law. Further, it is not contended that the by-law should, in order to be valid, be confined to cases where the playing or singing amounted to a nuisance, but the objections are, as I understand them, that the by-law is bad—first, because it is not confined to cases where the playing or singing is, in fact causing annoyance, and next because it enables a police-constable to bring it into operation by a request on his part to the player or singer to desist. As to the first of these objections, if the general principles upon which these by-laws ought to be dealt with are those which I have already stated, it is clear that the absence of this qualification cannot make the by-law invalid. But, further, such a qualification, in my judgment, would render the by-law ineffective. What is to be the standard of annoyance? What may be a cause of annoyance to one person may be no annoyance, and may even be pleasurable, to another person. Again, who is to be the judge in such a case of

whether there is or is not an annoyance? Is it to be the resident of the house within 50 yards of the playing or singing, or is it to be the magistrate who hears the charge? It is enough to say that in my judgment the absence of the suggested qualification cannot make the by-law invalid, even if it be admitted that its presence would be an improvement. As to the second objection—namely, that the policeman has the power of putting the by-law in operation by requiring the player or singer to desist, I again say that, even if the absence of this power would be an improvement and would make the by-law in the apprehension of some more reasonable, it is not on the principles I have already stated any ground for declaring the by-law to be invalid. In support of this objection pictures have in argument been drawn (more or less highly coloured) of policemen who, without rhyme or reason, would or might gratuitously interfere with what might be a source of enjoyment to many. In answer, I say a policeman is not an irresponsible person without check or control; if he acts capriciously or vexatiously he can be checked by his immediate superiors, or he can be taught a lesson by the magistrates should he prefer vexatious charges. If the policeman persisted in saying that the musician should desist when the people in the neighbourhood desire his music, his gratuitous interference would promptly come to an end. Nor is it correct to say (as has been erroneously stated in some of the cases cited) that the magistrate would be bound in every case to convict where the musician did not desist when called upon. It is clear that, under section 16 of the Summary Jurisdiction Act, 1879, the magistrate, if he thinks the case of so trifling a nature that it is inexpedient to inflict any punishment, may without proceeding to conviction dismiss the information. The facts of this case are certainly no illustration of the by-law having been gratuitously or vexatiously put in force. The case states (paragraph 5) that although it was not proved that the occupier of the house within 50 yards had on the day in question requested the constable to require the appellant to desist, yet it was proved that the singing was an annoyance to the occupier and that he had on previous occasions complained to the police of such singing. Indeed, it was stated during the argument that the conviction here appealed from was the second conviction of the appellant for an offence against this by-law. I have carefully read the cases cited in argument, but I do not propose to consider them in detail. Many of them relate to by-laws made under different statutes; others it is difficult to reconcile; few deal with the principles upon which by-laws like those in question are to be dealt with by the Courts; and some of them—as, for instance, “*Munro v. Watson*” (51 J.P., 660, 1887) and perhaps “*Johnson v. Mayor of Croydon*” (16 Q.B.D., p. 708, 1886)—may be distinguished from the present case. In weighing previous authorities it is further to be recollected that the cases have come before Divisional Courts, usually consisting of two members, and that those cases, being in their nature criminal, there has been no judgment of a Court of Appeal upon them. It is for this reason that the present special Court has been constituted. I cannot doubt that this Court has authority to review, and if it thinks fit to differ from, any prior decision of a Divisional Court on this subject (see “*Fortescue v. the Vestry of St. Matthew, Bethnal-green*” [1891], 2 Q.B., p. 170). I have said that there are few of the prior cases dealing with this matter which lay down the principles upon which the by-laws made by representative public bodies are to be considered. There is one notable exception; I refer to the case of “*Slatery v. Naylor*” (13 App. Cases, p. 446, 1888). That was a case in the Privy Council, in which the

members of that Court had to consider the validity of a by-law passed by the municipal council of the borough of Petersham, in New South Wales, under the provisions of the Municipalities Act, 1867. The Court consisted of Lords Hobhouse, Herschell, and Macnaghten and Sir Barnes Peacock and Sir Richard Couch. That case has been so fully discussed during the course of the argument that I do not think it necessary here to refer to it in detail. It is enough to say that, beyond doubt, the reasoning and principles on which it proceeds fully justify the views which I have expressed in this judgment. Nor are the weight and value of the reasoning in that case, as an authority in the present case, in any way lessened by the fact that the by-law there was made under the authority of a different statute. The cases are strictly analogous, and it was necessary for the judgment of the Privy Council that that tribunal should consider the principles upon which by-laws of representative governing bodies made under statutory authority should be considered. That it has done thoroughly and clearly. In my opinion, judged by the test of reasonableness, even in its narrower sense, this a reasonable by-law; but, whether I am right or wrong in this view, I am clearly of opinion that no Court of law can properly say that it is invalid. In the result the conviction appealed from must, in my opinion, be affirmed; but, as the question is one of wide importance, and as to which there has been a contrariety of judicial opinion, it will be affirmed without costs.

SIR FRANCIS JEUNE read a judgment concurring with that of the Lord Chief Justice.

LORD JUSTICE CHITTY concurred.

MR. JUSTICE MATHEW read a judgment in which he expressed his dissent from the conclusion arrived at by the other members of the Court. His Lordship, in the course of his judgment, said that the by-law in question was made under the Local Government Act, 1888, with which were incorporated certain provisions of the Public Health Act, 1875, and the Municipal Corporations Act, 1882. By section 23 of the Act of 1882 the county council were enabled to make such by-laws as to them seemed meet for the good rule and government of their district and for the prevention and suppression of nuisances not already punishable in a summary manner; and certain formalities were directed to be observed before the local enactments came into operation. These formalities had been complied with, and the first question was whether the by-law in question had been thereby legalized. It had been decided in very early times, with reference to the by-law mentioned in the statute 19 Henry VII., c. 7, that the requisite approval did not give it validity if not otherwise legal (see *Ipswich Tailors' case*, 11 Co., 54). The validity of the by-laws must be determined by the Judges when they were brought before them. This duty had been cast on the superior Courts when any restriction was sought to be imposed on personal liberty, and was traceable to the clause in the Great Charter, “*Nullus liber homo*,” &c. That rule had been followed and acted upon down to the present time. From the many decisions upon the subject it would seem clear that a by-law to be valid must, among other conditions, have two properties; it must be certain—that is, it must contain adequate information as to the duties of those who were to obey—and it must be reasonable. (See “*City of London*” case, Co. Rep., 251; Com. Dig., By-Law, B. 1: “*Eagleton v. East India Company*,” 3 B. and P., 55.) It was contended on behalf of the appellant that the by-law in the present case was not reasonable and was not certain. It forbade without qualification of any kind conduct which might be perfectly innocent and unobjectionable. It did not pro-

vide, as had been done in similar enactments, that the act prohibited should be an annoyance to any one. It contained no exception, and would, according to its terms, condemn all music and singing within 50 yards of a dwelling-house as in the nature of a nuisance. The right to prohibit was conferred on any policeman. A policeman had no such authority in the metropolis. Why should a policeman in the country be entrusted with powers so easily abused? For the respondent it was argued that the by-law had been framed by a representative body created under recent legislation, whose regulations should be indulgently treated, and that Parliament intended that local authorities should be upheld, and to this end that new canons of construction should be adopted by the Courts to preserve their by-laws from being declared invalid. The argument was that it was no longer enough to point out that a by-law according to its terms was unreasonable; it should be upheld if it might be reasonably enforced, and it was no longer an objection that it might be unreasonably enforced. It was urged that there were adequate safeguards for the public which, though not expressed, ought to be implied. It was said that confidence might be reposed in the discretion of the policeman. That seemed to his Lordship too generous a view of the qualifications of the ordinary constable. There was said to be a further safeguard—viz., that the county council would not sanction interference by the police unless there was some good cause. But a by-law once made could not and ought not to be controlled in its operation by the members of the council. Further, it was argued that the policeman who interfered without good cause would be reprimanded by his superiors, or a magistrate would probably refuse to issue a summons. These suggestions implied that there would be cases in which a constable ought not to have the power to prohibit or to summon. It seemed to him that the public ought to be informed in clear language what these cases were. It would not be satisfactory to a person who was innocent of any real offence and who was summoned as a criminal to have an apology offered to him on the ground that the policeman had been wanting in discretion. Again, it was said that the magistrate could refuse to convict in a trifling case under section 16 of the Summary Jurisdiction Act, 1879; but, in his opinion, the by-law afforded no security that this power would be exercised. This by-law was made for securing the good rule and government of the district, but, in his opinion, it would appear not to be well calculated to secure any such result. He did not propose to refer at length to the cases cited in the argument, where by-laws made under local authority had been condemned as unreasonable, but in none of those cases was there any indication of the principle which he understood to be now contended for—viz., that such by-laws should receive a special kind of interpretation. From the earliest times when charters were granted to towns municipal affairs had been managed by elected representatives of the inhabitants, and the by-laws made by such bodies had been frequently declared to be invalid. No case had been cited in which there was any trace of the principle now contended for that such by-laws were to be interpreted with any particular indulgence because of their popular origin. He concurred in the view that deference should be shown by the Courts to the by-laws of a local authority which might appear to interfere unduly with personal liberty, where there was reason to suppose that the regulations were called for by the requirements of the particular place. But this by-law was not confined to a particular locality. It applied to the whole of rural Kent. It seemed to him that it was practically proposed in this case that they should add a proviso to the by-law to the effect that it

ought not to be unnecessarily or unreasonably enforced. This, he considered, they had no power to do. His Lordship, having referred to "*Slattery v. Naylor*" (13 App. Cas., 446), said that he regretted being unable to concur with the view of the majority of the Court. Their judgment appeared to him to conflict with the recent decisions referred to, and with the views expressed by Mr. Justice Hawkins, the late Mr. Justice Cave, the present Master of the Rolls, and the late Lord Justice Kay. The principle of "*Alty v. Farrell*" ([1896] 1 Q.B., 636), a case which had the high authority of the Lord Chief Justice and Mr. Justice Wright, seemed to him to be applicable to the present case. The judgment of the majority of the Judges by whom the present case was decided would, no doubt, be entitled to great respect from those who might have to decide similar cases, though not binding on them. In the present state of the law, there seemed to be no mode of finally settling differences of judicial opinion that might arise in cases like the present. A change of procedure would seem to be necessary which would permit an appeal in the ordinary way. In his opinion, the conviction should be quashed.

MR. JUSTICE WRIGHT, MR. JUSTICE DARLING, and MR. JUSTICE CHANNELL agreed with the judgment of the Lord Chief Justice.

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.J.J.). } May 16.

THE ATTORNEY-GENERAL V. STRANGE.*

Revenue—Estate duty—Marriage settlement—
Life estate—Income.

On the death of a husband, estate duty is payable in respect of property the income of which was settled on him for life by the wife, and which becomes hers again unencumbered at his death.

Decision of Divisional Court (13 *The Times* L.R., 538) reversed.

This was an appeal by the Attorney-General, as informant, from a decision of Mr. Justice Vaughan Williams and Mr. Justice Kennedy, sitting as a Divisional Court, dated August 12 last, and reported in *The Times* of the following day, also in *The Times* L.R., Vol. 13, p. 588. The question raised was whether, on the death of a husband, estate duty was payable in respect of property the income of which was settled by the wife on the husband for life, and which, therefore, became hers again unencumbered after his death. The information set out the following facts:—By an indenture, dated January 14, 1846, and made between James Newburgh Strange, of the first part, the defendant, Charlotte Maria Strange, then Charlotte Maria Eyre, of the second part, Dame Louisa Strange, widow, of the third part, and certain trustees, of the fourth part, being a settlement made on the marriage of the said James N. Strange and Charlotte M. Eyre, certain sums of Consols and personal property, partly reversionary and partly in possession, were settled upon trust to pay the income thereof to the said James N. Strange for life, and after his decease to the said Charlotte M. Strange for life, with remainder as to the capital of the trust funds for the children or child of the said marriage as therein mentioned; and in the said indenture was contained a covenant by the said James N. Strange and the defendant Charlotte M. Strange to vest any personal property which the said Charlotte M. Strange was then or should during the intended coverture or the said James N. Strange in her

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

right should at any one time by gift, bequest, or otherwise become entitled of the value of £200 or upwards other than a life interest only and other than specific chattels not producing income, and besides the trust premises thereinbefore settled, in the trustee or trustees for the time being of the now stating indenture upon trust, and to the intent that the same might be laid out by such trustees upon some of the stocks, funds, &c., prescribed by the said indenture, and that the stocks, &c., upon which the same might be so laid out, and the dividends, interest, and annual produce thereof might be held by such trustees upon trust to pay the income thereof unto the said James N. Strange or his assigns during his life and after his decease to the said Charlotte M. Strange or her assigns during her life, and from the decease of the survivor of them, upon trust, if the defendant Charlotte M. Strange should survive the said James N. Strange, then after his decease in trust for the defendant Charlotte M. Strange, her executors, &c., but if she should die in his lifetime, then after his decease upon such trusts and purposes as the said Charlotte M. Strange should by will appoint, and in default of appointment upon trust for her statutory next-of-kin. The marriage between the said James N. Strange and the defendant Charlotte M. Strange was solemnized shortly after the date of the settlement. The defendant Charlotte M. Strange became entitled at different dates during the said coverture to personal property falling within the covenant hereinbefore stated. The said after-acquired property of the defendant Charlotte M. Strange was got in by the trustees of the said settlement and invested and the same was represented at the death of the said James N. Strange by a sum of £17,097 8s. 7d. £3 10s. per cent. stock of the Metropolitan Board of Works then and now standing in the names of the trustees of the said settlement. The said James N. Strange died on November 1, 1894. On the death of the said James N. Strange the defendant Charlotte M. Strange became absolutely entitled to the said after-acquired property, and she applied to the trustees of the said settlement and requested them to transfer the capital thereof to her, which they were and are prepared to do. The information stated that estate duty under the Finance Act, 1894, became payable in respect of the said after-acquired property as property passing on the death of the said James N. Strange, but she and her trustees refused to pay, contending that no estate duty had become payable in respect of the property bound by the said covenant to settle other or after-acquired property by reason of the provisions of section 21 (5) of the said Act, but the informant charged that the last-mentioned section did not apply, the defendant having become entitled, not to the income only, but to the capital of the property in question. The information prayed that it might be declared that upon the death of James N. Strange estate duty became payable upon the principal value of all property coming within the terms of and bound by the covenant to settle after-acquired property of the defendant Charlotte M. Strange as property passing on the death of the said James N. Strange. The Finance Act, 1894, section 21 (5), provides:—"Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor." It was decided by the Divisional Court that the case fell within the exception of that section, and that therefore estate duty was not payable until the death of the survivor.

From that decision the Attorney-General now appealed.

Sir Richard Webster (Attorney-General), Sir Robert Finlay (Solicitor-General), with them Mr. Vaughan Hawkins, were for the appellant; Mr. Dicey, Q.C., and Mr. Butcher, Q.C., were for the respondents.

Their LORDSHIPS reversed the decision of the Divisional Court and allowed the appeal, with costs.

The MASTER of the ROLLS, in giving judgment, said that he thought that the interpretation of section 21 (5) was plain; he saw no doubt about it. The marriage settlement was also plain enough. [His Lordship read and commented on the marriage settlement, and became absolutely entitled to the trust property. The trustees had no choice in the matter. They were bound to hand it over to her. Then, turning to the Finance Act, 1894, it appeared that sections 1 and 2 would cover the case unless there was any exemption. His Lordship would turn to section 21 (5) and apply that to the events which had happened. The wife had not become entitled merely to the income but to the whole property. It was said that if she became entitled to the capital she became entitled to the income. But the same meaning was not intended by the expression. The word "income" was used, and you could not construe it as including anything else. Throughout the Act "income" was always used in contradistinction to "capital." It appeared to his Lordship that it was a mere play upon the words to argue that income included capital. He thought, therefore, that the appeal must be allowed in the usual way.

LORD JUSTICE RIGBY, in delivering judgment to the same effect, said that it appeared to him that what was contemplated by the section was successive titles to the income of property as distinguished from titles to the property itself; and that, therefore, the case aimed at by the section had not arisen here.

LORD JUSTICE COLLINS concurred.

[Solicitors—The Solicitor for Inland Revenue; Hunters and Haynes.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.JJ.) } May 16

HALLETT V. HALLETT.*

Will—Bequest—Construction.

This was an appeal by the defendant from a judgment of Mr. Justice Gorell Barnes, sitting as an Additional Judge of the Chancery Division, on February 9, in an action brought to recover possession of certain portions of Hampden-house, which is situated at 142, Marine-parade, Brighton, and which adjoins the Bristol Hotel in that town. The case involved the construction of the will of William Hallett, who in 1842 was the owner in fee of the Bristol Hotel, and the lessee, with an option to purchase the freehold, of Hampden-house. From 1842 to 1852 Hallett occupied both houses together, but in 1852 he let the greater part of the Bristol Hotel to one Samuel Bacon for 21 years, while he himself resided in Hampden-house. Such parts of the Bristol Hotel premises as were not let to Bacon he incorporated and occupied with Hampden-house till his death in 1862. In 1861 he exercised his option of purchasing the freehold of Hampden-house, and by his will, made in 1862, he devised the two properties in the following terms—to his wife absolutely "all that his leasehold messuages and premises known as 142, Marine-parade, Brighton, with the appurtenances, together with the furniture, fixtures, &c." To his wife for life with remainder to his children "all that his

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

freehold estate known as the Bristol Hotel as now on lease to Samuel Bacon, with the appurtenances." He devised the residue of his real estate in the same way as he had devised the Bristol Hotel. After the testator's death in 1862, the widow continued to reside in Hampden-house, as it had been enlarged and occupied by her husband, until her death in 1891, and from 1891 to 1896 it was taken possession of under her will by the defendant, Mr. George Hallett, as her heir, the hotel in its reduced form being occupied by various tenants who succeeded Samuel Bacon. In 1896 the devisees in trust of the Bristol Hotel under William Hallett's will, the plaintiffs in this action, asserted a claim to all such parts of the Bristol Hotel as had been originally incorporated by Hallett with Hampden-house. Mr. Justice Gorell Barnes held that they were right, being of opinion that the testator could not have intended the additions made by him to Hampden-house to be permanent. From that decision the defendant now appealed.

Mr. Cozens-Hardy, Q.C., and Mr. Mackarness were for the appellant; Mr. Vernon K. Smith, Q.C., and Mr. R. F. Norton were for the respondents.

The MASTER of the ROLLS, after stating the facts and reading the material passages of the testator's will, said that if the construction put upon the will by Mr. Justice Gorell Barnes was right the premises in dispute would pass neither under the devise of the leasehold premises nor under the devise of the Bristol Hotel, but would be swept up by the residuary devise. This would be such a startling result that it was impossible to suppose that the testator could have intended it. The descriptive words used by the testator of Hampden-house, though containing the word "leasehold," were clearly applicable to the premises in their enlarged condition and passed to his widow the additions which were freehold. He thought that in the case of "Hall v. Fisher" (1 Coll., 47), which was cited on behalf of the respondents, Vice-Chancellor Knight Bruce, although right in principle, had gone a little far. The appeal must be allowed, and the action dismissed, with costs.

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } May 16.

STROUD V. LAWSON AND OTHERS.*

Practice—Pleading—Statement of claim—
Distinct causes of action—Plaintiff put to
election—O. 16, r. 1.

This was an appeal by the defendants from an order of Mr. Justice Darling at Chambers. The plaintiff sued—first, in his own behalf; and, secondly, in his own behalf and also on behalf of all the other shareholders in the Beeston Pneumatic Tyre Company (Limited). The defendants were three directors of the company. The plaintiff, in his statement of claim, first, alleged that the defendants fraudulently conspired together to induce the public to buy the shares of the company in the market at prices greatly above their actual value, and that the plaintiff was thereby induced to buy and did buy certain shares of the company, and in consequence thereof incurred loss, and he claimed £550 damages. The plaintiff, secondly, alleged that the directors of the company in June, 1896, wrongfully paid an interim dividend of 100 per cent., which was not paid out of the profits of the company, such dividend amounting in all to £30,000, and he claimed that the payment of this dividend was *ultra vires* and illegal, and that the defendants should account for the £30,000 to the company. One of the particulars of the alleged fraud under the first head of the claim was the

declaration of the dividend of 100 per cent. The defendants applied that the statement of claim should be struck out as embarrassing unless the plaintiff elected on which of the two claims he would proceed, upon the ground that there were two separate causes of action and two separate sets of plaintiffs, and that the defences would be different. Mr. Justice Darling refused the application.

Mr. J. Brooke Little appeared for the defendants; Mr. Mattinson, Q.C., and Mr. G. F. Hart for the plaintiff.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said the question was whether the plaintiff should be put to his election with regard to two absolutely distinct causes of action. He was of opinion that the plaintiff ought to be put to his election. The action was brought by Mr. Stroud, in the first place, on his own account solely, to recover damages from the defendants for having cheated him into becoming a shareholder in the company of which they were directors by false and fraudulent misrepresentations. That was a common law right of action. He then sued in a different capacity—not in his own personal capacity, but on behalf of himself and all the other shareholders—he sued the same defendants with having—to put it shortly—paid a dividend out of capital, and he claimed that they should put back the money which they had so paid *ultra vires*, not into his pocket, but into the coffers of the company. For this purpose it was necessary that he should make the company a defendant on the record. He thus joined together in one action a well-known common law action and an action which in the old days would have been brought in the Court of Chancery. In the first action he sued on his own behalf, and he had to prove fraud; in the other action he sued, not on his own behalf, but on behalf of all the shareholders, and he had not to prove fraud. There were clearly two causes of action, and in his opinion there were different plaintiffs and different defendants also. He thought that the case did not come within Order 16, rule 1, which regulated the joinder of plaintiffs. That rule was altered in consequence of the decision of the House of Lords in "Smurthwaite v. Hannay" ([1894] A.C., 494). The new rule was as follows:—"All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or, in the alternative, where if such persons brought separate actions any common question of law or fact would arise." The plaintiff could not bring the case within that rule unless he showed that the relief claimed under the two causes of action arose out of the same transaction. In his opinion the plaintiff had not shown that, and the proper order to be made in this case was either to strike out one or other of the two claims or to put the plaintiff to his election as to which of the claims he would proceed upon. The appeal would therefore be allowed.

LORDS JUSTICES CHITTY and VAUGHAN WILLIAMS delivered judgments to the same effect.

[Solicitors—L. Stroud, for plaintiff; Steadman and Van Praagh, for defendants.]

Q.B. Div. (Wills } 1898.
and Kennedy, J.J.) } May 16.

NORTH-EASTERN RAILWAY COMPANY V. DALTON
OVERSEERS.*

Highway—Exemption from highway rate—
Liability to repair *ratione tenuræ*—Estoppel—
Res judicata—Highway Act, 1835.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

This was a case stated by the quarter sessions of the North Riding of Yorkshire, on the hearing of an appeal by the North-Eastern Railway Company, against a poor-rate made for the township of Dalton. The facts were as follows:—Prior to the making of an order by the quarter sessions for the North Riding of Yorkshire in 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing it to the Birdforth Highway District, the hamlet formed part of the township of Bagby in that district, and was a place in which all the highways were repairable by the occupiers of lands *ratione tenuræ*, and in which no highway rates were leviable by reason of the exemption contained in section 33 of the Highway Act, 1835. The hamlet continued to form part of the township of Bagby until June 1, 1886, when it became part of the township of Dalton, as is mentioned below. The North-Eastern Railway Company was at all material times, and still is, in occupation of lands in the hamlet, and was, prior to the making of the order of 1881, referred to below, liable *ratione tenuræ* to repair a portion of a certain highway in the hamlet. Upon April 11, 1881, an order was made at petty sessions, notwithstanding the opposition of the railway company, under section 35 of the Highway Act, 1862, whereby it was ordered that all the highways within the hamlet of Islebeck should become and be parish highways and be repaired and maintained by the Birdforth Highway Board, and whereby the sums to be paid by the respective occupiers of lands within the hamlet previously liable to the repair of the highways in full discharge of all claims thereafter in respect of the repair and maintenance of the said highways were fixed. Such sums, which were merely nominal, were duly paid. On August 22, 1881, the railway company was rated in respect of its said lands to a rate for the expenses incurred by the Birdforth Highway Board in repairing and maintaining the highways within its district, including those within the hamlet of Islebeck, and for other expenses of the board. The company appealed against that rate to quarter sessions upon the ground that the company was exempt from liability to contribute towards the repair and maintenance of the said highways, and the appeal was allowed. By an order of the Local Government Board, dated June 1, 1886, and confirmed by the Local Government Board's Provisional Orders Confirmation (Poor Law) Act, 1887, the hamlet of Islebeck was detached from the township of Bagby and was amalgamated with the township of Dalton in the Birdforth Highway District. On June 7, 1897, the poor-rate, with respect to which the present appeal was brought, was made for the township of Dalton, and the railway company was rated to that rate in respect of its occupation of the said lands in the hamlet of Islebeck. The rate was levied, *inter alia*, in respect of expenses incurred, or to be incurred, by the rural district council of Thirsk, which council is the successor of the Birdforth Highway Board, in respect of the repair and maintenance of the highways within the rural district of Thirsk, including the portion of the township of Dalton which was or is comprised in the hamlet of Islebeck. The company appealed against the rate, and on their behalf it was contended—(a) That it having been decided in the appeal against the rate of 1881 that the company was not liable to contribute towards the repair and maintenance of the highways in the portion of the township of Dalton formerly within the hamlet of Islebeck the question was *res judicata*, and that the quarter sessions were precluded from deciding otherwise in the present appeal; (b) that the company, having been liable to maintain highways in the hamlet of Islebeck *ratione tenuræ*, was exempted by section 33 of the Highway Act, 1835, from liability to rates levied in respect of

the repair and maintenance of such highways, and had continued to be exempt ever since; and (c) that the company, having complied with the requirements of the order of petty sessions above-mentioned, was, by virtue of section 35 of the Highway Act, 1862, discharged of all claims thereafter in respect of the repair and maintenance of the highways in the hamlet of Islebeck, and was, therefore, not liable to pay the said rate. On behalf of the respondents it was contended—(a) That the decision of the quarter sessions in the appeal of 1881 was final only for its proper purpose and object, which was that the railway company was not liable to pay the particular rate, and was not conclusive on the points arising in the present appeal; (b) that the exemption from the payment of highway rates conferred by section 33 of the Highway Act, 1835, continued only so long as the liability of the company to repair *ratione tenuræ* lasted, and that the exemption was, therefore, determined by the order of petty sessions; and (c) that that order only operated to discharge the company from all claims by the Birdforth Highway Board or its successors in respect of the portion of highway formerly repairable *ratione tenuræ* by the company and thereby made repairable by the parish, and in no way affected the liability of the company in respect of its occupation of property within the rural district of Thirsk to pay rates for expenses incurred by the council of that district in respect of the repair and maintenance of the highways within that district. The quarter sessions dismissed the appeal, stating the present case for the opinion of the High Court.

Section 35 of the Highway Act, 1862, provides that, "where any person or corporation is liable by reason of tenure of lands or otherwise to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway." And the section goes on, *inter alia*, to provide for the application of the sum so paid.

Mr. A. A. Bethune (with whom was Mr. R. Cunningham Glen) appeared for the appellant company; Mr. Macmorran, Q.C., and Mr. Gowan Taylor appeared for the respondents.

The cases of "Reg. v. Heath" (L.R., 1 Q.B., 218); "Heath v. Weaverham Overseers" (L.R. [1894] 2 Q.B., 108); "Reg. v. Hutchings" (L.R., 6 Q.B.D., 300); "Rev. v. Haughton Inhabitants" (1 E. and B., 512); and "Wildes v. Russell" (L.R., 1 C.P., 722) were cited in the course of the argument.

The COURT dismissed the appeal.

MR. JUSTICE WILLS said the case raised two questions—the first as to the construction of section 35 of the Highway Act, 1862; the second the question of estoppel. His Lordship read the section, the material provisions of which are above set out, and said the question was whether an order under the section operates to discharge the person liable from liability in respect of highway expenses altogether, or whether

its operation is confined to the extra cost which would fall upon him as compared with other ratepayers by reason of the *ratione tenuræ* liability. The language of the section was far from plain. But, upon the whole, it appeared to him that the governing words were "the highway shall thereafter be . . . repaired and maintained by the parish." It would have been very easy to add that the land in respect of which the liability existed should continue to enjoy the exemption. But that was not expressly said; and some of the consequences that would follow from such a construction of the section were so startling that, in his opinion, the respondents' construction ought to be accepted. In this particular place—to take it as an example—there were formerly no highways which were not repairable *ratione tenuræ*. If the appellants' view were applied in such a case, the result might be that a sum fixed once for all with reference to the then probable cost of repair would be absolutely fixed for all time; and if the expenses increased there would be no means of providing funds to meet them. Also, on the same view, the contribution of an individual towards highway expenses might be fixed at a sum which might in course of time become utterly inadequate to represent the burden of the liability to repair the particular highway from the burden of repairing which he was discharged, or utterly inadequate to represent a fair proportionate share of the general highway expenses. A man might be liable to repair a country lane, commute that liability, and then turn his property into a building estate. If he had continued subject to the *ratione tenuræ* liability he would have had to bear the increased expenditure. But if he had commuted his whole liability for a sum fixed once for all, the whole of the increased expenditure would have to be borne by the rest of the community. It was said on the other side that the opposite construction might operate harshly in certain cases; but such cases must be rare, and legislation of the kind would hardly be expected to work with perfect fairness in all cases. The more reasonable construction was that where the Legislature said the highway should "thereafter be a highway to be thereafter repaired and maintained by the parish" it meant what it said—namely, that the highway should become repairable by everybody in the parish, including the person formerly liable *ratione tenuræ*. If, as in the present case, the burden in the shape of highway rates cast on the lands by reason of the extinction of the *ratione tenuræ* liability was an equivalent for that liability, then the sum to be paid as commutation would be properly fixed at a merely nominal amount. The second question was whether the judgment of the quarter sessions on the appeal of 1881 was an estoppel. Questions of estoppel were often difficult, not from any difficulty in the principle, but from the difficulty in applying the principle. But it appeared from "Reg. v. Hutchings" (6 Q.B.D., 300), which was founded upon the "Duchess of Kingston's Case," that, though a judgment of a Court of concurrent or exclusive jurisdiction directly upon the point is conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose, it is not conclusive of any matter which came collaterally in question, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment. The judgment of the quarter sessions in 1881 was that the then rate was to be quashed. It necessarily followed that that rate was bad, and as between the same parties that question could not have been raised again. But the construction of section 35 of the Highway Act, 1862, was only incidentally cognisable on a matter to be inferred by argument, and was not one of the things necessarily involved in the judgment of the Court of

quarter sessions. The decision in "Reg. v. Hutchings" was very near this case. Mr. Bethune had argued that there was a distinction between the judgment of a Court of quarter sessions, which was a Court of record, and a decision of magistrates. That might be so for some purposes. But the decision in "Reg. v. Hutchings" went on no such ground as that. Indeed, the Court expressed the opinion that a decision of a Court of summary jurisdiction would have been an estoppel on a matter directly in issue.

MR. JUSTICE KENNEDY concurred.

[Solicitors—A. K. Butterworth, for appellants; Swarbrick, Thirk, for respondents.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } May 17.

CHINA TRADERS' INSURANCE COMPANY (LIMITED) v.
ROYAL EXCHANGE ASSURANCE CORPORATION.*

Practice—Discovery—Documents—Action on
policy of reinsurance—Order for ships' papers.

This was an appeal from the refusal by Mr. Justice Mathew, sitting in Chambers as the Judge taking commercial causes, to make an order on the plaintiffs for the production of ships' papers. The question raised was whether an order for production of ships' papers should be made in a case of reinsurance. The action was brought to recover for losses under two policies of reinsurance on goods per ship *Conqueror*. The plaintiffs were the insurers by original policies of certain goods on the *Conqueror* from Singapore to Boston, and they had effected reinsurances with the defendants in respect of these goods. The claim alleged that the *Conqueror*, with her cargo, became a total loss on the voyage by perils insured against, and that the plaintiffs had paid under the original policies for a total loss. Upon the hearing of a summons for directions, the defendants applied for an order that the plaintiffs and all persons interested in these proceedings and in the insurance the subject of this action should produce and show to the defendants, their solicitors or agents, upon oath all ships' papers (in the terms of Form 19 in Appendix K to the Rules of the Supreme Court, 1883, with the additions thereto mentioned in the case of "China Steamship Company v. Commercial Union Assurance Company," 8 Q.B.D., 142). Mr. Justice Mathew refused the application, but ordered lists of documents to be exchanged between the parties and inspection given. The defendants appealed by leave.

Mr. Joseph Walton, Q.C., and Mr. F. W. Hollams appeared for the defendants; Mr. J. A. Hamilton appeared for the plaintiffs.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether, upon a reinsurance by an underwriter, who made a claim against the reinsurer, the underwriter was liable to have an order for production of ships' papers made against him. He desired to say that, in his opinion, the order of Mr. Justice Mathew in the present case, that each party should exchange documents, was sufficient, but that was not the point which the parties as well as Mr. Justice Mathew wished to have decided. The rule as to ships' papers was a very old rule, the case of "Goldschmidt v. Marryat" (1 Camp., 559) upon the subject in the time of Sir James Mansfield being decided in 1809. As between the assured and the underwriter it was common practice to order the assured to produce ships' papers. An order for production of ships' papers was a matter peculiar to insurance. In 1890, in the case of "Nord Deutsche Versicherungs Gesellschaft v.

Merchants' Marine Insurance Company" (not reported), a Divisional Court consisting of Mr. Justice Mathew and Mr. Justice Cave held that an order for production of ships' papers could not be made in a case of reinsurance. Later on, in "Willis and Co. v. Baddeley" ([1892] 2 Q.B., 324) in this Court Lord Justice Bowen and himself said that the point raised in the above unreported case must be left open; and in 1897 it was said that Lord Justice Collins at Chambers, in the case of "Royal Exchange Assurance Corporation v. Faber," made an order for production of ships' papers in a case of reinsurance. Mr. Justice Mathew had come to the conclusion that in such a case he would not order production of ships' papers, and that an order for the exchange of documents was sufficient. In his opinion that was not a correct view. The reinsurer had open to him all the defences which were open to the original underwriter as against the assured, and it was right that he should see all the documents which the original underwriter might have seen. It was said that the underwriter would probably have no documents, whereas the shipowner would have them. But the rule as to production of ships' papers applied to an insurance on goods as well as on ship, though there was not much probability that the cargo-owner would have the ships' papers. But he might have access to them. In his opinion a reinsurer could have an order made against the original underwriter for production of ships' papers.

LORD JUSTICE CHITTY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Waltons, Johnson, Bubb, and Whatton. for the plaintiffs; Hollams, Sons, Coward, and Hawksley, for defendants].

Q.B. Div. (Hawkins }
and Phillimore, JJ.)

1898.
May 17.

THE QUEEN V. WARDLE AND OTHERS, JUSTICES, AND
THE HARTON COAL COMPANY—EX PARTE BURROWS*.

Justices—Jurisdiction—Test case—Justices
equally divided—*Res judicata*.

This was a rule *nisi* directed to justices of South Shields ordering them to show cause why they should not state a case. Two hundred and thirty summonses were issued by the Harton Coal Company against their workmen under the Employers and Workmen Act, 1875, claiming damages on the ground that they wrongfully left their employment. The Act (sections 3 and 4) gives jurisdiction to justices to settle disputes of a certain character between employers and their workmen, and section 9 provides that such jurisdiction shall be exercised as if made upon complaint. A test case (Clarke's case) was heard before the justices, which, it was agreed, should decide the others. The justices were four in number and were equally divided, and the chairman announced that the bench being equally divided the summons was dismissed. A case was asked for by the Harton Coal Company, but was refused. Another of the summonses, Burrows's case, was subsequently heard before seven justices, and Burrows, by a majority, was fined 10s. Burrows asked for a case, contending that the matter was *res judicata*. The case was refused, whereupon Burrows obtained this rule *nisi*.

Mr. ASQUITH, Q.C., and Mr. DANCKWERTS (Mr. Mundahl with them), showing cause, contended that the justices in Clarke's case had no power to dismiss the summons. The justices being equally divided there was

no decision. They referred to "Reg. v. Belcomb" (11 Q.B., 388).

Mr. ROBSON, Q.C. (Mr. J. H. W. Pilcher with him), in support of the rule, contended that the justices in Clarke's case having said that the summons was dismissed it must be taken that they came to a decision and adjudicated on the summons. Such decision would, under the arrangement between the parties, decide Burrows's case. He cited "Reg. v. Brackenridge" (48 J.P., 293); "Rox. v. Justices of Leicestershire" (1 M. and S., 442); "Reg. v. Justices of Monmouthshire" (4 B. and C., 844); "Reg. v. Justices of Monmouthshire" (8 B. and C., 137); "Reg. v. Ashplant" (52 J.P., 475); and "Kinnis v. Graves," decided before Mr. Justice Wills and Mr. Justice Kennedy on May 12, 1898.

Mr. JUSTICE HAWKINS, in discharging the rule *nisi*, said that what the justices did in Clarke's case was an adjudication as against Clarke, but it was not a decision upon the questions which were in the contemplation of the employers and the workmen, and which each desired to have settled by the judgment of the bench. At the hearing of Burrows's case the counsel for the complainants submitted that the decision in Clarke's case was not such a decision as was contemplated by the arrangement, and the justices adopted that view and heard the case. As between the complainants and Clarke, without discussing the various cases cited, it must be assumed on the authority of "*Ex parte Evans*" ([1894] A.C. 16) that the adjudication in Clarke's case was binding on both parties, though the course adopted by the justices was a very doubtful one, notwithstanding the case of "Reg. v. Ashplant" (52 J.P., 475), which, it must be remembered, was a criminal case and not a civil one like the present. Possibly their decision might have been reversed had they granted a case as they were asked to do, but no steps were ever taken to set it aside, and the decision stood as between the complainants and Clarke. As between the complainants and the other workmen, his Lordship was by no means satisfied that the arrangement contended for, even if assented to by all, could under any circumstances be set up as a legal answer to the complaint, though in honour the complainants might feel bound by it. On the affidavits it was nowhere stated that Burrows was a party to the arrangement which was come to in Clarke's case. But, assuming his concurrence in an arrangement that Clarke's case was to be treated as a test case, it could not be doubted that the decision referred to in the arrangement meant a decision on the merits. Nobody would say that a decision given in favour of one party because the justices were equally divided was a decision on the merits, or could be treated as a test case. He thought the justices sitting in Burrows's case were right in refusing to grant a case.

Mr. JUSTICE PHILLIMORE gave judgment to the same effect.

[Solicitors—Rowcliffes, Rawle, and Co., for Cooper and Goodger, for showing cause; James Kirkley, for J. Oswald Davidson, in support of the rule.]

Q.B. Div. (Ridley and }
Channell, JJ.)

1898.
May 17

BENFORD V. SIMS.*

Criminal Law—Cruelty to animals—Jervis's Act (11 and 12 Vict., c. 43), sec. 5—Counselling the commission of an offence.

This was a case stated by Mr. T. W. Lewis, stipendiary magistrate for Cardiff. An information was pro-

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

ferred by the appellant, Frederick Benford, an inspector of the Royal Society for the Prevention of Cruelty to Animals, against the respondent, a veterinary surgeon practising at Cardiff, for unlawfully cruelly ill-treating a horse by causing it to be worked in an unfit state. Early in 1897 Alfred Hunt, a coal merchant, the owner of the animal, consulted the respondent with reference to the lameness of the animal, a bay mare. The respondent advised that she should be turned out to grass. That was done until November, 1897. On November 18, 1897, the respondent gave a certificate that he found the mare "to be renewing her hoof on the near fore foot; nevertheless the mare is free from pain and quite fit for work." On December 13 last the mare, while working, was stopped by the appellant. She was then very lame, and even light work caused her pain. The magistrate found that the respondent knowingly counselled the owner to cause the act of cruelty to be perpetrated. Further, that although the advice of the respondent in some degree influenced the owner to cause the animal to be worked, such advice was the remote cause of the cruelty in some degree, and not the proximate cause of the cruelty in any degree, and, therefore, not the cause of the cruelty within the meaning of the statute, and that the respondent was charged with the offence committed by the owner, and was not charged with the offence disclosed by the facts—viz., knowingly counselling an act of cruelty to be caused. The question for the opinion of the Court was whether the magistrate was right in acquitting the respondent.

Mr. Colam appeared for the appellant. The respondent did not appear.

The COURT held that the respondent ought to have been convicted and that the case must be remitted to the magistrate with an intimation to that effect. Although the words of section 2 of the Cruelty to Animals Act, 1849 (12 and 13 Vict., cap. 92), were "shall cruelly . . . cause . . . to be cruelly . . . ill-treated," section 5 of Jervis's Act (11 and 12 Vict., cap. 43) enacted that a "person who shall . . . counsel . . . the commission of any offence . . . shall be liable to be proceeded against and convicted . . . either together with the principal offender or before or after his conviction." The magistrate ought to have convicted the respondent under that section.

Case remitted.

[Solicitor—S. G. Polhill, for appellant.]

Q.B. Div. (Wills) 1898.
and Kennedy, JJ.) May 17.

JENKINS v. COOMBER.*

Bill of Exchange—Endorsement—Incomplete bill
—Bills of Exchange Act, 1882, secs. 55 and 56
—"Steele v. M'Kinlay" (5 App. Cas., 754).

This was an appeal from a decision of his Honour Judge Lumley Smith, Q.C., in an action on a bill of exchange. It appeared that one Arthur Coomber, the defendant's son, was indebted to the plaintiffs, a firm of builders, and that, being pressed for payment, he arranged that the plaintiffs should draw a bill at three months on him, which he would get his father, the defendant, to back. In pursuance of this arrangement the plaintiffs drew the bill in question on Arthur Coomber. The bill was made payable to the plaintiffs' order. Arthur Coomber accepted it, got the defendant, his father, to sign his name on the back, and handed the bill back to the plaintiffs. The bill was not paid at maturity, and the plaintiffs brought the present

action. The learned County Court Judge gave judgment for the defendant, holding that the case was governed by "Steele v. M'Kinlay" (L.R., 5 App. Cas., 754), the authority of that case not being, in his opinion, affected by the Bills of Exchange Act, 1882. The plaintiffs appealed.

Mr. ATTENBOROUGH appeared for the appellants, the plaintiffs below, and contended that the defendant was liable either under section 55 or section 56 of the Bills of Exchange Act, 1882.

Mr. Abraham appeared for the respondent.

The cases of "Steele v. M'Kinlay" (5 App. Cas., 754), "Wilkinson v. Unwin" (7 Q.B.D., 636), "Holmes v. Durkee" (1 Cab. and El., 23), and "Bank of England v. Vagliano Brothers" ([1891] A.C., 107) were cited in the course of the argument. The COURT dismissed the appeal.

MR. JUSTICE WILLS said that, in his opinion, the learned County Court Judge was right. He did not think the Bills of Exchange Act, 1882, was meant to introduce in this respect the important alteration in the law that it had been contended it did. He thought there was no intention of inferentially repealing the decision of the House of Lords in "Steele v. M'Kinlay." In the present case, at the time when the defendant wrote his name across the bill it was not a perfect instrument, though it might have been made so by the plaintiffs' endorsement; nor had it ever become a perfect instrument. It was plain, therefore, that section 56 of the Act, which would have given the plaintiffs a right of action against the defendant if they had been holders in due course, was not satisfied, because "holder in due course" was defined by section 29 as a holder who has taken a bill "complete and regular on the face of it" under certain conditions; and here the bill was not complete and regular on the face of it. It was sought to make the defendant liable as an endorser under section 55. The Act afforded little help as to the meaning of "endorsement," because by section 2 it defined "endorsement" as meaning "endorsement," completed, it was true, by delivery. It was, however, plain that the writing of a signature across a bill was not necessarily an endorsement, as was pointed out by Lord Watson in "Steele v. M'Kinlay." It appeared to him that in this case the law merchant, unless it had been altered in a very material respect—and in his opinion it had not—had no application. The cases in which an endorser had been held liable to a drawer, to whose hands a bill had returned, were all cases in which the instrument was perfect in itself, and were not in point. In the present case the facts were exactly like those in "Steele v. M'Kinlay." Therefore the contract of indemnity on which the plaintiffs relied was not one depending on the law merchant, but upon an agreement between the parties, and was not relied on as getting over a defence that might otherwise have prevailed, viz., the defence of circuity of action, but was relied on as creating the primary liability. For these reasons the appeal must be dismissed.

MR. JUSTICE KENNEDY delivered judgment to the same effect.

[Solicitors—Attenborough and Son, for the appellant; Biggs, Roche, and Co., for the respondent.]

Q.B. Div. (Wills and) 1898.
Kennedy, JJ.) May 18.

ORCHARD v. BUSH.*

Innkeeper—Liability—Property of guest—Loss of.

This was an appeal by the defendant against a

decision of the learned County Court Judge of Liverpool in an action brought by the plaintiff to recover the value of a coat which was lost by the plaintiff in the dining-room of an hotel kept by the defendant in Liverpool. Persons in very considerable numbers were in the habit of using the dining-room of the defendant's hotel as a restaurant, 80 or 90 persons other than persons staying at the hotel dining there every evening. On the occasion in question the plaintiff, who was going home from his place of business, went on his way to the railway station, to the defendant's establishment to dine about 9 o'clock. He hung his coat up on a peg in the dining-room, and on his leaving at about 10 o'clock he found that the coat had disappeared. He therefore brought the present action to recover the value of the coat. The learned County Court Judge held that the relationship of landlord and guest existed between the defendant and the plaintiff, though the plaintiff only went to the defendant's establishment to dine, and he gave judgment for the plaintiff. The defendant appealed.

Mr. LUSH appeared for the defendant in support of the appeal. He contended that under the circumstances there was no evidence on which the learned County Court Judge could come to the conclusion that the plaintiff was a guest at the defendant's hotel so as to give rise to the liability on the defendant's part that attaches to an innkeeper as regards the safe custody of the goods of his guests, and he cited "*Strauss v. County Hotel Company*" (12 Q.B.D., 27), "*Reg. v. Rymer*" (2 Q.B.D., 136), "*Medawar v. Grand Hotel Company*" ([1891] 2 Q.B., 11), "*Ultzen v. Nichols*" ([1894], 1 Q.B., 92), "*Lamond v. Richard*" ([1897], 1 Q.B., 541), "*Burgess v. Clements*" (4 M. and S., 306), "*Thompson v. Lacy*" (3 B. and Ald., 283), and "*Dawson v. Chamney*" (5 Q.B., 164) on this point. He further contended that even if the relationship of innkeeper and guest existed between the parties, still the defendant was not liable in the absence of negligence, because the coat had not been committed to his custody. In support of this contention he cited "*Great Western Railway v. Bunch*" (13, App. Cas., 31) and "*Ultzen v. Nichols*" ([1894] 1 Q.B., 92).

Mr. HORRIDGE appeared for the respondent, the plaintiff below. He cited "*Bennett v. Mellor*" (5 T.R., 273) and "*Yorke v. Grenaugh*" (2 Ld. Raym., 866). The notes to Calve's case in 1 Smith's Leading Cases were also referred to in the course of the argument.

The COURT dismissed the appeal.

MR. JUSTICE WILLS said the only question was whether there was evidence that the plaintiff when he lost his coat was a guest at an inn. The place to which the plaintiff went was the dining-room of an hotel, and in what sense he was not a guest his Lordship failed to understand. Taking the narrow view contended for by Mr. Lush—namely, that to be a guest at an inn a person must be a traveller or wayfarer—the plaintiff was a guest. He was on his way from his place of business to the railway station, whence he intended to proceed further by train. If he had been going along a country lane on horseback, and had stopped at the hotel for the purpose of necessary refreshment, why would he not have been a wayfarer and a guest? In his Lordship's opinion he clearly would. What difference did it make that, instead of going on horseback, he walked to the station with a view to taking the train, and accepted refreshment? He could not see why the plaintiff was not a wayfarer and a guest. Further, he was not disposed to take that narrow view of the meaning of "guest." He thought that a person who uses an inn is a guest if he is received into the four walls of the inn and there

receives such accommodation as the innkeeper offers to persons who use the inn. That the person does not stop the night would make no difference. And on authority there was not much to be said for the contention that in this connexion the expression guest is confined to wayfarers. True that in old times a guest was more often a wayfarer than not. But the liability was said to arise when the innkeeper receives a person *causa hospitandi*. Why did an innkeeper who gave a person refreshment, receiving him for the same purposes and in the same way as he received other persons at the inn, not receive that person *causa hospitandi*? The present case was much less strong than "*Bennett v. Mellor*" (5 T.R., 273). There a man who went to an inn for a purpose wholly unconnected with the use of the inn as such, and who, while waiting for an answer with reference to the business on which he went to the inn, sat down in the public room and took some refreshment, was held to be a guest and to be entitled to the privileges of a guest. That was a much stronger case than this, for the use made of the place by the plaintiff in the present case was much more like the natural use of an inn. The case would have been quite different if the place where the plaintiff dined had been a restaurant detached from the hotel or not substantially forming part of it. If it had been a restaurant merely, then his Lordship would have thought that no liability would have arisen. But the room in question was part of the inn and used as part of the inn, and the defendant supplied the plaintiff with the refreshment as an innkeeper.

MR. JUSTICE KENNEDY delivered judgment to the like effect.

[Solicitors—Richard White, for H. F. Neale, Liverpool, for the appellant; Tibbetts and Co., for the respondent.]

Q.B. Div. }
(Mathew, J.) }

1893.
May 18.

CAHN AND MAYER V. POCKETT'S BRISTOL CHANNEL
STEAM PACKET COMPANY (LIMITED).*

Sale of Goods—Property in goods, when it passes
—Bill of lading, with draft for acceptance attached—Fraudulent endorsement of bill of lading—Sale of Goods Act, 1893, sec. 19, subs. 3, and sec. 25, subs. 2.

This was an action nominally for damages for the non-delivery of certain copper. The real question in dispute was whether the property in the copper, which had been sold by Steinmann and Co. to one Pintscher, had passed to the plaintiffs by the endorsement to them of the bill of lading by Pintscher. The facts are fully set out in his Lordship's judgment.

Mr. Pickford, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. McCall, Q.C., and Mr. Parker Lowe for the defendants.

MR. JUSTICE MATHEW said that the action was brought by the endorsees of a bill of lading against shipowners for non-delivery of the goods. The facts were contained in a lengthy correspondence, but they might be very briefly stated. A firm at Liverpool, Steinmann and Co., sold to one Pintscher, a merchant, the goods in question, which were to be shipped at Swansea and delivered at Rotterdam. Under the bill of lading the goods were shipped at Swansea on the defendants' vessel, and were to be transhipped at Bristol and forwarded to Rotterdam, at 15s. a ton, through freight. Steinmann and Co. forwarded the bill of lading, endorsed in blank, to Pintscher, together

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

with a draft for acceptance. The amount of the bill of exchange was incorrectly stated, but nothing turned on that, because no effort had been made by Pintscher to set the mistake right. When the documents arrived Pintscher was on the verge of bankruptcy, and it was clear that he ought to have sent back the bill of lading and the bill of exchange, which he did not intend to accept, but he did not do so. He did what was wrong, and committed a fraud upon Steinmann and Co. He declined to accept the draft, but sold the goods, and endorsed the bill of lading, to the plaintiffs. Then his financial difficulties became known to Steinmann and Co., and they took steps to obtain possession of the goods. They succeeded in doing so, on giving an indemnity to the defendants, and the question now arose whether the plaintiffs, as endorsees of the bill of lading, or Steinmann and Co., the sellers, are entitled to the goods. The first point taken for the defence was that the action ought to have been brought against the steamship company into whose ship the goods were transhipped, but his Lordship was clearly of opinion that there was only one contract of carriage, at a through rate of freight, and on that contract the defendants, if any one, were liable. The next point was taken under section 19, subsection 3, of the Sale of Goods Act, 1893, which provided that "where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." It was said that under that section Pintscher ought to have returned the bill of lading to Steinmann and Co.; that he acquired no property in the goods; and that, therefore, the plaintiffs acquired none, and were not entitled as against Steinmann and Co. to retain the possession of the goods. The plaintiffs sought to meet that point by relying on section 25, subsection 2, of the same Act, which provided that, "where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale . . . to any person receiving the same in good faith . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." The effect of that somewhat extraordinary section was that the buyer became a mercantile agent for himself. It was said in this case that Pintscher, the buyer, had obtained possession of the bill of lading and thereby was enabled to represent himself as the owner of the goods, and that under the provisions of section 25, subsection 2, he could create a title in the plaintiffs. The bill of lading did not of itself create title, because it was not a negotiable instrument, but it was argued that, when it was in the possession of a person who appeared to be the owner, it might be endorsed so as to give the endorsee a title to the goods. The defendants said that the significant words in section 25, subsection 2, were "with the consent of the seller," and that this bill of lading was not in Pintscher's possession with the consent of Steinmann and Co., the sellers. In his Lordship's opinion Pintscher held the bill of lading, as agent of the sellers, for safe custody, until he should have accepted the draft. He determined not to accept the draft, and therefore he continued to have the custody only of the bill of lading, not possession of it, with the consent of the seller. He had, therefore, no right to deal with the bill of lading by endorsing it to the plaintiffs, and

he could not, by so dealing with it, create a title to the goods. On these grounds judgment must be for the defendants.

[Solicitors—Richard White, for Clason Dahne, Swansea, for plaintiffs; Woodcock, Ryland, and Parker, for Forshaw and Hawkins, Liverpool, for defendants.]

Q.B. Div. (Ridley and } 1898.
Phillimore, JJ.) } May 18.

COLE AND ANOTHER V. LANGFORD.*

Judgment—Fraud—Judgment obtained by fraud
—Action to set aside judgment.

This was a motion, under Order 27, rule 11, of the Supreme Court Rules, for judgment in default of delivery of a defence. By the terms of the rule referred to "such judgment shall be given as upon the statement of claim the Court or a Judge shall consider the plaintiff to be entitled to."

Mr. GREGSON ELLIS, who appeared for the plaintiffs, said that this case raised the important question whether a judgment that had been obtained by fraud could be set aside. In 1896 the present defendant had obtained judgment in the High Court of Justice against the present plaintiffs for £53 and costs. That judgment had been obtained by a fraud for which the present defendant was now in prison. The statement of claim set out the particulars of the fraud and claimed that the judgment obtained thereby should be set aside. In making the application Mr. Gregson Ellis said that he felt it his duty to refer to authorities, some of which might be thought to show that a judgment cannot be set aside on this ground. The decision of the Court of Appeal in "Flower v. Lloyd" (6 C.D., 297) was in his favour, but the subsequent opinion of the majority of the Court of Appeal in "Flower v. Lloyd" (10 C.D., 327) was against his contention.

MR. JUSTICE PHILLIMORE referred to "Priestman v. Thomas" (9 P.D., 70, 210).

Mr. GREGSON ELLIS also mentioned the case of "Baker v. Wadsworth" (67 L.J., 301), in which the Divisional Court held that a judgment obtained in an action will not be set aside in a subsequent action brought for that purpose upon mere proof that the judgment was obtained by perjury.

The COURT granted the application on the ground that though perjury was not a sufficient cause for setting aside a judgment obtained by it, nevertheless that this could be properly done where the judgment had been obtained by a fraud on the Court.

[Solicitor—A. H. Holmes, for plaintiffs.]

Q.B. Div. (Grantham } 1898.
and Lawrence, JJ.) } May 18.

LOCAL GOVERNMENT ACT, 1894—PETITION FROM THE
RURAL DISTRICT OF CRICKHOWELL—COX AND OTHERS
V. DAVIES.†

Election Law—District council—Nomination
paper—Validity—Returning officer's jurisdiction
as to validity—Rural District Councillors
Election Order, 1893, rule 7 (2).

This was a motion to strike off the file an election petition filed by Messrs. William Cox, William Williams, William Edwards, and Alfred William Lewis, the petitioners, praying that the election of Mr. John

*Reported by T. E. HAYDON, Esq., Barrister-at-Law.

†Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Ward Davies on the Rural District Council of Crickhowell should be declared void.

Mr. Corrie Grant appeared for Mr. Davies, in support of the motion; and Mr. Roskill appeared for the petitioners.

The petition stated that the election was held on April 2, 1898, and that Mr. Davies was a candidate. The nomination paper used by him was signed by the proposer and seconder with the name, place of abode, description, and qualification of the candidate in blank. Mr. Davies afterwards filled in his name, &c., and delivered the paper to the returning officer. The returning officer published a statement in the prescribed form, in which he gave notice of his decision that Mr. Davies's nomination was valid. It was submitted by the petitioners that the nomination paper was bad on the ground that the signatures of the proposer and seconder were put to it before the name of the candidate had been inserted.

Mr. CORRIE GRANT contended that the ground for avoiding the election put forward in the petition was not a proper ground on which to proceed by election petition, and that the decision of the returning officer was final, having regard to rule 7 (2) of the Rural District Councillors Election Order, 1898. That rule provided as followed:—"The returning officer shall, as soon as practicable after the receipt of any nomination paper, examine and decide whether it has or has not been properly filled up and signed by two parochial electors of the parish or other area, and whether it is or is not invalid under rule 4 (5) or rule 6. His decision that a nomination paper has been so filled up and signed, and is not invalid as aforesaid, shall be final, and shall not be questioned in any proceeding whatever."

Mr. ROSKILL contended that the ground of invalidity put forward by the petitioners was not one into which the returning officer had authority to inquire. His duty was confined to seeing that the nomination paper was correct on the face of it. Rule 14 of the rules as to nominations in elections of councillors, schedule 3, part II., of the Municipal Corporations Act, 1882, provided as followed:—"The decision of the mayor shall be given in writing, and shall, if disallowing an objection, be final, but, if allowing an objection, shall be subject to reversal on petition questioning the election or return." That rule was taken direct from the Municipal Elections Act, 1875, section 3. It was in effect the same as the rule relied on by the other side. The added words "and shall not be questioned in any proceeding whatever" gave no greater force to the rule. In the interpretation of the new rule, therefore, the Court ought to be guided by the decisions on the old rule. Counsel cited "*Howes v. Turner*" (1 C.P.D., 670) and "*Harmon v. Park*" (7 Q.B.D., 369) in support of his contention that the objection to the nomination paper was not such an objection as under the old rule could have been dealt with by the returning officer. The proper way of raising such an objection was on petition.

MR. JUSTICE GRANTHAM made the order prayed for. He said that counsel had endeavoured to minimize the effect of the rules of 1898 by referring to a decision in which Lord Esher said, with regard to a certain decision by a mayor, that the decision was not one of those which were not to be questioned by virtue of the rule then prevailing. The present rule was not then in existence. The question in that case was whether the nomination was made in time. It had nothing whatever to do with the nomination paper. His Lordship found a difficulty in saying that a candidate should not be allowed to get the names of his supporters filled in on the paper before he filled in his own. He himself had had practical experience of elections and knew that it

was constantly done. Was there anything so wrong in the practice as that the candidate should be exposed to the expense of an election petition. If there were forgery or a mistake that would be a different matter, but that had not been shown. In "*Harmon v. Park*" eight burgesses signed a nomination paper on the assumption that two other burgesses, whom they knew, respectively proposed and seconded the candidate. The name of the proposer was afterwards struck out, and the name of another gentleman was substituted as proposer. The nomination was held to be invalid, whether that decision could have been given under the new rules was not for their Lordships to say. They were bound by the new rules. The nomination paper was good on the face of it, and there was nothing to show that anything wrong had been done in getting it filled up.

MR. JUSTICE LAWRENCE concurred.

Leave to appeal was refused.

[Solicitors—Bridges and Sawtell, for Davies; H. W. Watkins, for petitioners.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.J.J. } May 19.
IN RE DE NICOLS—DE NICOLS V. CURLIER.*

International Law—Husband and wife—Change of domicile—French law as to community of goods—Matrimonial domicile—Will.

Decision of Kekewich, J. (*ante*, p. 206, and [1898] 1 Ch., 403), reversed.

"*Lashley v. Hog*" (4 Pat., 581) discussed.

This was an appeal by the defendant, the testator's daughter, from a decision of Mr. Justice Kekewich dated February 3 last and reported in *The Times* of the following day; also *ante*, p. 206. The question was whether, where a Frenchman and a Frenchwoman, having married in France without entering into any marriage contract altering the French law as to the "community of goods" as between husband and wife, subsequently come over to this country and acquire a domicile here, "movable goods," such as money and securities, acquired by the husband during his domicile here can be affected by his will made here according to the English law, so as to deprive his widow of the rights originally vested in her by the French law at the date of her marriage. The question arose in consequence of the death of the testator, Mr. Daniel Nicolas de Nicols, the late proprietor of the Café Royal, Regent-street. In the year 1854 Mr. de Nicols was a man of no means, earning his living as a coachmaker in Paris, at wages. On May 30 in that year he married his first cousin (both being of age), the ceremony being performed at the mayor's office of the Third District of Paris, and the marriage was duly registered at the Prefecture of the Department of the Seine. It appeared, however, that the register was destroyed by fire by the Commune at the close of the Franco-German war. No contract of marriage was executed on the marriage, but, in accordance with French law and custom, the municipal officer who performed the ceremony formally called upon the parties to declare whether they had executed any contract of marriage, to which they both replied in the negative, when their answers were duly recorded on the usual "minute." The husband had at the time of the marriage no property whatever of his own, but the wife was possessed of a small piece of land at Vachy, in France, which was the birthplace of both of them, a sum of

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

1,000*l.*, or about £40, in cash given to her as a *dôt* by her parents, and a sum of between 1,500*l.* and 1,600*l.*, or between £60 and £64, representing savings by her as an assistant in a linen business. Soon after the marriage the husband and wife sold the piece of land for 500*l.*, or about £20, and became managers of a wine and spirit business in Paris, which in a year's time they purchased from the proprietor for 6,000*l.*, made up of the proceeds of the wife's piece of land, her *dôt* and savings, and the joint earnings realized by her husband and herself in carrying on the business. In December, 1862, they sold that business for 14,500*l.*, or about £580. In October, 1863, Mr. and Mrs. de Nicols came over to England, and with a sum of about £400, which represented their sole property, set up a small café, called the Café Royal, in Glasshouse-street, Regent-street, and under their skillful management this café expanded into the large and well-known café of that name in Regent-street. In 1865 he took out letters of naturalization as a British subject, and he and his wife remained in this country until his death, she actively assisting him in the management of the café. Out of that business and from an interest in the property upon which the Empire Theatre now stands Mr. de Nicols amassed a fortune of about £600,000. On February 28, 1897, he died, having made a will dated March 22, 1895, in the English form, in which he described himself as "of the Café Royal, No. 68, Regent-street, in the county of Middlesex, and Regent-house, Surbiton, in the county of Surrey, restaurant proprietor," and proceeded, "I hereby declare that I am a domiciled Englishman naturalized in England in the year 1865." Then, after appointing three persons his executors and trustees and bequeathing various legacies, he gave his residuary real and personal estate to them in trust for sale and to hold the proceeds on trust for his wife for life, and after her death upon trusts for his daughter, her husband and children. He died possessed of considerable freehold and leasehold property, besides investments in numerous stocks and shares. It was said that he had also £100,000 worth of wine in France. The only issue of the marriage was one child, a daughter, who was married to a French marquis. This was an originating summons taken out by Mme. de Nicols, the widow, against the executors and trustees of the will and the daughter, to ascertain (amongst other things) what were the rights and interests of the plaintiff in the real and personal estate of the testator by reason of her marriage with him without any marriage settlement or contract, the parties being then domiciled in France. Subsequently the question for decision was formulated in Chambers as follows:—
 "Did the change of domicile alter the legal position of the parties to the marriage in reference to property?" and the summons was adjourned into Court for argument on this question. Upon the summons being opened it was arranged that the argument should be confined to the effect of the change of domicile on the testator's "movable goods" only. The contention on the part of the plaintiff was that the "*communauté légale de biens*" was never dissolved during the joint lives of herself and her husband, and that such "*communauté*" regulated the property and interests of herself and her husband as from the date of the marriage up to the determination of the "*communauté*" by his death, and that she was entitled under it to one moiety of all property in the possession of her husband or of him and herself jointly at the time of his death, notwithstanding his will. On the other hand, it was contended on behalf of the defendant, the child of the marriage, that the rights of the parties were governed by the law of their change of domicile. Mr. Justice Kekewich was of opinion that there was no

principle requiring him to say that by a change of domicile at any time subsequently there was any surrender by the wife of that to which she was entitled under the matrimonial contract, and therefore held that the husband by his will disposed only of such property as was properly his, and that it did not include what was the wife's property under the matrimonial contract—that is, her right under the law of community of goods. Accordingly his Lordship made a declaration that the plaintiff's right under that law to movable property acquired during the coverture by husband and wife, or either of them, was not affected by the will. But this decision was without prejudice to any question as to the rest of the property of the testator. The testator's daughter appealed.

Mr. Dicey, Q.C., and Mr. Whinney were for the appellant; Mr. Renshaw, Q.C., and Mr. Ingle Joyce were for the respondent, the plaintiff; Mr. E. J. Elgood (with him Mr. Maugham) was for the respondents, the executors and trustees.

At the conclusion of the arguments on the 6th inst., their Lordships reserved judgment.

The MASTER of the ROLLS read the judgment of the Court as follows:—This is an appeal from the decision of Mr. Justice Kekewich, reported ([1898] 1 Ch., 403). The question raised by this appeal turns upon whether the decision of the House of Lords in the case of "*Lashley v. Hog*" (4 Pat., 581) applies to it or not. Mr. Justice Kekewich has treated that decision as not applicable to the present case, and he has decided that a change of domicile has not affected the rights acquired by two French people in each other's unsettled movable property by their marriage in France. In order to appreciate "*Lashley v. Hog*" and its true bearing on the case before us it is necessary to understand how at the date of that decision the law of Scotland stood as regards the effect of marriage on the movable property of the wife. By the Scotch law, on the marriage of two persons domiciled in Scotland the existing and after-acquired movable property of both husband and wife was regarded as a common fund (*communio bonorum*) divisible in certain shares on the death of either of them. But the whole of this so-called common fund was at the disposal of the husband during the marriage and was liable to the payment of his debts. During the marriage neither his wife nor his children had any right to any part of it. But the law applicable to this so-called *communio bonorum* did not depend in any way on whether any of the movable property which constituted it came from the wife or not. The proportion, if any, to which she contributed to it was of no importance. The whole was the husband's property, and his inability to dispose of the whole of it by will and the rights to it which arose on the death of himself or his wife in no way depended on the amount of her contribution, if any, to the common stock. Assuming a *communio bonorum* to exist, the right of the wife and children to it on his death, or in other words, the distribution of the *communio bonorum* on the death of the husband would on general principles of law be determined by the Scotch Law of Succession to the movable property of married men or widowers. So the persons to take the wife's share, if any, of the *communio* on her death would be decided by the Law of Succession as applied to her share. But when the question is, as it was in "*Lashley v. Hog*," whether on the wife's death in her husband's lifetime any part of his property became hers or became payable to persons claiming through her as if it were her property, it is very difficult to understand upon what principle recourse is had to the Law of Succession. Apart from authority we should have thought that the matrimonial law of the place where the parties were domiciled when they married and not the law of the domicile of the

husband on the wife's death would have been the law to apply to such a question as that. We pass now to "Lashley v. Hog," which is reported also in the appendix to Robertson's Law of Succession, No. 3, p. 414. Many questions were raised and decided on that appeal, but the only one which concerns us on the present occasion is the effect of the change of domicile on the rights of married persons to their respective unsettled movable properties. Mr. and Mrs. Hog, both of whom were English, married in England. Her unsettled movable property, existing and after acquired, became his, and she had no right to his movable property except what she might acquire under the Statute of Distributions if he died intestate. Mr. and Mrs. Hog had several children and went to Scotland and became domiciled there and they both died there. His wife predeceased him. One of their daughters married a Mr. Lashley. Mr. Hog had amassed a large fortune and he left a will making provisions for his children. Mrs. Lashley, however, refused to take anything under her father's will and insisted on her right under the Scotch law. These rights were as she insisted:—(1) A share of what her mother became entitled to in the *communio bonorum* when she died. (2) A share of her father's property at the time of his death. She succeeded in establishing her right to a share of her father's estate in a previous litigation (4 Pat., 583). Owing to circumstances not mentioned here, she got the whole legitimum (see p. 609). Her claim to her share of what her mother became entitled to when she died remained to be decided, and that was one of the questions before the House of Lords in "Lashley v. Hog." The House of Lords decided in her favour, reversing the decision of the Scotch Court on this point. The judgment of Lord Eldon is extremely long, dealing with various matters which do not bear on the question we have to consider. We have all studied that judgment with great care in order to ascertain the real grounds on which his decision on this point was based. The case was argued for the appellant, Mrs. Lashley, on the ground that her father being a domiciled Scotchman when his wife died, the distribution of property on the dissolution of the marriage must be regulated by the law of the place of the domicile of the married pair at that time. The previous decision in favour of Mrs. Lashley's claim to legitimum—i.e., her share of her father's estate on his death, was relied upon and it was urged that no distinction could be made between a wife's share and a child's share. The argument for the respondent was to the effect that the destination of the movable property of married persons on the dissolution of the marriage depended on the law of the place where they were domiciled when they married; and that the death of the wife in the lifetime of her husband did not deprive him of what became his on his marriage. These were shortly the two views presented to the House of Lords for decision. The House adopted the view presented by the appellant, and held that on the dissolution of the marriage by the death of the wife a portion of the husband's property became divisible amongst those persons who would have become entitled to it by the law of Scotland if the husband and wife had been domiciled in Scotland when they married. The claim of the daughter to her share of her father's movable property on his death is intelligible enough. It is a mere illustration of the well-settled rule that the law of a person's domicile regulates the succession to his movable property. But the claim of the daughter to what became divisible on her mother's death cannot be explained on any such principle; for although when that share became divisible the mother was dead yet the father was not; and it was a part of his property which the daughter claimed and was held entitled to.

The decision in her favour necessarily involves the view that the change of domicile affected the matrimonial rights of the husband and wife, and this was plainly what both Lord Eldon and Lord Rosslyn meant to decide and what the House of Lords did decide. (See 4 Paton, 611-619.) Lord Eldon said distinctly (p. 617) that it was best to hold that the wife's rights shifted with the domicile of her husband, and that was the basis of the judgment. It is plain that he was much influenced by the difficulty of making any distinction between the rights of a wife who survived her husband and the rights of those who claimed her share if she died in his lifetime (p. 615). Lord Rosslyn concurred in Lord Eldon's judgment and repudiated the idea that marriage imported any implied contract which a subsequent change of domicile could not affect. It is impossible to escape from the conclusion that the change of domicile was held to have altered the respective rights of both husband and wife with respect to their unsettled movable properties. She acquired and he lost rights by the change even during his life. This decision is binding on us. It is true that there are several material differences between the Scotch and French matrimonial laws of property, the wife having more extensive rights under the law of France than she has under the law of Scotland. But these differences do not warrant us in holding that the law of the matrimonial domicile can prevail after such domicile has been changed. It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the law of the matrimonial domicile; but that a change of domicile does affect the application of that law if not embodied in an express contract. But after all there is some practical convenience in holding that a change of domicile changes the rights of husband and wife as regards their respective unsettled movable properties, just as it changes their rights to obtain judicial decrees for separation and divorce and their testamentary powers. In America and in Scotland this view has prevailed; although on the continent it has been repudiated as opposed to sound legal principle. After "Lashley v. Hog" we do not consider the question open to judicial review in this country. We cannot regard the decision as based only on the law of Scotland. It decided a most important principle of private international law. The appeal therefore must be allowed and the declaration made by Mr. Justice Kekewich must be altered accordingly. The costs of the appeal will be costs in the summons.

[Solicitors—Tyrrell Lewis, Lewis and Broadbent; Hicks, Arnold, and Mozley.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } May 19.

GOMERSALL V. DAVIES.*

Defamation—Libel—Publication, what amounts to—Letter opened by clerk of addressee in ordinary course of business.

This was an application by the defendant for a new trial of an action of libel, or for judgment. The plaintiff was a game and poultry salesman residing and carrying on business at Leeds, and the defendant was an auctioneer carrying on business at Preston. The alleged libel was contained in a letter written by the defendant to the plaintiff and addressed to him at his residence and place of business. The letter was opened and read by a person in the employment of the plaintiff as clerk. The question was whether there had been a publication of

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the libel. The trial of the action took place at Leeds, before Mr. Justice Wright and a jury, and, in answer to questions put by the learned Judge, the jury found that the letter was opened by a person other than the plaintiff in the ordinary course of business; that the writer did not expect any one to open the letter but the plaintiff; but that the probability was that some person in the employment of the receiver might see the letter. Damages were assessed at £20, and judgment was entered for the plaintiff for that amount.

Mr. SCOTT FOX appeared for the defendant, and argued that there had been no publication of this libel. In order to maintain an action for libel it was necessary to show an intention to defame on the part of the defendant, an intention to publish defamatory matter. There was no evidence on which the jury could properly find that the defendant intended this letter to come to the notice of any person other than the plaintiff, as was held by Lord Ellenborough to be necessary in the case of "*De la Croix v. Thevenot*" (2 Stark, 63). Mr. Justice Wright thought this case was governed by "*Rex v. Burdett*" (4 B. and Ald., 95), but he submitted that that case was not really applicable to the facts of this case. "*Emmens v. Pottle*" (16 Q.B.D., 354) and "*Reg. v. Munslow*" [(1895] 1 Q.B., 765) showed that an accidental publication was no publication at all.

Mr. Blake Odgers, Q.C., and Mr. J. A. Compston, for the plaintiff, were not called upon to argue.

The COURT dismissed the application.

LORD JUSTICE A. L. SMITH said the plaintiff was a game and poultry salesman who carried on business, or at any rate had an office, at his own house. He complained of a letter which had been written to him by the defendant and addressed to him at his house, and which had been opened and read by some one in his employment, as being a libel. The plaintiff stated in his evidence that he carried on the greater part of his business in the market, and that his foreman was in the habit of opening his letters and reading them and bringing them to him in the market. The jury, in answer to questions put to them, found that the plaintiff's business was such that to the defendant's knowledge letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment. In the face of that finding how could it be said that this was an accidental publication? He did not trench on the cases in which it had been held that an accidental publication was not a publication at all. On the finding of the jury he was clearly of opinion that there had been a publication of this libel. The appeal must therefore be dismissed.

LORDS JUSTICES CHITTY and VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Barton and Pearman, for J. H. Armistage, Leeds, for the plaintiff; Meredith, Roberts, and Mills, for E. L. Wallis, Hereford.]

Q.B. Div. (Wills and) 1898.
Kennedy, J.J.) May 19.

MANSFIELD CORPORATION v. BUTTERWORTH.*

Local Government—Streets—"Proposed works"
—Insufficiency or unreasonableness—Private
Streets Works Act, 1892, sec. 7—Construction
—Jurisdiction of justices.

This was a special case stated by the justices of the Mansfield Division of Nottingham, before whom certain

objections made under section 7 of the Private Street Works Act, 1892, by the respondent to certain proposals of the appellants with reference to a street called Quarry-lane were heard. The appellants, in whose borough that Act is in force, resolved, in pursuance of the Act, to execute certain works of paving, &c., in part of Quarry-lane, a street in their borough, and specifications of the proposed works, with plans and sections, an estimate of the expenses, and a provisional apportionment, were duly prepared and approved by the appellants. The provisional apportionment included a piece of land belonging to the trustees of a charity called "*Bellamy's Charity*," having a frontage of about 200 yards on Quarry-lane, and hereafter referred to as the respondent's land. The respondent duly objected to the proposals of the appellants on the grounds specified in section 7 (d) of the Act—namely, "that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive." The proposed works were intended to be done over a part of Quarry-lane, about 677 yards in length. For several years past there has been a considerable traffic, both vehicular and foot traffic, over and along such part of the street, and such traffic has increased during the past 12 months, and is increasing, in consequence of the erection (which is still in progress) of a street of houses on land abutting on and adjoining Quarry-lane, but at a further distance from Mansfield than the respondent's land. Vehicular traffic between the new street of houses and Mansfield passes through Quarry-lane and over the portion thereof on which it was proposed to execute the works above referred to. There is no made roadway or footpath, and no foundation to the road, which is uneven, with very deep ruts, but there is a footpath irregularly demarcated with rough stones. There are no sewers to carry off the sewage of the houses erected and in course of erection in the said new street, or of the houses adjoining Quarry-lane, and there is no provision for lighting it. In wet weather Quarry-lane is almost impassable, and it is frequently in a foundering condition and dangerous to persons using it, either by night or by day, with horses and carts, or on foot. The average width of Quarry-lane throughout the 677 yards is about 16ft., and for several yards opposite the respondent's land the width is about 12ft. (inclusive of the rough footway referred to, which is 3ft. in width). At other points in the street where the respondent's land does not adjoin Quarry-lane its width is from 14ft. 6in. to 16ft. It was admitted that the estimated expenses stated in the provisional apportionment were not excessive. In support of the respondent's objection it was contended that, inasmuch as it was not part of the plan of the appellants' proposed works that Quarry-lane should be widened opposite any part of the respondent's land, but that the works should be executed whilst retaining Quarry-lane at its present width, the proposed works would be insufficient and unreasonable, having regard to the requirements of vehicular traffic as existing at the present time as well as the probable requirements of such traffic in future, and that the insufficiency and unreasonableness meant by the statute had reference to the probable requirements of future vehicular traffic as well as, in addition to, the requirements of present vehicular traffic. For the appellants it was contended that the justices could not find that the proposed works were insufficient and unreasonable within the meaning of section 7 of the Act on the ground only that they considered that the street ought to be widened before any works were done, and that the insufficiency and unreasonableness meant by the statute must be in respect of the nature and character of the proposed works, having regard to the present condition of the street and the traffic over it. The

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

Justices were of opinion that the proposed works were insufficient and unreasonable on the ground that the existing width of the highway (that is to say, 9ft. roadway and 3ft. footway) at the point before mentioned was insufficient for a highway, and that such works or any part thereof ought not to be done unless and until the street was made wider, and they therefore, having visited and viewed Quarry-lane at such point, ordered and adjudged that the works were insufficient and unreasonable on the ground that such proposed works involved the retention of the present width of the street without enlargement. The question for the Court was whether the justices could find on the grounds above stated that the proposed works were insufficient and unreasonable within the meaning of section 7 (d) of the Act.

Mr. Appleton appeared for the appellants; and Mr. John Chester for the respondent.

The Court allowed the appeal.

Mr. Justice WILLS said the question arising was one of some difficulty; but he had come to a tolerably clear conclusion, notwithstanding the apparent difficulty of the language of the Act. The Act provided that where a street was not in a state satisfactory to the local authority, they might resolve that certain works should be done, comprehending such works as had been ordered in the present case. After that the surveyor was to prepare plans and specifications, &c., and then the local authority were to pass a resolution approving the plans, &c., prepared by the surveyor with or without modification. Then, after that, opportunity was to be given to the persons affected by the proposals to object, and the objections were to be heard before a Court of summary jurisdiction. The objections that could be made were specified in section 7. Certain of the objections—two of them beyond all doubt—went to the root of the whole scheme, because, if they were valid in fact, they went to establish a state of things in which the local authority had no jurisdiction to pass the resolutions. That was much as it was under section 150 of the Public Health Act, 1875. Under that section the local authority might pass resolutions, execute works, and apportion expenses. But if it turned out that the alleged street was not a street, the whole foundation of the proceedings failed, and the person proceeded against escaped. The Act of 1892 preserved objections of this class, and provided for objections of other kinds. Then the Act gave the justices power, where an objection succeeded, to quash "the resolution." Looking at the whole scheme of the legislation, and more particularly at the fact that under section 7 there was a large class of objections relating to the plans and matters of that kind, he thought it impossible to doubt that the jurisdiction of the magistrates was to quash the resolution approving the plans. That was just as effectual in the case of a place which was not a street as if the original resolution were quashed. In the present case the Court was specially concerned with the objection, under clause (d) of the section, "that the proposed works are insufficient or unreasonable." At first sight that objection to proposed works might appear to be an objection of the same class as the objection that the place was not a street, going to the root of the whole scheme. But the language of the clause was capable of another construction—namely, as referring to the works as specified in the plans and sections. He thought this was the true construction of the clause; and that the Act was not intended to interfere with the jurisdiction of the local authority to adopt the scheme as a whole, in the sense of determining when the work was to be done, but merely to give the justices power to consider the sufficiency and reasonableness of the way in which the work was proposed to be done. The first ground of the

objection was the insufficiency of the works. In his opinion the expression "insufficient" in the clause pointed exclusively to a comparison between the thing ordered to be done and the means of effecting it. It did not mean insufficient having regard to some matter which might make a better scheme for the neighbourhood in general. The other ground of the objection was the unreasonableness of the works. "Unreasonable" was a much wider word. It did give power to the justices to consider whether or not the thing proposed to be done was as a whole a reasonable thing to be done. That followed from "Sheffield Corporation v. Anderson" (64 L.J., M.C., 44), where it was held under a local Act similar to the Act of 1892 that the justices had power to say that under the circumstances a sewer was not required for a street. He thought there was no reason to quarrel with that construction of the Act. And if the magistrates had found in this case that the works ought not to be done at all, that is to say that the works were not required, and had held that the scheme was unreasonable on that ground they would have had jurisdiction to disapprove of it and quash the resolution approving the plans. But, upon a careful consideration of what was said in the special case, it was plain to his Lordship's mind that the magistrates had not decided anything of that kind. He thought the magistrates had thought it would be a very good thing to have the street made wider, and that they would put the screw on the corporation and get the street widened by withholding their approval of the scheme. It was clear from their deciding that the work was insufficient that they were thinking of the insufficiency of the general scheme for the good of the public; a matter they had no power to consider. And it appeared that they found that the work was unreasonable because they thought that the corporation ought to add to their scheme a widening of the street. He thought the magistrates had applied the wrong principle in dealing with the case, and that there was no ground to suppose that, if they had applied the right principle, they would not have dismissed the objection. The magistrates' order must therefore be quashed and the appeal allowed.

Mr. Justice KENNEDY delivered judgment to the like effect.

[Solicitors—Torr, Gribble, Oddie, and Sinclair, for J. Harrop White, Mansfield, for the appellants; J. and R. Gole, for Pashley, Rotherham, for the respondents.]

Q.B.Div. (Ridley and }
Channell, JJ.) }

1898.
May 19.

RE AN ARBITRATION BETWEEN THE LLANWONNO SCHOOL BOARD AND THE YSTRADYFODWG SCHOOL BOARD.*

Local Government—Transfer from one parish to another—Adjustment of property and liabilities—Transfer of schools—Cost of building—Arbitration—Local Government Act, 1894, sec. 68.

This was a special case stated by an arbitrator pursuant to section 19 of the Arbitration Act, 1889, in an arbitration between these School Boards under section 68 of the Local Government Act, 1894, with regard to the adjustment of the expenses of building such schools, and with regard to the compensation, if any, to be paid by the Ystradyfodwg School Board to the Llanwonno School Board in respect of the transfer of certain property—viz., the school and premises formerly belonging to the Llanwonno Board from the

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Llanwonno Board to the said Ystradyfodwg School Board.

Mr. B. Francis-Williams, Q.C., and Mr. S. T. Evans, M.P., appeared for the Llanwonno School Board; Hon. A. Lyttelton (Mr. Cripps, Q.C., with him) for the Ystradyfodwg School Board.

By an order of the county council of Glamorgan made on June 14, 1894, confirmed, with certain modifications, by a confirming order of the Local Government Board made on November 21, 1894, a part of the parish of Llanwonno was transferred to the parish of Ystradyfodwg. In that part there were certain schools called Porth Schools, which up to that time had been vested in the Llanwonno School Board, and by virtue of that order became vested in the other School Board. In 1888 and the subsequent years the school had been increased. The costs of this work had been paid out of revenue, with the aid of an increased rate on the whole parish of Llanwonno, before the date of the order of transference. The claim by the Llanwonno School Board was for a proportionate part of the cost of the said additions and alterations. The question for the Court was whether there was anything for the arbitrator to consider. The Local Government Board order contained the following provisions:—

“II. From and after the day when any part of any existing parish ceases, in pursuance of the order, to be within the district of the School Board of such existing parish, the powers, duties, and liabilities of such School Board in respect of such part of the existing parish shall cease and determine, and all buildings, with their fittings, being the property of such School Board and situate within such part of the parish, shall be transferred to and shall vest in the School Board of the parish in which such part is included by the order, and all contracts, liabilities, and engagements attaching to or incurred by the School Board of the existing parish in respect of such buildings, or exclusively in respect of the said part of the existing parish, shall vest in and attach to and be enjoyed and discharged by the School Board of the parish to which the said part of the existing parish is transferred.”

By paragraph 13 of the order it was provided that any question “with regard to the interests” of the School Boards in the schools should be dealt with in an adjustment under section 68 of the Local Government Act, 1894.

Mr. FRANCIS WILLIAMS contended that the arbitrators ought to allow the Llanwonno School Board something for their outlay on the school. If the money had been raised by a loan charged on the school it was admitted that payment must be made for it. The question was whether Clause 11 of the order gave the other School Board the buildings without paying for them. The contention for the other side was apparently this—there was no liability, therefore nothing to arbitrate on.

Mr. LYTTELTON said this was an administrative arrangement. If the money was to be paid, to whom could it be paid? The constituent bodies who had contributed towards the school were altered. It was not alleged that Llanwonno had incurred any expense by reason of the transfer. The fact that ten years ago the School Board had spent money on enlarging the school out of the income did not now give them a claim. There was nothing on which to arbitrate.

Mr. JUSTICE RIDLEY said the scheme was contained in paragraphs 11 and 13 of the order. But the order must not be read apart from the Act. If the words were read in the sense argued for on behalf of the authority of the district to which the school was now added that authority would get the school without making any payment for the increased size. The Local Government Board had power to make an order to that

effect, if they chose, under section 59 (4) of the Local Government Act, 1888. But in this case he did not think they had done so, for in paragraph 13 it was contemplated that there was something to be adjusted—namely, the “interests” of the School Boards. It was enough to say in this case that there was something for the arbitrator to adjust. The learned Judge referred to the 68th section of the Local Government Act of 1894, and said that this matter came within the words of that section. He would not lay down any principle for the arbitrator, but it sufficed to say that there was something for him to adjust.

Mr. JUSTICE CHANNELL concurred. The ratepayers of the whole parish were joint owners of the school originally and joint debtors in respect of liabilities. When the boundaries were altered something had to be arranged as to who should take the buildings. The Act of Parliament provided in such a case for an adjustment. It might be made in the order or by agreement between the boards, or, thirdly, if it had not been done otherwise, by arbitration. The question here was, Had such adjustment been made in the order? If it had, nothing remained for the arbitrators to decide. If not, then there was a question for the arbitrators. Did the scheme here mean simply that the liabilities of having to keep up the school cast upon the School Board of Ystradyfodwg were to be set off against the possession of the building, or did it merely settle that of the two parties that parish was to have possession? It was not likely that the liabilities should balance equally with the benefits of possession. He did not think that the order was meant to adjust the interests. How could any question about the interests of the School Boards arise under section 13 if they had been already adjusted by section 11 of the order? There was therefore something for the arbitrator to deal with and the matter must go to him.

[Solicitors—Hooper, for Walter Morgan, Bruce, and Co., Pontypridd; Wrenthmore and Son, for Spickett and Sons, Pontypridd.]

Q.B. Div. (Ridley)
and Channell, JJ. }

1898.
May 19.

DAVIS V. WITNEY URBAN DISTRICT COUNCIL.*

Local Government—Purchase of lands—Notice by local authority to landowner under sec. 16 of Public Health Act, 1875—Appointment of arbitrators—Notice of abandonment of scheme by local authority—Public Health Act, 1875, sec. 308—Compensation.

This was an action on an award, certain questions of the defence and reply in which had been set down for argument, by an order made by a Master in Chambers under Order XXV., r. 2.

Mr. A. T. Lawrence, Q.C. (Mr. A. J. David with him), appeared for the plaintiff; Mr. F. Low appeared for the defendants.

The claim was for £269 11s. 10d., of which the particulars were as follows:—Damages for compensation under award, £10; arbitrators' fees, £38 11s.; plaintiff's solicitors' costs under clause 3 of award, £81 15s. 10d.; plaintiff's costs of witnesses and other disbursements under clause 3 of award, £139 5s.—total, £269 11s. 10d. It appeared that the Witney District Council on April 22, 1897, had given the plaintiff notice under section 16 of the Public Health Act that they proposed to make a sewer through certain lands of hers. They had, however, not carried out the proposal. On

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

September 30, 1897, the plaintiff gave notice to the defendants that she claimed £300 for compensation for injury and damage to be sustained by her by reason of the said intended construction and extension of a sewer through the said lands and that she required an arbitration; she also gave notice that she had appointed her arbitrator. On October 13, 1897, the defendants appointed their arbitrator. One meeting was held and then on November 27 the defendants rescinded all resolutions whereby the carrying of a sewer through the said lands of the plaintiff was, or purported to be, authorized. The defendants forthwith gave notice to the plaintiff of such rescission. The arbitrators made their award on December 8, 1897, directing the council to pay the plaintiff £10 in discharge of all her claims for damages or compensation and £39 11s. for the arbitrators' costs, and also to pay the costs of the plaintiff as between solicitor and client. The defendants alleged in their defence that the award was bad, for that, while purporting to be an award under the provision of the Public Health Act, 1875, as to arbitration, it purports to award to the plaintiff compensation in respect of matters which are not subjects of compensation under the said Act—viz., in respect of acts, matters, and things intended to be done but not in fact done by the defendants. The submission to arbitration left to the arbitrators the question of "the amount of the compensation due for the damage or injury the said E. Davis would sustain by the execution of certain works by the Urban District Council of Witney."

Mr. LAWRENCE said there were no authorities on the exact point raised. A notice to treat for land was equivalent to an agreement to purchase an easement. The Crown could give a notice to take lands and might withdraw it, but the Crown alone could do so. See "*Steele v. Mayor of Liverpool*" (14 W.R., 311). Notice under section 16 and section 32 was not quite the same as a notice to treat, but if to give the notice was an essential exercise of the power, the power was exercised. The authority would have no power to give the notice unless they were clothed with it by the Act. The land was bound by the notice and the plaintiff could do nothing with the land so long as the notice remained. "*Ex parte Edwards*" (L.R., 12 Eq., 389). It would be bad policy to allow people after receiving such notice to alter the position of the land.

Mr. Low said the point was whether section 308 of the Public Health Act referred to the exercise of the power in the construction of the sewer. The question referred to the arbitrators was what damages would be effected by the construction of the sewer. The authority had offered to pay the plaintiff's costs when they rescinded their resolution. This sort of notice was not a notice to treat. If it had been intended to make it so it would have been quite easy to say so. In section 175 of the Public Health Act, 1875, certain provisions of the Land Clause Act were incorporated but not those as to notice to treat. The action could not be supported. The submission referred the question of damages caused by the execution of the works, nothing else.

In the result,

The COURT disagreed.

MR. JUSTICE RIDLEY thought that the submission did not contain anything more than a reference of the damage or injury which would be caused by the execution of the works. That did not include damage caused by land being tied up by a notice. The assessment of damage could be made before the injury was incurred, though the person could not recover the amount assessed till the injury had been sustained. Here no damage had been incurred by execution of works. After the first meeting of the arbitrators notice was given that the works would not be executed. The arbitrators were wrong in awarding the £10 for a matter which was not

referred to them. As to the competence of the arbitrators to deal with the costs, it seemed to him that they had in law no such power, and therefore, in his view, there must be judgment for the defendants.

MR. JUSTICE CHANNELL differed upon the question whether the arbitrators had power to deal with the costs. He thought they had. They were properly appointed and the arbitration properly begun. He did not think that under the circumstances he would have given costs as between solicitor and client, but as they had, in his view, jurisdiction, the Court could not interfere. However, as he was the junior Judge his judgment would be withdrawn.

[Solicitors—Crowders and Vizard, for Westell and Sons, for the defendant; Dale, Newman, and Hood, for Challoner and Son, Abingdon.]

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.JJ.) } May 20.

WRIGHT V. LONG.*

Undue Influence—Confidential adviser—Sale to
—Fiduciary relation—Assignment set aside.

This was an appeal from a decision of Mr. Justice Gorell Barnes, reported in *The Times* of February 5. The real object of the action was to set aside an indenture dated February 27, 1896, purporting to be an assignment by the plaintiff to the defendant of certain leasehold premises in Wardour-street. The plaintiff was a dealer in antique furniture carrying on business at 142 and 144, Wardour-street. In 1895, being in financial difficulties, he applied to the defendant, who was a friend of his, for assistance, and in June, 1895, the defendant advanced him two sums of £120 upon the security of two bills of exchange and of a deposit of the lease of the plaintiff's business premises. On January 4, 1896, after the defendant had commenced an action to enforce one of the bills, the plaintiff signed the following document, which was addressed to the defendant:—

" 'Long v. Wright.'"

"Dear Sir,—Without prejudice to your rights and in consideration of your staying proceedings in this action, I hereby sell and deliver possession to you of all my goods, chattels, fixtures, and effects now in or upon the shop and upstairs and warehouses and premises at 142 and 144, Wardour-street, W., and also all those that I have an interest in at the same premises jointly with Mr. Evelyn Wright, at the price of one hundred and twenty-four pounds fifteen shillings and sixpence, the amount of debt and costs in that action. If the goods be not delivered over to you, you are to be at liberty to at once proceed with the action."

"Yours truly,

"FREDERICK WRIGHT."

The value of the goods was stated to be over £3,000. The plaintiff, who was a man of intemperate habits, alleged that he was completely intoxicated at the time when he signed this document, and that on subsequently inquiring what it meant the defendant informed him that the signing of the document was merely a matter of form and that he, the defendant, was acting as a friend to the plaintiff and required the document to protect the plaintiff from a creditor of his (the plaintiff's) named Harris, a bill discounter. The defendant also, according to the plaintiff's account, advised him to stay away for a time from his business, which was being carried on at a loss, and offered to manage it for him in the meantime and to preserve the property from Harris. On his return to the business,

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

in March, 1896, the plaintiff discovered that the defendant had removed a great part of the furniture to the sale-rooms of Messrs. Foster and Co., Pall-mall, where it had been sold for £433 4s. 7d., which was paid to the defendant. The defendant's account of the document of January 4 was that the plaintiff thoroughly understood that it was drawn up in his (the plaintiff's) interest and that the goods therein mentioned were to be sent to Messrs. Foster's sale-room to be sold by auction to meet his most pressing creditors, but that this arrangement fell through because the plaintiff had selected goods of insufficient value; and the defendant further alleged that he had never made any claim to the goods under this document. On February 18, 1896, the plaintiff signed a document under which the defendant had an option to purchase the lease of the Wardour-street premises for £700, and on February 27 the plaintiff signed a further document purporting to be an absolute assignment of the premises for that sum. The value of the lease was stated to be about £2,000. The plaintiff alleged that he was again intoxicated when he signed these documents, and that he executed the assignment on the faith of the representation by the defendant that the price of £700 was fixed for the purpose of being shown to Harris, and that on March 28, when the accounts between the plaintiff and defendant were to be finally settled, the defendant would pay him £1,800 for the lease. However, when the settling day came, the defendant refused to make any further payment. Thereupon the plaintiff commenced these proceedings to set aside the transaction. In his statement of claim the plaintiff rested his case mainly on the ground that on each occasion the defendant had plied him with liquor until he became so intoxicated that he was unfit to transact business; but he further alleged that he had acted throughout in reliance entirely on the advice of the defendant and without any independent advice and was completely under the influence and control of the defendant, who took an unfair advantage of his position. Mr. Justice Gorell Barnes held that the plaintiff had failed to make out his case and dismissed the action with costs. The plaintiff appealed.

Mr. Candy, Q.C., and Mr. Christopher James were for the plaintiff; and Mr. Vernon Smith, Q.C., and Mr. Ashton Cross for the defendant.

The COURT allowed the appeal.

The MASTER of the ROLLS thought that the plaintiff was entitled to succeed on his alternative case—viz., that the defendant occupied such a position towards the plaintiff that he ought not to take any unfair advantage of him. It was not a case in which the maxim *caveat emptor* applied, but it was a dealing by one person with another who was more or less in his power. The plaintiff had grossly exaggerated his case, and his Lordship did not propose to differ from the view taken by the learned Judge of the credibility of the witnesses. But, looking at all the facts, and especially at the correspondence, it appeared that the plaintiff was a person who was as often drunk as sober, a person who was muddled with drink and who required protection, and that the parties were not dealing with each other as business men, but that the defendant had been acting towards the plaintiff as a friend and had been helping him out of his difficulties. It was obvious that the plaintiff was in want of money, and he signed documents which purported to give the defendant absolute control over his goods by making it appear that they had been sold to him. Those documents were not intended to be operative according to their tenor and were only important as showing the extent to which the plaintiff trusted the defendant. They were documents which a man would be a fool to sign unless he trusted completely to his friend's honour. The plaintiff's case was that the

assignment of the lease was also a paper transaction as between him and the defendant. Having regard to the relations existing between the parties, and to the fact that this assignment was at a very large undervalue, his Lordship thought that the plaintiff was entitled to succeed, although he succeeded less by the strength of his own case than by the weakness of the defendant's. The appeal would therefore be allowed and the assignment set aside.

LORD JUSTICE RIGBY concurred. In his opinion it was sufficient to determine this case in the plaintiff's favour that the defendant had taken upon himself the office of adviser and manager of the plaintiff's affairs and had entered into this bargain without the plaintiff having any independent advice. The defendant stood in such a position towards the plaintiff that the onus of upholding the transaction was upon him.

LORD JUSTICE COLLINS also concurred. He thought that the learned Judge had gone wrong from treating this case from the common law point of view without reference to the fiduciary relation existing between the parties, and had decided it on the question whether the drunkenness of the plaintiff was such as to incapacitate him from understanding the nature of the transaction. But in the opinion of the Lord Justice the drunkenness was important to the issue only as emphasizing and confirming the view that the defendant had taken upon himself the relation of friend and adviser to the plaintiff.

[Solicitors—Churchill; Lydall.]

Q.B. Div. (Wills and }
Kennedy, J.J.) }

1898.
May 20.

GEORGE V. GOLDSMITHS', &C., INSURANCE ASSOCIATION.*
Insurance—Policy against burglary and house-breaking—Loss, whether within policy—Construction.

This case arose out of a dispute as to whether the Goldsmiths' and General Burglary Association were liable to Mr. George, under a policy of insurance against burglary and house-breaking, in respect of a loss sustained by him in the circumstances stated below. The dispute was referred to the arbitration of Mr. Justice Channell while he was at the Bar, and now came before the Court on his award, which was stated in the form of a special case. The facts were shortly as follows:—At all material times Mr. George carried on business as a jeweller in London at a shop at the corner of the Strand and Salisbury-street. In 1891 he insured the goods at his shop with the Goldsmiths' Association against burglary and house-breaking. The policy recited that Mr. George desired to effect an insurance against loss by burglary or house-breaking as thereafter defined, and, in its operative part, insured him against loss "by theft following upon actual forcible and violent entry upon the premises." The loss in respect of which the proceedings arose occurred at about half-past 8 of the morning of March 12, 1897. On that morning Mr. George's porter left the door of the shop unlocked, though closed, while he took down the shop shutters, and while he removed the shutters to the place where they were kept. While he was momentarily absent putting away the shutters some person or persons entered the shop by opening the door, wrenched a padlock off an inner door of the shop front, and stole jewelry from the shop front to the value of upwards of £800. The present proceedings were taken to recover from the Goldsmiths' Association the value of the jewelry so stolen.

Mr. JOSEPH WALTON, Q.C., and Mr. A. T. LAWRENCE, Q.C., appeared for Mr. George, who was in the position of

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

plaintiff. They argued that the policy was essentially a policy of insurance against burglary and house-breaking, and that the words in the policy referring to a forcible and violent entry must be understood as referring to an entry involving a forcible breaking into the premises in the technical sense in which a breaking has to be forcible in order to constitute house-breaking or burglary, and not to an entry violent in the popular sense; and they referred to Hale's "Pleas of the Crown," p. 551; "Foster's Crown Cases," p. 108; "Russell on Crimes" (sixth edition), vol. 2, pp. 6, 7.

Mr. BUCKNILL, Q.C., and Mr. ATTENBOROUGH appeared for the Goldsmiths' Association, and argued that, though the persons who stole the goods might have been guilty of house-breaking in the technical sense, that did not bring the loss within the policy, since there had been no violence in the ordinary sense used in entering the premises. They referred to "Stanley v. Western Insurance Company" (L.R., 3 Ex., 71), "Rex v. Paine" (7 C. and P., 13).

The COURT gave judgment in favour of Mr. George.

MR. JUSTICE WILLS said the case was by no means an easy case. He had, however, come to the conclusion that the association were liable on the policy. The policy was, broadly speaking, a policy against burglary and house-breaking. It contained a recital that the assured was desirous of being insured "against loss by burglary or house-breaking as hereinafter defined." It would be convenient to start a consideration of the meaning of the definition in the policy by stating what would have been an appropriate definition of burglary or house-breaking if those expressions had been left to their natural meaning. The proper description of burglary or house-breaking—disregarding the distinction between them, which merely depended on the hour at which the offence was committed—was feloniously breaking and entering a building or house, or whatever it might be, for the purpose of committing a felony. The policy dropped all allusion to breaking as a term by itself, though breaking was an absolutely essential part of the offence; and substituted for breaking and entering, "actual forcible and violent entry," and it also substituted a reference to theft following upon such an entry for a reference to entry for the purpose of committing a felony. Some qualifications of the ordinary definition were, no doubt, meant by the use of these substituted expressions. The first alteration was the substitution for breaking and entering, which might be constructive, of "actual" forcible and violent entry. That got rid of constructive breaking. But did it mean anything different from actual breaking and entering? The word "forcible" added nothing; for the conception of a forcible entry must enter into any definition of burglary or house-breaking. In old indictments the entry was always stated to have been made with force and arms. Therefore, if the definition in the policy had been forcible entry followed by theft, it would have been very much like the ordinary definition of burglary or house-breaking except that "followed by theft" would be substituted for "with intent to commit a felony." Did the use of the word "violent" make any difference? His Lordship did not think it did. Etymologically the word meant *vi*, by force; and in dictionaries the first synonym to be found for violent was by force or forcible. There were, moreover, cases which the policy must obviously have been intended to cover, in which, nevertheless, the force used would be so trivial that they would be excluded from the policy, if the word violent were read in its popular sense. Take the case of a dwelling-house entered by pushing aside a catch and lifting a window, which might be effected without anything approaching the popular conception of violence. Could it be supposed that the policy would not apply to such a case as that? Another

instance would be the opening of premises by means of a skeleton key which would take no more force than opening a door in the ordinary way. Such illustrations were valuable as showing that violent could not be read in its popular sense. He thought the policy contained a somewhat inartificial description of burglary or house-breaking with some qualifications; and that the qualifications he had pointed out were sufficient to explain why the parties to the policy had inserted this definition instead of leaving the words burglary and house-breaking to take care of themselves. He desired to add that he must not be taken as having implied that an ordinary case of shoplifting would come within the policy, even if the thief himself opened the door. That would have to be considered when the case arose. There was clearly a substantial distinction, though it was difficult to express it in words, between a case of shoplifting and what took place in this case.

MR. JUSTICE KENNEDY delivered judgment to the same effect.

[Solicitors—Stanley J. Attenborough, for Mr. George; Attenborough and Son, for the Association.]

Q.B. Div. (Ridley and)
Channell, J.J.)

1898.
May 20.

THE MAYOR OF BURY ST. EDMUNDS V. WEST SUFFOLK COUNTY COUNCIL.*

Local Government — Bridges — Expenses of —
Quarter-sessions borough — Liability — Local
Government Act, 1888, sec. 35.

This was a special case raising a question as to the liability of a quarter-sessions borough with a population of over 10,000 to contribute towards the costs of county bridges which had become county bridges since the passing of the Local Government Act, 1888.

Mr. William Graham appeared for the Borough of Bury St. Edmunds; Mr. Wills for the West Suffolk County Council.

The matter came before the Court on an order that a special case in the terms of the endorsement on the writ of summons in the action brought by the Corporation of Bury St. Edmunds should be stated for the decision of the Court. The writ, so far as is material, was endorsed thus:—"The plaintiff's claim is for a declaration that the plaintiffs are not liable to contribute rateably to the cost of erecting, maintaining, or repairing new county bridges." From the case it appeared that Bury St. Edmunds is a quarter-sessions borough with a separate commission of the peace and a population, according to the census of 1881, of 10,000 and upwards. There are bridges in the borough which it is bound to maintain. At the date of the passing of the Local Government Act, 1888, there were certain bridges in the county of West Suffolk which the defendants, the West Suffolk County Council, were legally bound to repair—namely, certain county bridges towards the repairs of which the plaintiffs have not been called on to contribute. Since the passing of the Act of 1888 certain other bridges in West Suffolk have become county bridges. Of these Glemsford Fernhill bridge was erected by that parish, and was taken over as a county bridge by the defendants under section 22 of the Highways and Locomotives (Amendment) Act, 1878. All the other new bridges except one were purchased, taken over, or erected by the defendants under the powers conferred upon them by section 6 of the Local Government Act, 1888. There are practically no main roads in the county of West Suffolk, and what few there are

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

do not cross any of the bridges above referred to. The sums paid by the defendants in respect of these bridges have been charged by the defendants in their county accounts as general expenses; and the plaintiffs have been assessed, according to their county rate basis, and have thereby contributed £137 13s. as their rateable proportion of the £1,570 4s. 4d. expended. The plaintiffs contend that the payments should have been charged to special and not to general expenses, so that they might be exempted from contributing. The following sections of (51 and 52 Vic., c. 41) the Local Government Act, 1888, are material:—Section 6.—“The county council shall have power to purchase or take over on terms to be agreed on existing bridges not being at present county bridges, and to erect new bridges and to maintain, repair, and improve any bridges so purchased, taken over, or erected.” Section 35.—“In the case of a quarter-sessions borough . . . containing . . . a population of 10,000 or upwards the following provisions shall . . . apply. (2) Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorized to incur costs the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose.”

Mr. GRAHAM said the question was as to the liability to contribute by a quarter-sessions borough with a population of over 10,000 persons to bridges made county bridges recently. This was a claim mainly for a declaration that they were not liable, but also to recover from the county council the money paid in respect of these bridges. But he had to admit, on the authority of the case “*Thetford v. Norfolk County Council*” ([1898] 1 Q. B., 141), that he could not claim in respect of any payment made over six months ago. As to special and general expenses, section 68 of the Local Government Act, 1888, defined them; any expense not levied over all the county was a special expense. Under section 6 of the Local Government Act, 1888, the county council might take over bridges. He admitted that, in respect of any county bridge existing as a county bridge when the Act came into force, the borough had not been charged. The principle that the county repaired county bridges and boroughs repaired borough bridges was the old law. It was preserved by section 35 (1) of the Local Government Act, 1888, and it applied as well to bridges made county bridges since the Act as to old county bridges.

Mr. WILLS contended that the contributions had been rightly enforced. There were three classes of boroughs—(1) a county borough, which had to repair all bridges within the ambit of the borough; (2) the smaller quarter-sessions boroughs, in which all the bridges were county bridges; (3) the intermediate quarter-sessions boroughs with a population of over 10,000. For any bridge that became a county bridge after the Act of 1888 the boroughs of the third class ought to contribute. Such boroughs were liable to be rated for this purpose as part of the county unless they brought themselves within the exemption of section 35 (2). Erecting or taking over these new county bridges was not a purpose for which the quarter-sessions could have incurred costs. The power was entirely new. This borough was well represented on the county council, therefore no injustice would be inflicted.

Mr. GRAHAM referred to section 35 (6) as showing that if his contention was right the borough members could not vote on the question of county bridges.

Mr. WILLS said that this was a circular argument, and did not carry the matter further.

The COURT decided in favour of the borough.

Mr. JUSTICE RIDLEY said the matter was clear. The question arose on the construction of section 35 of the Local Government Act, 1888 (51 and 52 Vic., c. 41). The policy of the Act was that a borough of this description should keep up its own bridges at its own expense, and where it was not liable before should continue not to be liable to be rated for the county bridges. Now, the maintaining and repairing of county bridges had always been a purpose for which the county quarter sessions could incur expense. Boroughs of this sort were therefore *prima facie* exempt. As a consideration for allowing them to continue exempt it was provided that they were to maintain their own bridges. The learned Judge referred to section 119 of the Municipal Corporations Act, 1882. The object of the legislation in section 35 of the Local Government Act was to divide the liabilities according to the purpose for which the expense was incurred. The purpose here was one for which the quarter sessions might have incurred costs. Under section 22 of the Highways and Locomotives (Amendment) Act the county authority was authorized to contribute half the cost of erecting a new bridge. That was only half. It was true that section 6 of the Local Government Act of 1888 allowed the county council to erect bridges wholly at their own expense. That, however, did not prevent one from saying that this was a purpose for which the quarter sessions were authorized to incur costs, and therefore that these boroughs were exempt from contributing to such purpose.

Mr. JUSTICE CHANNELL delivered a judgment to the like effect. The whole matter turned on the word “purpose” in section 35 (2) of the Act of 1888. It was a very general word and must be so interpreted. His Lordship then read the section. The policy of the Act was to leave the boroughs exempt when they were exempt before. Speaking generally, when the boroughs had to pay for their own bridges they did not pay for the county bridges. The provisions of section 6 of the Act of 1888 merely gave an enlarged power to the county council of incurring costs in respect of a purpose for which the quarter sessions had power to incur costs. The plaintiffs were entitled to the declaration sought. As to the claim for the return of the money, it did not appear that any of the payments had been made within six months. They could not, therefore, be recovered.

[Solicitors—Edgar Robins and Clark, for C. E. Salmon, Bury St. Edmunds, for the borough; White, Borrett, and Co., for A. Townshend Cobbold, Ipswich, for the County Council.]

Q.B. Div. (Ridley and }
Channell, JJ.) }

1898.
May 20.

RE AN ARBITRATION BETWEEN THE GUARDIANS OF THE ROCHDALE UNION AND THE GUARDIANS OF THE HASLINGDEN UNION.*

Local Government—Transfer of an area to different union—Adjustment of property and liabilities—Local Government Act, 1894, sec. 68.

This was a special case stated in pursuance of section 7 of the Arbitration Act, 1889, and the question at issue was as to whether any adjustment was rendered necessary by reason of the transfer of an area in one union to another union.

Mr. D. Brynmor Jones, Q.C., and Mr. A. Glen appeared for the Rochdale Union, which desired that there should be an arbitration and an adjustment in

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

respect of the financial relations between the unions altered by the transfer of a valuable area; Mr. C. A. Russell, Q.C., and Mr. Macmorran, Q.C., appeared for the Haslingden Union.

The facts were as follows. The township of Spotland was one of the townships comprised in the Rochdale Union on the formation of that union on January 21, 1837, and the township of Newchurch was one of the townships comprised in the Haslingden Union on the formation of that union on December 20, 1836. By an order of the county council of the county of Lancaster dated June 28, 1894, a certain portion of the said township of Spotland, being the portion included in the borough of Bacup, was, in pursuance of the Local Government Act, 1888, and the Local Government Act, 1894, as from December 28, 1894, amalgamated with a certain portion of the said township of Newchurch, which formed the remainder of the said borough of Bacup, so as to form one township or parish for Poor Law purposes coincident in area with such borough by the name of the township of Bacup. By an order of the joint committee duly appointed by the said county council and the councils of the county boroughs of Bury, Manchester, Oldham, and Rochdale, dated June 28, 1894, the portion of the new township of Bacup, which formerly formed part of the township of Spotland, was, in pursuance of the said Acts as from December 28, 1894, detached from the Rochdale Union, and the whole of the township of Bacup was included in and became part of Haslingden Union, and it was provided that section 68 of the Local Government Act, 1894, should apply for the purposes of any adjustment which might be required in consequence of the provisions of such order, subject to the proviso that the arbitrator in any adjustment between the Haslingden and Rochdale Unions should have regard to the large amount of workhouse accommodation then provided by the Rochdale Union and to all other special circumstances of such last-mentioned union. The said two several orders "A" and "B" were duly confirmed by the Local Government Board by two confirming orders, each dated November 21, 1894, which came into operation on December 28, 1894. The guardians of the Rochdale Union gave notice that by reason of the detachment of the part of the township of Bacup from their union a serious loss had been occasioned to them, and they demanded an adjustment by arbitration. At the arbitration the Rochdale guardians contended that the following matters ought to be taken into consideration in making the adjustment—namely, (a) The amount of the outstanding loans charged upon the common fund of the Rochdale Union; (b) the exceptional number of paupers requiring relief in the Rochdale Union by reason of (1) the density of population, (2) the situation of the town of Rochdale; (c) the comparative absence of pauperism from the said transferred portion of the township of Spotland; (d) the large amount of workhouse accommodation provided by the Rochdale Union; (e) the unsuitability and unfitness of a great part of the Rochdale Workhouse for the purposes for which it was provided; (f) the loss of all contribution from the said transferred portion of the township of Spotland towards the expenses of the guardians of the Rochdale Union; (g) the increase in the rates leviable in the remainder of the Rochdale Union by reason of such transfer. On behalf of the guardians of the Haslingden Union it was contended that none of the said matters were matters in respect of which the arbitrator had power to award an adjustment as between the guardians of the Haslingden Union and the guardians of the Rochdale Union. The arbitrator was of an opinion that none of the said matters relied upon on behalf of the Rochdale guardians were matters for adjustment between the said

parties under the said Acts, and he accordingly declined to receive any evidence on the part of the Rochdale guardians in relation thereto, and awarded and determined that no adjustment was required for the purposes of the above-mentioned acts and orders between the said parties, and that each party should pay their own costs of this arbitration.

Mr. BRYNMOR JONES said this was a question between two adjacent unions. The matter in dispute was whether there could be any claim in consequence of part of the area of Rochdale Union being transferred. Bacup had extended into two unions. The county council had taken away a bit from one of them so as to round off the boundary. The workhouse remains in Rochdale. The orders doing this were made under the Local Government Acts, 1888 and 1894. He contended that there should be an adjustment. There was a loan charged on the common fund. Since the transfer the precept for raising money to pay it was only directed to the overseer of that part of Spotland which was in the union. On the other side it was said it could not be imposed on the Haslingden Union; also that it was not a matter for adjustment between the parties before the Court. He contended also that rates were "income." A considerable part of the paying area had been transferred.

Mr. RUSSELL, for the Haslingden Union, said the cardinal question to consider was whether the right parties were before the arbitrator. The Rochdale Union said there was a matter requiring adjustment, but it had never been held that loss of rates was such a matter, and the subject-matters mentioned in the section 64 of the Act of 1894 were exhaustive. The case depended on the following provisions:—Section 68 (1) of the Local Government Act, 1894 (56 and 57 Vict., c. 73)—"When any adjustment is required for the purpose of this Act, or of any order . . . under this Act, then if the adjustment is not otherwise made the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses so far as affected by this Act, or such scheme, order, or thing of the parties to the agreement." (2) "The agreement may provide for the transfer or retention of any property, debts, or liabilities with or without any conditions for the joint use of any property and for payment by either party to the agreement in respect of property, debts, and liabilities so transferred or retained, or of such joint use." (3) "In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act, 1889, . . . and his (the arbitrator's) award may provide for any matter for which an agreement might have provided." (4) "Any sum required to be paid by any authority for the purpose of adjustment may be paid as part of the general expenses of exercising their duties under the Act, . . . and if it is a capital sum the payment thereof shall be a purpose for which the authority may borrow under the Acts relating to such authority."

Mr. MACMORRAN, on the same side, dealing with the question whether the transfer of rateable value was a case of adjustment, contended that adjustment did not mean compensation. The income dealt with in the sections could not include the rates. It meant income derived from property. If adjustment meant compensation it might be unjust in a very few years.

The Court held that an adjustment was necessary. It was not necessary to go into details to assist the arbitrator as to methods of adjustment; but it might be laid down that clearly the loan required adjustment, also the workhouse, which was property. Equally would it require adjustment if it was nothing but a burden. As to the headings *b*, *c*, *f*, and *g* in the Rochdale

claim, they, if they stood alone, would probably not require adjustment. But they might be taken into consideration when adjusting the other matters.

[Solicitors—Bower, Cotton, and Bower, for Leach, for Rochdale Union; Robbins, Billing, and Co., for T. H. Townsend, Rawtenstall, for Haslingden Union.]

Q.B. Div. } 1898.
(Day, J.) } May 20.

BROGGI V. ROBINS.*

Landlord and Tenant—Weekly tenancy—Defective condition of premises—Neglect to repair—Personal injuries—Liability of landlord.

This was an action for personal injuries due, as alleged, to the defendants' negligence. The defence denied liability.

Mr. ABINGER, in opening the case, said that the plaintiff, Dina Broggi, was the infant child of Davide Broggi. In 1895 Davide Broggi took two rooms at 33, Dean-street, Soho, from the defendants, Messrs. Robins, Snell, and Gore, on a weekly tenancy at 8s. 6d. per week. The defendants agreed to do all necessary repairs. In September, 1896, a part of the fireplace fell on one of Broggi's children and injured his leg. After that Broggi called the attention of defendants' collector to the condition of the floor and asked to have it repaired. It was not repaired, and on February 13, 1897, the plaintiff, a child of five years old, was sitting in a chair in front of the fire when a plank of the floor gave way and she was thrown into the fire. The child upset in her fall a saucepan of boiling soup, by which she was scalded and disfigured for life.

There was a conflict of evidence as to the agreement to repair and also as to the alleged request to repair the floor.

Mr. MARSHALL HALL, for the defence, contended that there was no contract to repair, and also that defendants had no notice that the floor was in need of repair. Further, there was no contract between the plaintiff and the defendants, and no duty on the part of the defendants to the plaintiff. ("Lane v. Cox" [1897], 1 Q.B., 415.)

Mr. ABINGER, in reply.—The cause of action arises *ex delicto*, not *ex contractu*. Where a person is under an obligation which he fails to fulfil, any one injured by that failure can sue. ("Heaven v. Pender," 11 Q.B.D., 503.) The landlords must have contemplated that the room would be used by the tenant's children, and that brings the case within "Miller v. Hancock" ([1893] 2 Q.B., 177). In "Lane v. Cox" there were no covenants, either express or implied, to repair.

Mr. JUSTICE DAY said that, in his opinion, the action was maintainable. Even if there was no express agreement to repair, the tenants, having regard to the usual practice in houses of that class, had a right to expect reasonable repairs to be done. The previous accident showed that the place was in a miserable condition. Credible evidence was given that the collector's attention had been called to the fact that the floor needed repair. Upon the grounds that there was a usage to do necessary repairs and that those repairs had been neglected after due notice the defendants must be held liable.

Judgment for the plaintiff for £100. Stay pending appeal. Costs to abide the event of the appeal.

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.JJ.) } May 23.

ATTENBOROUGH V. JAY.*

Trade Name—Similarity of name of trader—Injunction refused.

Decision of North, J. (*ante*, p. 365), affirmed.

This was an appeal by the plaintiffs from a decision of Mr. Justice North, reported *ante*, p. 365. The plaintiffs were six persons named Attenborough, who were all stated to have some relationship with one Robert Attenborough, who came to London about a century ago and established a pawnbroking business. The plaintiffs have among them nine establishments in London, where they severally carry on the businesses of silversmiths, jewellers, and pawnbrokers. They are not connected in business, except that they severally trade under names the principal feature of which is Attenborough. It was stated that except the establishments of the defendants, and one business carried on under a style containing the phrase "late Attenborough" and another carried on under a style containing the phrase "successor to Attenborough," there is no similar business carried on in London under a style of which the name "Attenborough" is part. The defendants have two shops, Nos. 142 and 144, Oxford-street, communicating with one another. No. 144 is apparently a silversmith's shop, with the word "Jay's" on the fascia. No. 142 has, and for many years has had, the name "Attenborough" on the fascia. Adam and Eve-court is by the side of the premises, and up the court are two entrances to the premises, one admitting to an ordinary pawnshop, where pledges for sums not exceeding £10, and therefore within the Pawnbrokers Act, 1872, are taken; the other entrance admits to an office, where pledges of larger amount, outside the Act, are taken. This latter business is known as contract business in the trade. The door of the contract office has for years borne the name Attenborough, but over the pawnbroking door, in accordance with statute, the name of the actual licensee, till recently "James Jay," has been placed. Some 40 years ago one Richard Attenborough established a business of silversmith, jeweller, and pawnbroker at what is now 142, Oxford-street. He died in the latter part of 1886. In April, 1887, the late James Jay bought at auction the remainder of the lease of the premises, which had been put up for sale by the executors of Richard Attenborough, and, under options given to the purchaser of the lease as a condition of the sale, James Jay also bought the pledge contracts of the testator and the stock-in-trade on the premises. He carried on a business similar to the business of Richard Attenborough down to his own death in 1896, with the addition that he took the adjoining shop, No. 144, in 1891. He bequeathed the benefit of his shops and business to five persons. These persons associated with themselves two other persons, intended to act as managers, and took steps to form themselves into a limited company under the name, as finally determined, of "Jay, Richard Attenborough, and Co. (Limited)." The plaintiffs brought this action against the seven signatories to the memorandum of association. They claimed, *inter alia*, an injunction to restrain the defendants from proceeding with registration of a company under the name "Jay, Richard Attenborough, and Co. (Limited)," or any other name of which "Attenborough" formed part. Mr. Justice North came to the conclusion that there was no ground for interfering by injunction.

*Reported by H. O. BUCKLE, Esq., Barrister-at-Law.

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Mr. HENRY TERRELL, Q.C., and Mr. W. M. CANN argued in support of the appeal.

Mr. Cozens-Hardy, Q.C., and Mr. Thomas Douglas appeared for the respondents.

Their LORDSHIPS, without calling upon the respondents' counsel to argue, affirmed the decision of Mr. Justice North and dismissed the appeal, with costs.

The MASTER of the RULES, in giving judgment, said that he was not surprised at the plaintiffs being annoyed at what was being done by the defendants. "Attenborough" was no doubt an extremely valuable name in connexion with the business of pawnbroking. His Lordship then reviewed the facts at great length and continued:—It is said that the goodwill of the business did not pass when James Jay bought from the executors of Richard Attenborough; but so far as the vendors were concerned he got what they had to dispose of. The defendants—namely, the persons who took under the will of Richard Attenborough and others—were carrying on the business that the testator had acquired by purchase. It was said that the defendants had no right to carry on the trade of pawnbroking under the name of Attenborough, and that if they did their business would be mistaken for that of the plaintiffs, and the plaintiffs asked the Court to restrain by injunction. To establish their case the plaintiffs must prove that any business carried on under the style of Richard Attenborough would be mistaken for theirs. The plaintiffs, however, had failed entirely in proving that which was essential to success. The decision of Mr. Justice North was right, and the appeal must be dismissed, with costs.

LORD JUSTICE RIGBY delivered judgment to the like effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Stanley J. Attenborough; Cuthbert Curtis.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.J.) } May 23.

WHEELER V. FRADD.*

Practice — Costs — Taxation — Two counsel on appeal—Discretion of Taxing Master.

The Court refused to overrule the exercise of discretion by the Taxing Master (affirmed by the Judge at Chambers), who refused to allow the costs of two counsel on an appeal.

This was an appeal by the defendant from an order of Mr. Justice Darling at Chambers refusing to review the taxation of costs. The Taxing Master refused to allow the costs of more than one counsel upon an appeal. The action was brought to recover £1,000 paid to the defendant upon the terms of a letter in connexion with the promotion of a company. At the trial judgment was given for the defendant, and this judgment was affirmed by the Court of Appeal (reported *ante*, p. 302). At the trial the plaintiff was represented by Mr. Witt, Q.C., and Mr. J. Corner; and the defendant by Mr. Boxall. Upon the appeal Mr. Dickens, Q.C., appeared with Mr. Boxall for the defendant. Upon the taxation of costs the Master refused to allow the costs of Mr. Dickens, Q.C., giving as his reason for doing so that the case turned simply upon the construction of a letter, and that it was unnecessary to employ two counsel. The Judge refused to interfere with the Master's decision.

Mr. BOXALL, for the defendant, contended that two counsel ought to have been allowed. The question as to the number of counsel to be allowed on taxation was one with which the Court would always deal. The

case was a very important one for the defendant, and he was entitled to have two counsel on the appeal, the plaintiff being represented by two counsel.

Mr. J. CORNER, for the plaintiff, said that at the trial the defendant was represented by only one counsel, and why should he have more than one counsel on the appeal? The Master and the Judge had exercised their discretion in the case, and this Court would not interfere.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that this was an attempt to appeal against two exercises of discretion—one by the Master and the other by the Judge at Chambers. The question was whether two counsel should be allowed on the appeal. He did not put his decision upon the ground upon which the Master put his decision—namely, that the case turned simply on the construction of a letter. He put his decision upon the ground that the Master and the Judge had both exercised their discretion in this case, and he could not say that they had exercised it wrongly, and therefore this Court could not interfere.

LORD JUSTICE CHITTY concurred. If the Taxing Master and the Judge had acted upon some supposed rule, and were wrong in doing so, he would interfere. But this was a matter of mere discretion in the circumstances of this case.

LORD JUSTICE VAUGHAN WILLIAMS agreed.

[Solicitors—Bennett and Co., for the plaintiff; A. Puleston, for the defendant.]

Q.B. Div. (Lord Russell of Kill- } 1898.
owen, C.J., and Ridley, J.) } May 23.

RUNDLE V. HEARLE.*

Highway—Repair—Liability *ratione tenuræ*—
Footpath across field—Dedication.

There may, in law, be a dedication to the public of a footpath across a field without placing upon any one the obligation to repair it.

The occupier of the field occasionally doing repairs to the footpath for his own benefit does not necessarily show a liability to repair *ratione tenuræ*.

A footpath crossed a field in the occupation of the defendant, at one point in which there was a stone stile with stone steps. The plaintiff, in crossing the stile, fell and injured himself, owing to the stile having got out of repair. There was evidence that some of the defendant's predecessors had done small repairs to the path and stile.

Held, that this was not sufficient evidence of liability to repair *ratione tenuræ*, and that the defendant was not liable.

Quære, whether an action in respect of an injury caused by non-repair will lie against a person liable *ratione tenuræ* to repair.

The Lord Chief Justice delivered the judgment of the Court in this case this morning, allowing the appeal. The facts appear sufficiently in the judgment.

Mr. D. M. Kerly (Mr. Duke with him) was counsel for the appellant; and Mr. MacLeod was for the respondent.

The LORD CHIEF JUSTICE read the following judgment:—This is an appeal by the defendant from the judgment of his Honour Judge Granger. The plaintiff sued the defendant under these circumstances. The

defendant is the yearly tenant of a farm through which is a public pathway. At one point in its course is a stone stile with stone steps, some of which have been worn away by time and user. In crossing it the plaintiff slipped from one of these steps, fell, and broke his leg. He thereupon sued the defendant for damages, alleging that he was liable *ratione tenuræ* to repair the stile and that he had suffered by its want of repair. The learned County Court Judge took this view and awarded him damages. It appears that the plaintiff was aged 67 years and that as far back as 1891 he had had a "seizure." He was described by his medical attendant, who was called by him, as being, when the accident happened, in a decrepit state, and as never having had the complete use of his legs since the "seizure." He added he did not think it was safe for him to cross the stile in question and that it was a difficult stile. The learned County Court Judge, however, who heard the witnesses, has not thought it proper to find contributory negligence, and we do not dwell further on this point, and we proceed to consider the ground on which he did act. If it were necessary to consider and determine the point whether an action will lie at the instance of a private person against one liable *ratione tenuræ* to repair we should desire to hear further argument upon it. There is, so far as we are aware, no record of any such case in the books, although the circumstances giving rise to such an action must have been of frequent occurrence. Baron Martin expressed considerable doubt upon the point in the case of "Young v. Davis" (7 H. and N. 760, at p. 773 [1862]). (His Lordship quoted the passage from the learned Baron's judgment.) We do not, however, decide this case on the view taken by this learned Judge, for we are of opinion that there was in this case no sufficient evidence to warrant the learned County Court Judge in coming to the conclusion that the defendant was under the obligation to repair *ratione tenuræ*. There was the usual conflict as to the past and existing state of the stile and what had been done to it in the way of repairs. One of the plaintiff's witnesses stated that the stile was at the time of the accident in the same state it was in 40 years ago, and the defendant and his witnesses denied that the defendant had in fact repaired the stile. We must, however, assume that the learned County Court Judge gave effect to the other evidence on the part of the plaintiff and proceed to examine it. There was no evidence that the parish had ever repaired or had ever required the defendant or any prior occupier to repair, but there was evidence that the defendant's predecessor in possession, who was, however, proved also to be the owner, had done repairs to the path and stile. Another witness stated that previous occupiers had repaired, and finally a man formerly in the defendant's employment stated that he had done some repairs. In no case do the repairs seem to have been considerable. The fact that a person has done repairs to a way may certainly be some evidence of such liability. For instance, in "Reg. v. Blake-more" (2 Denison's Cr. C., 410), where the defendant was so held liable, the evidence was that his predecessor had been convicted of not repairing the high road in question in the year 1801, and had subsequently done repairs to it; and in "Reg. v. Barker" (25 Q.B.D., 213) the defendant and his predecessors had repaired the high road, for the non-repair of which he was indicted, from time immemorial, and on that evidence was found liable. But in each of those cases the road was a road for carriages and horses, which is a widely different thing from a foot-path through fields and over stiles. The one requires repairs on a system, and at certain intervals, from the nature of the user, while the other does not; and on the contrary may never, except on isolated occasions,

receive any repairs at all. Such a path may be dedicated subject to the right of ploughing ("Mercer v. Woodgate," L.R., 5 Q.B., 26), although the plough would for the time destroy all traces of the path, and after the plough has passed, the path is in common experience trodden out afresh by passers by, not made by repair or of hard material, for that would be inconsistent with the passage of the plough at the next season. So it may be that in dedicating to the public such a pathway through his fields the farmer may do so without any obligation to repair resting on himself or on anybody. It is a path on which people may pass if they choose to do so, but they must pass along it as they find it, and must take it (to use the words of Cockburn, C.J., in the case just quoted) subject to any condition which the owner imposes. Mr. Justice Blackburn, in the same case, said, "If this right is inconsistent with a grant of a right of way to the public, then there was no dedication at all, and the present owner has a right to step up the pathway altogether and so prevent the parish from repairing the path in such a way as to interfere with his ploughing." As the user for which the path is dedicated does not necessitate repairs, we see no objection in law to a dedication of the path without placing on any one the obligation to do them. In the present instance the evidence on which the learned County Court Judge has acted is very slight, considering that the path is an immemorial one, and is quite consistent with such small repairs as were done, that they were done by the occupier for his own benefit. They were done on his own land. It is not as if they had been done outside his own land, or as if he had done the repairs under threat of legal proceedings or had admitted that in doing them he was discharging a legal obligation. We think that the case is like "Hudson v. Tabor" (1 Q.B.D., 225; 2 Q.B.D., 290; 45 L.J., Q.B., 190; and 46 L.J., Q.B., 463). There an action was brought for not maintaining a seawall on the defendant's land, where it adjoined that of the plaintiff, whereby the plaintiff's land became flooded. And it was shown, in order to prove the liability of the defendant, that he and his predecessors had from time immemorial repaired the wall where his land fronted the sea. The jury found for the plaintiff, but the Court of Queen's Bench and the Court of Appeal held that there was no evidence of liability, and Lord Coleridge, C.J., in giving judgment, said, "The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not, *per se*, although a man's neighbour may in fact benefit by such repair, impose on a man the duty of continuing such repair for his neighbour's benefit, when he ceases to care to do it for his own." So here the acts relied on were at the least ambiguous, and we think constitute no sufficient evidence of liability—see also *per Baron Hullock*, in "Rex v. Allanson" (Lewin's Crown Cases, 158 [1828]). In the words of the learned Baron, "An adjoining occupier occasionally doing repairs for his own convenience to go and come is no more like that sort of repair which makes a man liable *ratione tenuræ* than the repair by an individual of a road close to his door is to the repair of the road outside his gate." We, therefore, think the defendant entitled to judgment. The appeal must be allowed.

Q.B. Div. (Lord Russell of Killowen, C.J.) } 1898.
May 23.
BARNES AND ANOTHER V. GLENTON, LEWIS, AND SAUNDERS.*

Limitations, Statute of—Mortgagor and Mortgagee—Mortgage by trustees—Retirement of

one trustee—Payment of interest by co-trustees—Mercantile Law Amendment Act, 1856 (19 and 20 Vict., c. 97), s. 14—Real Property Limitation Act, 1874 (37 and 38 Vict., c. 57), s. 8.

The defendants, who were entitled as trustees of a testator to certain mortgage securities, executed an assignment of those securities to the plaintiffs to secure an advance. Shortly afterwards, but more than 12 years before the present action was brought, one of the defendants retired from the trust. The remaining trustees continued to pay interest on the mortgage debt. In an action against the defendants, including the trustee who had retired from the trust, to recover the mortgage debt,

Held, that, though there was no express covenant by the defendants to repay the principal money, upon the facts of the case the transaction was one of loan from the plaintiffs to the defendants, accompanied by the security of the transferred mortgages, and that therefore the defendants undertook a personal liability.

Held further, that the money advanced by the plaintiffs was charged upon and payable out of land within the meaning of s. 8 of the Real Property Limitation Act, 1874, and that therefore the payment of interest by the co-trustees prevented the Statute of Limitations from running as regards the trustee who had retired; and that in such a case s. 14 of the Mercantile Law Amendment Act, 1856, did not apply.

The learned Judge gave judgment in this case this morning. It was an action brought to recover money lent and interest thereon due under a deed of September 9, 1882, and made between a Mrs. Barber and the parties to this action. All the material facts appear in his Lordship's judgment. The case was tried before the Lord Chief Justice without a jury, and was argued on February 16 and on April 23, when judgment was reserved.

Mr. Dickens, Q.C., and Mr. H. F. Manisty were for the plaintiffs; Mr. C. A. Russell, Q.C., and Mr. Rufus Isaacs for the defendant Angelo John Lewis; Mr. Johnstone Edwards and Mr. Alfred Roscoe for Mrs. Glenton.

The LORD CHIEF JUSTICE read the following judgment:—The claim of the plaintiffs as endorsed on the writ is "for money lent due under a deed dated September 9, 1882." The defendants were the trustees of the will of Lewis Glenton, who died in 1873, the defendant Maria Glenton, widow of the testator, being a beneficiary under that will. The material facts are these:—One Fairless Barber had acted as solicitor for the testator and for the defendants as trustees, and certain mortgages for sums amounting to £3,095 15s. 5d. had been transferred to Barber as trustee for Lewis Glenton. Fairless Barber died in 1881, and such mortgages thereupon became vested in Maria Louisa Barber, his widow, who was devisee under and executrix of his will. At the time of Barber's decease the estate of Lewis Glenton was indebted to him in a considerable sum for services rendered by him as solicitor to Lewis Glenton and to the trustees and also for money advanced. The defendants as trustees of Lewis Glenton's estate, with the object of paying off the moneys so due to Fairless Barber's estate and for other purposes in connexion with their trust, entered

into negotiations with the plaintiffs for the advance of a sum of £1,650 upon the security of the mortgages before mentioned. The negotiations resulted in the plaintiffs agreeing to make the advance. The transaction was carried out thus:—By four deeds executed on September 9, 1882, Maria Barber assigned the mortgages in question to the plaintiffs. The only parties to these deeds were Maria Barber and the defendants. They contain no covenant for repayment by Maria Barber of the moneys advanced. Indeed, it was expressly agreed that she should come under no personal liability. On the same September 9, 1882, a deed or declaration of trust was afterwards executed to which Maria Barber, the defendants (not described as trustees), and the plaintiffs were parties. It recited the four transfers already referred to; that as to the principal moneys they belonged in equity as to part to Maria Barber and as to the balance to the defendants; that the plaintiffs had, at the request of the defendants, advanced to them £1,650, part of which had been applied in payment of a portion of the moneys secured by the transferred mortgages, which belonged to Maria Barber, and the balance paid to the defendants, and that it had been agreed that the repayments of such moneys and interest should be secured in the manner thereafter mentioned. The deed then provided (1) that the moneys advanced by the plaintiffs should be a first charge upon the transferred mortgage securities; (2) that the plaintiffs might either allow the moneys secured by the several mortgages to remain as invested or might call in and realize them, and as to any money received for interest should, after retaining interest on their advance, pay any balance to the defendants or the survivors or survivor or other the trustees for the time being of Lewis Glenton's will, but no step was to be taken against the mortgaged properties or the persons entitled to redeem without the consent in writing of the defendants or other the trustees of Lewis Glenton, but such consent was only to be refused in case the trustees within three months after application made to them paid off the claim of the plaintiffs. It is only necessary further to say that, subject to the claim of the plaintiffs, the mortgage securities were dealt with as the property of the defendants or other the trustees of Lewis Glenton. The deed contained no express covenant by the defendants to repay the plaintiffs their advance. Immediately after the execution of this deed the defendant Lewis retired from the position of trustee. Interest was paid from time to time up to March, 1896. After crediting the sum of £352 0s. 9d. received on account of principal, the sum of £1,363 15s. 7d. for principal and interest remained unpaid at the date of the writ—namely, April 12, 1897. In this state of facts two points were raised by the defendants. The first was that the plaintiffs had advanced the moneys solely on the security of the mortgages, and that there was no personal liability on any of the defendants to repay. The other point applied to the case of the defendant Lewis only. It was contended for him that the six years' limitation applied and was a defence; that the liability here, if any, was for a simple contract debt within the meaning of the statute of 21 James I., cap. 16, section 3, and as Lewis had had nothing to do with the trust since 1882 he was within the protection of the Mercantile Law Amendment Act (19 and 20 Vic., c. 97, section 14), and that therefore the payments made by his co-contractors or co-debtors, the other defendants, did not keep the debt alive as against him. I have now to determine these questions. As to the first, I have arrived at the conclusion, after a careful consideration of the correspondence and deeds, that it was intended the defendants should undertake, and that the defendants did undertake, a personal liability. The correspondence before

the advance was made was conducted by the firm of Barber and Oliver, solicitors, on the part of the plaintiffs. That correspondence beginning in May of 1882 treats the money as a loan, and speaks of the defendants as the borrowers. The correspondence after the advance was made has the same complexion, and indeed, when it turned out in 1897 that the mortgage security was inadequate and the present action was threatened, neither of the defendants Glenton nor Saunders suggested nonliability; and as regards the defendant Lewis, his only answer was that he had (as was the fact) ceased to act as a trustee since 1882. Further, there is the express stipulation that Maria Barber should be under no personal liability in respect of the advance, and an absence of the suggestion of any such stipulation on the part of the defendants. Lastly, the declaration of trust recites that the advances were made to the defendants by the plaintiffs at their request. In my judgment the conclusion properly to be drawn from the facts is that the transaction was a loan by the plaintiffs to the defendants accompanied by the security of the transferred mortgages, for which (unless there is any other defence) they are liable. It was insisted in argument that the defendants were trustees. At best this is only one of the facts to be considered in determining what is the proper inference to draw, and it is to be pointed out that the trustees received a portion of the money advanced and that all was applied for the purposes of the trust, and that Maria Glenton is one of the beneficiaries of that trust. As Maria Glenton and Saunders have no other defence there must be judgment against them. But a further contention was raised on behalf of the defendant Lewis, with which I must now deal. It was contended that the claim against him was within, and was barred by, 21 James I., cap. 16. The plaintiffs, on the other hand, argued that it was not within 21 James I., cap. 16, but that it was an action to recover a sum of money secured by or charged upon, or payable out of, land within the meaning of section 8 of the Real Property Limitation Act, 1874, and that the payments of interest to the plaintiffs by his former co-trustees from time to time kept the claim alive against him. It was admitted on his behalf that, if the plaintiffs' contention was correct, he could not claim the benefit of section 14 of the Mercantile Law Amendment Act, 1856 (see "*Re Frisby*," 43 Ch.D. 106, at p. 116). The question then is—Does the Real Property Limitation Act, 1874, govern this case? (His Lordship read section 8 of the Act.) In my opinion this section applies. By the deed now sued on the money advanced is made a first charge on all moneys recovered by virtue of the mortgages, and the plaintiffs have the power to foreclosure, subject only to the defendant's consent, which they could withhold only in the event of their preferring to pay off the debt. Therefore, having regard to the terms of this deed, I think this money was secured by mortgage and was charged upon and was payable out of land within the meaning of section 8. It was argued in *Frisby's* case that the section applies only to actions against a mortgagor, and Lord Justice Bowen appears to have held that view; but Lord Justice Cotton said he could find nothing in the section pointing at such a limitation. In my view, however, it is not necessary in this case to express an opinion on the point, for I think the transaction between these parties amounted at least to an equitable mortgage, and the defendants are practically in the position of mortgagors. Section 8 of the Act of 1874, therefore, applies to this case, and, if so, the defendant Lewis is not entitled to the benefit of section 14 of the Mercantile Law Amendment Act, 1856. It follows that the payments made by the co-trustees of Lewis are sufficient according to the decision in "*Re Frisby*" to keep the

claim alive against him. It was also contended on behalf of Lewis that if the two sections are read together, 21 James I., cap. 16, would govern all cases where there was a contract without specialty, and that section 8 of the Act of 1874 applied only where there was a specialty. It was argued that here there was no specialty contract, and therefore the case fell within 21 James I., cap. 16, and therefore Lewis was entitled to the benefit of the Mercantile Law Amendment Act, 1856. I do not agree with this contention. I think the effect of this section 8 is to take out of 21 James I., cap. 16, and for all purposes, all actions of debt secured by mortgage or otherwise charged upon or payable out of land. But, further, section 8 expressly included cases of security by lien which are not often effected by specialty contract. There must, therefore, also be judgment against the defendant Lewis, but as the question is important there will be in his case stay for an appeal if it is desired. It follows from what I have already said that there will also be judgment for the plaintiffs on the counter-claim.

Q.B. Div. (Wills and)
Kennedy, JJ.) }

1898.
May 23.

SMITH V. SHANN.*

Licensing Acts—Beerhouse licence—Transfer of licence—Refusal of licence at general annual licensing meeting—Wine and Beerhouse Act, 1869 (32 and 33 Vict. c. 27), ss. 8, 19.

Where at a transfer sessions the applicant applied for and obtained a transfer of a licence to sell beer to be consumed on or off the premises, notwithstanding the objection that the house had been a disorderly house,

Held, that the justices at the next general annual licensing meeting, upon the same objection being taken, had jurisdiction to refuse to grant a renewal of the licence, there being nothing upon which an estoppel could be founded.

This was a special case stated by justices on refusing to grant a renewal of a licence for the sale of beer to be consumed on or off the premises. It appeared that the applicant had applied to a sessions held for the purpose of transferring licences for a transfer to him of the licence then existing in respect of the house in question. Objection was taken that the house was a disorderly house, but notwithstanding the objection the justices granted the transfer. At the next general annual licensing meeting the applicant applied for a renewal of the licence, and, on the same objection being taken, the justices refused to grant a renewal. The applicant desired to appeal, on the ground that the justices were bound by their previous decision on the question whether the house was a disorderly house, and that, therefore, by virtue of sections 8 and 19 of the Wine and Beerhouse Act, 1869, they had no jurisdiction to refuse to grant a renewal, and this special case was stated for the purpose of raising that point.

Mr. C. A. Russell, Q.C., and Mr. Jordan, appeared for the appellant; Mr. Danckwerts for the respondents.

MR. JUSTICE WILLIS, in giving judgment, said there was nothing on which an estoppel could be founded in this case, and he had no doubt the justices were acting within their jurisdiction in refusing to renew this licence.

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

MR. JUSTICE KENNEDY concurred.
[Solicitors—Crowders and Vizard, for Hockin and Co., Manchester, for appellant; Wheatley and Co., for Cobbett, Manchester, for respondent.]

Prob., Divorce, and Adm. Div. (The Right Hon. the President, Sir Francis Jeune) } 1898.
May 23.

THE GEMMA.*

Admiralty—Arrest of ship—Bail—Agreement as to—Value of ship in her damaged condition and her "freight"—Meaning of.

This was a summons adjourned into Court to decide the amount of bail that ought to be given by the owners of the Gemma in a collision action.

MR. BUTLER ASPINALL, on behalf of the plaintiffs in the collision action, said that the claim against the Gemma amounted to about £7,000. The Gemma was only worth in her damaged condition £4,500, and her gross freight £374. After the collision the Gemma was arrested, and the defendants' solicitors then wrote to the plaintiffs' solicitors saying that if the Gemma was released they would give an undertaking to put in bail for a sum not exceeding the value of the Gemma in her damaged condition and her freight. On this undertaking the Gemma was released and proceeded on her voyage and earned her freight. The defendants now claimed to be entitled to deduct the expenses of earning the freight incurred since the arrest in estimating the amount of bail to be given. He contended that they were precluded from doing this by the terms of the letter by which they purchased the release of the ship.

DR. STUBBS, for the defendants, contended that the plaintiffs were not entitled to be placed in a better position than if they had arrested the cargo of the ship. In that event they could not have obtained bail for more than the amount of the freight then due.

THE PRESIDENT, in giving judgment said that this agreement to give bail was made by persons who knew what they were doing. In construing this agreement he could only construe the word "freight" in its ordinary sense as meaning the whole freight due under the charterparty, and the defendants must therefore give bail in accordance with that ruling.

[Solicitors—F. Cooper and Co.; Stokes and Stokes.]

Chan. Div. } 1898.
(Kekewich, J.) } May 24.

HEAD V. GOULD.†

Trustee—Breach of trust—Liability of retired trustees for acts of successors.

Trustees who retire from the trust and pass on the trust property to their successors are not liable for a breach of trust committed by their successors when the breach of trust is not the outcome of their retirement and the appointment of the new trustees, and was not contemplated by the retiring trustees at the time of such retirement and appointment.

This case raised a question of great interest and importance to trustees—namely, whether retiring trustees are responsible for a breach of trust com-

mitted by their successors whom they have appointed under a power vested in them for the purpose under the instrument of trust. The facts, so far as it is necessary to state them, were shortly as follows:—Two of the defendants in this action, Messrs. Houlditch and Clapp, were formerly trustees of the marriage settlement, made in 1865, of Mr. and Mrs. Head. Mrs. Head survived her husband, and in 1895, owing to Mrs. Head's importunities, those trustees applied £1,500, part of the trust funds, in paying off a mortgage debt of hers, taking a transfer of the security, being a mortgage of her life interest under the settlement, and of a policy on her life. The transaction was not one authorized by the trust. From time to time, Mrs. Head and her family being in difficulties, those trustees were pressed for further assistance out of the trust funds, and at length, in 1894, being apparently wearied out by these importunities, they retired from the trust, appointing by deed as trustees in their places a Mr. Gould, a solicitor's clerk, and Miss Head—who had just attained 21—a daughter of Mrs. Head. Shortly afterwards these two new trustees disposed of the rest of the trust property, consisting of a house at Seaton and some life policies, and handed the proceeds over to, or applied them for the benefit of, Mrs. Head. Last year this action was commenced by Mrs. Head's infant son against the old and new trustees and also Mrs. Head for the purpose of having the trust funds replaced. The only point of public interest was as to the liability of the old trustees for the breach of trust committed by the new. The defendant Mr. Gould did not appear, and his defence had been ordered to be struck out. At the conclusion of the arguments on the 11th inst. his Lordship reserved judgment, which he delivered this morning.

MR. P. O. LAWRENCE, Q.C., and Mr. Methold appeared for the plaintiff; Mr. Warrington, Q.C., and Mr. Rowden for the defendants Messrs. Houlditch and Clapp, and Mr. G. M. Gover for the defendant Miss Head.

MR. JUSTICE KEKEWICH, after stating the facts, proceeded:—This brings me to the large and important question whether Messrs. Houlditch and Clapp can be held responsible for the breach of trust committed by the present trustees in selling the house, surrendering the policies, and spending, it matters not how, the produce of the two transactions. To the parties concerned the question is both large and important. As regards those not concerned in the particular case the amount involved is immaterial, but the alleged liability of the former trustees is of vast importance, affecting as it does not only the two large classes to one or both of which most men belong, trustees or *cestuis que trustent*, but also all members of the legal profession, to whom the position and duties of trustees are a source of constant anxiety. The case made against Messrs. Houlditch and Clapp may be thus fairly stated:—You had exhausted all the trust property except this house at Seaton and the policies. You knew that this remaining property was barely sufficient to provide the plaintiff's portion, even assuming that the policies were maintained; and you further knew that the income derived from the house was not more than sufficient to maintain these policies. You were urgently pressed to make further advances to Mrs. and Miss Head, and you asserted with perfect truth that no further advances could properly be made—that is to say, could not be made at all without a breach of trust far more serious in fact and in its consequences than any that had yet been committed. In order to relieve yourselves and to indirectly assist Mrs. and Miss Head, you suggested, or, if you did not suggest, assented to, the appointment of new trustees who, you knew, would be more accommodating and contemplated, if they did not actually intend,

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

†Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

that which you had properly declined to do. I have no doubt that if this charge can be regarded as proved against Messrs. Houlditch and Clapp the responsibility insisted on must follow, and that they must be held liable to make good the loss to the trust occasioned by the breach of trust which they did not themselves commit. This doctrine, to the authorities in support of which I will presently refer, is based, according to a passage in Lewin on Trusts, p. 752, on agency, and the retiring trustee is treated as actually doing what he does not do in person, because his successor is treated as his agent for this purpose. This view is also taken by Vice-Chancellor Stuart in one of the cases to which I have to refer. Far be it from me to say that it is not a sound and satisfactory view; but I venture to think that a different and equally satisfactory explanation of the doctrine can be given. It is the duty of the trustees to protect the funds entrusted to their care, and to distribute those funds themselves or hand them over to their successors intact—that is, properly invested and without diminution, according to the terms of the mandate contained in the instrument of trust. This duty is imposed on them as long as they remain trustees, and must be their guide in every act done by them as trustees. In retiring from the trust and passing on the trust estate to their successors—and this whether they appoint those successors or merely assign the property to the nominees of those who have the power of appointment—they are acting as trustees, and it is equally incumbent on them, in this ultimate act of office, to fulfil the duty imposed on them as at any other time. If, therefore, they neglect that duty and part with the property without due regard to it, they remain liable, and will be held by the Court responsible, for the consequences properly traceable to that neglect. This explanation will, I think, be found consistent with all judicial utterances on the subject, and help to make them consistent with themselves. It is strange that so little authority should be forthcoming on a point of such importance, especially as no one presumes to cast doubt on the doctrine which may be regarded as an integral part of accepted legal lore. In former days, when students learned law and practice not only by reading books and attending lectures (means, of course, which cannot be safely neglected), but at least equally as much from the precept and example of a master and animated discussion in the pupil-room, doctrines such as this not calling for frequent practical application were passed from one generation to another and became ingrained in the minds of practitioners without being formulated in reported cases unless a precise question was raised between litigants in a concrete form. This possibly explains why, for a doctrine in substance undisputed, there is so little authority to be found. It is right that I should say a word on the few cases cited, which are admitted to be all that can be discovered in the books. His Lordship then referred to and commented on three cases—viz., “*Webster v. Le Hunt*” (8 W.R., 534; 9 W.R., 918), “*Palairot v. Carew*” (32 Beav., 564, 567-8), and “*Clark v. Hoskins*,” before Vice-Chancellor Stuart and the Lords Justices (36 L.J., N.S., Ch., 689; 37 L.J., N.S., Ch., 561). His Lordship then came to the conclusion that, in his belief, Messrs. Houlditch and Clapp did not contemplate any breach of trust at all; and his Lordship was convinced that they never contemplated that actually committed. With the judgment (his Lordship continued) of the Court of Appeal in “*Clark v. Hoskins*” before us, it is easy to understand the Master of the Rolls as meaning what he probably intended to express, that in order to make a retiring trustee liable for a breach of trust committed by his successor you

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must show, and show clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place. That is clearly the doctrine of “*Clark v. Hoskins*.” It will not suffice to prove that the former trustees rendered easy or even intended a breach of trust if it was not in fact committed. They must be proved to be guilty as accessories before the fact of the impropriety actually perpetrated. His Lordship accordingly held that the charge against Messrs. Houlditch and Clapp of responsibility for the acts of their successors fell to the ground, but he reserved their costs for further consideration after the result of inquiries and accounts directed under the judgment, which was in form one for the execution of the trusts of the settlement.

[Solicitors—Dangerfield, Blythe, and Hodgson; Gibbs, White, and Strong.]

Q.B. Div. (Wills and }
Kennedy, J.J.) }

1898.
May 24.

THE QUEEN V. FRY AND OTHERS, JUSTICES, AND
STOKER.*

Justices—Petty sessions—Conviction—Separate informations—Separate offences—Hearing of subsequent informations after adjournment of first—Validity of conviction.

The applicant was charged before justices upon three informations with three separate offences under the Licensing Acts. The justices, after hearing the first charge, were in favour of a conviction, but decided to adjourn their decision and the consideration of the amount of the penalty until after the other charges were heard. The second and third charges were then heard and dismissed. The justices then announced their decision upon the first charge, and convicted the applicant and imposed a penalty. Upon an application for a *certiorari* to bring up the conviction that it might be quashed, the justices made an affidavit setting out the above facts, and stating that in adjudicating on each case they applied to each the evidence given in reference to it, and none other.

Held, that in these circumstances, as the justices had decided to convict upon the first charge before hearing the others, the only question left unsettled being the amount of the penalty, the conviction was right.

This was an application to make absolute a rule *nisi* that had been granted for a writ of *certiorari* to bring up a conviction in order that it might be quashed. It appeared that one Masters, a licensed victualler, was charged on March 11, 1897, before the Right Hon. Sir Edward Fry and two other justices of the county of Somerset on three informations with three different offences against the licensing laws. The first information charged Masters with permitting drunkenness on his premises on February 7, 1898; the second charged him with selling intoxicating liquor during closing hours on February 8; and the third charged him with keeping his premises open after closing hours on February 8. The first information was heard first, and in an affidavit filed by them the justices said that, speaking to the

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

best of their recollection of what took place, they were unanimous in favour of convicting, but adjourned their decision and the consideration of what penalty should be inflicted till after the other informations were proceeded with. The second information was then heard and dismissed, whereupon the superintendent of police in charge of the third case informed the justices that the evidence he proposed to tender was the same as that already given in the second case, and that he could not expect to succeed in this case after the decision in the second case. The justices then reverted to the first case and announced their decision on it—namely, that they had decided to convict, and they imposed a fine of £5 and costs, and ordered a record of the conviction to be endorsed on the licence. The justices in the affidavit above mentioned which was filed by them said that in adjudicating on each case they applied to that case the evidence that was given in reference to it, and no other, and that the evidence given in the second case in no way influenced their decision or the amount of the fine imposed in the first case.

The case was argued on May 10, when Mr. Danckwerts appeared to show cause against the rule, and Mr. Eldon Banks and Mr. H. H. Gregory appeared in support of the rule. The Court took time to consider their judgment.

MR. JUSTICE WILLS now delivered the written judgment of the Court, discharging the rule, and upholding the conviction, as follows:—We are of opinion that this rule should be discharged. We should be very sorry to give any countenance to the notion that justices may mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. Such a course would be contrary to law, and, undoubtedly, as a general rule, it will be prudent and right for the justices to avoid any course which reasonably bears the aspect of such a mistake. If a *prima facie* case is made out that such an error has, or may have, been committed, it will in general lie upon the justices to show very clearly that it has not been committed. On the other hand, we should be equally sorry to throw any doubt upon the right of the justices in any case for reasons of justice arising out of the circumstances of the case itself and for its better determination to adjourn or to postpone their decision; and, if their discretion in this respect be honestly exercised, and not, directly or indirectly, with the view of throwing in facts or evidence which have no legitimate bearing on their decision, it must not be interfered with. In this instance we think the case put forward against the proceedings of the justices is completely answered. It is impossible, in considering the weight to be given to what the justices said and the effect to be given to what they did, to leave out of sight the fact that their chairman is a great lawyer of long judicial experience and as thoroughly capable of appreciating the impropriety involved in any mixing up the evidence in the several cases which were heard before the decision upon the first was pronounced, and of dealing with each case separately and upon its own merits, as we ourselves are. It is most unlikely that a bench of justices whose deliberations were guided by him should have been permitted to fall into such an impropriety of procedure as is suggested by the appellant. We entirely accept the statement that the justices were at the close of the evidence and speeches in the first case unanimously of opinion that there should be a conviction in that case; and we accept it none the less because, with that caution which we might expect from the chairman when speaking of matters which had happened some weeks earlier, they so state "to the best of their recollection." We entirely accept also their statement that they applied to the case the evidence that was given in reference to it

and none other. It may be added that in these cases the circumstances were such that it was singularly easy to keep the case in which they convicted apart from the other two, which related to a different date and involved different charges. The extent of the penalty to be awarded in the case in which they were unanimous as to conviction might not improperly be influenced by what might belearnt by the justices in the course of the two other cases. Indeed, Mr. Banks, the counsel for the appellant, admitted in the course of the argument before us that if the amount of the penalty was the only matter involved in the postponement of the judgment there was nothing illegitimate or improper in the proceeding. We cannot doubt that, inasmuch as the justices had made up their minds in the first case to convict, the only question then left unsettled was the amount of the penalty to be imposed, and that they forebore immediately upon the close of the first case to publish their decision as to conviction or acquittal only on account of the obvious inconvenience of splitting the publication into two parts. A case of "*Hamilton v. Walker*" was relied upon by the applicant for the *certiorari* as to which a word must be said. It is reported in four different reports—(61 *L.J.*, M. C., 134; *L.R.* [1892], 2 Q.B., 25; 8 *The Times L.R.*, 531; and 56 *J.P.*, 583.) Of these by far the most complete is that in 56 *J.P.*, 583, to which I therefore refer. In that case *Hamilton* was summoned before the justices on two summonses—first, for delivering to one Farrell a number of indecent advertisements to the intent that they should be delivered and exhibited to certain inhabitants, &c.; secondly, for that Farrell exhibited to certain inhabitants, &c., certain indecent advertisements, and that *Hamilton* aided, abetted, counselled, and procured Farrell to do so. The magistrates heard the first summons and were asked to dismiss it, but said that they would hear the second summons before doing so, and having heard it they convicted upon both. The Court held that neither conviction could be supported. Both Pollock, B., and Vaughan Williams, J., held that the first was bad because the statute (*Jervis's Act*) requires that each case shall be considered on its own merits and on the evidence given under that one information. As to the second conviction, Pollock, B., held that it was bad for the same reason as the first, and Vaughan Williams, J., upon a totally different ground—viz., that if the first case had been decided first, the defendant could have set up *autrefois convict* as an answer, and had been deprived of the opportunity of doing so. Pollock, B., however, said "I do not go so far as to say that the justices might not reserve their judgment after hearing the evidence (upon the first case)." Here there is nothing to show that the justices, in acting on each information, proceeded on the evidence applicable solely to that information. In the present case there is most explicit evidence, coming from a deponent whose assurance upon this point is most satisfactory and conclusive, that, in regard to the information now in question, the parties proceeded solely upon the evidence applicable to it; and it is clear that the ground of the decision in "*Hamilton v. Walker*," as stated in the judgments of both the learned Judges who formed the Divisional Court, does not exist in the present case, and its existence is negatived by the affidavit to which we have referred. The same observation applies to the judgment of Pollock, B., in respect of the second information before him. The reason given by Vaughan Williams, J., for holding the second conviction bad has no application whatever to the present case. There is therefore no conflict between our present decision and that given in "*Hamilton v. Walker*"; and

it becomes unnecessary for us to express any opinion as to whether we should assent to the reasons given by the members of the Divisional Court for the judgment given in that case. This rule must be discharged with costs.

[Solicitors—Bell, Brodrick, and Gray, for Hirst and Sandford, Bristol, for the applicant; Guscotte, Wadham, and Bradbury, for O'Donoghue and Anson, Bristol, for the respondent.]

Q. B. Div. (Ridley and } 1898.
Channell, JJ.) } May 24.

WHITE V. BRADFORD UNION.*

Rating—Rateable value—Tied publichouse.

In estimating the annual value for rating purposes of a tied publichouse, the rent which would be obtained from a tenant from year to year, including the brewers as possible competitors, but excluding the special price which the brewers would give owing to personal considerations apart from the value of the house and unfettered by any personal contract, must be considered.

This was a special case stated by the quarter sessions of the county of Wilts on an appeal against a rate on a publichouse, raising a question as to whether the possible competition of brewers as hypothetical tenants, who would relet the premises as "tied houses," should be taken into consideration in estimating the value.

Mr. Bucknill, Q.C., and the Hon. H. L. Lopes appeared for the appellant at quarter sessions; Mr. Foote, Q.C., Mr. Radcliffe, and Mr. T. H. Parr for the respondents at quarter sessions, who were the appellants in this Court.

The quarter sessions had held that in arriving at the value for rating purposes of the premises it was the hereditament, independently of and without reference to any personal contract with brewers, that had to be assessed—in fact, the free house, not excluding brewers as competitors, but treating them, like other tenants, as tenants of an hereditament unfettered by any personal contract. They put the rateable value at £35. The facts sufficiently appear from the judgment given this morning.

MR. JUSTICE RIDLEY said,—This was a case stated by the quarter sessions for the county of Wilts upon an appeal by the occupier of a publichouse in the parish of Bradford-on-Avon against the assessment of such house to the poor-rate. The assessment committee had assessed the house at £85 gross estimated rental and £70 net rateable value, but the quarter sessions reduced the assessment to £35 gross estimated rental and £28 net rateable value. It was not contended before us that the value put on the house by the assessment committee could be maintained, but it was contended that the gross estimated rental should be £45, and not £35. The point arose in the following way:—The house in January, 1897, was purchased by a firm of brewers for a large sum and by them let to the appellant as a tied house on a rental of £27 10s. per annum. It was not argued that this figure furnished the proper rental on which to base the rateable value, nor, since the decision of "*Sunderland-near-the-Sea v. Sunderland Poor Law Union*" (34 L.J., M.C., 121), was it possible to do so with success. The rental must be estimated according to the statute 6 and 7 Will. IV., c. 96, which statute requires it to be based on the corporeal hereditament, taking into account the mere permanent elements of value to be found therein, but without allowing for the effect of temporary contracts and other such accidents.

It is the rent at which the premises may reasonably be expected to let on a yearly tenancy, not that at which they may let when certain contracts of a personal nature affecting the rental are in existence between the landlord and tenant. The hypothetical tenant is to be a tenant supposed to take the hereditament as it stands and used as it is, so far as the nature of the premises goes—that is to say, as a publichouse, as ironworks, or dwelling-house, as the case may be; but, while that is true, the value of the hereditament is not to be affected by contracts or conditions not directly bearing on the occupation or use of the property, but of a personal and collateral character. Now in this present case the contention of the appellant is set out in paragraph 11 of the case as follows:—"The true test was the rent an ordinary tenant intending to occupy the premises from year to year as a 'free' house for the purpose of carrying on his own retail business as a publican would give, not what a brewer in competition with other brewers would give for the purpose of converting the premises into a tied house for the exclusive sale of his (the brewer's) beers, thereby increasing the profits of his own business." This appears to me to be correct according to the rules above stated. The "ordinary tenant intending to occupy the premises as a free house from year to year" is in the same position as the hypothetical tenant of the statute; he is willing to give the rent for the premises, not for the business carried on upon them. The rent so estimated is found by the case to be £30 to £35. What, on the other hand, was the contention of the respondents? It is set out in paragraph 12, and was that the net annual value of the premises was "their value to the owner, and not their value to the tenant in fact occupying the same, and that the premises should be assessed at the value at which they would let to a hypothetical tenant from year to year (all possible competitors who would be willing to take the premises from the owner being taken into account as possible hypothetical tenants), and that therefore the competition of brewers ought to be taken into consideration, although they did not in fact themselves intend to occupy the premises, and that the area of competition ought not to be restricted to such intending tenants as would themselves occupy the premises in question." This can hardly be understood without reference to the earlier paragraph, No. 10, from which it appears that if brewers were to be included as competitors, though they did not in fact occupy but only intended to convert the premises into a tied house, the rent would be high enough to support a gross estimated rental of from £40 to £45, and if such brewers were excluded and the area of competition was restricted to such tenants as would occupy the house as a free house the rent would only support a gross estimated rental of £30 to £35. But upon reading the two together it appears sufficiently clear that the respondents' contention, as against that urged by the appellant (and on which he relied to raise the rent from £30 to £35 to £40 to £45), was this—that not only the competition which would be due to the situation and character of the hereditament, but also the competition of brewers intending to use the premises as a "tied" house was to be taken into consideration. In so far as this contention introduces into the estimate an element not referable to the rateable hereditament itself, but to some personal or temporary contract under which the business is to be carried on upon it, I think it is clearly wrong. And from the findings in the case it is clear that it was by the introduction of such an element—that is, by the use of the house as a tied house—that the gross estimated rent of £40 to £45 was arrived at by the respondents. That is the only difference between the two contentions, and in my opinion the quarter sessions were right in holding that the hereditament only had to

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

be assessed, and that, although the competition of the brewers was not to be excluded in estimating the rent, they must be treated like other tenants from year to year of an hereditament unfettered by personal contract. The order should therefore be confirmed.

MR. JUSTICE CHANNELL delivered a judgment to the like effect. The difficulty of ascertaining the correct amount at which the publichouse should be rated arose from the fact that a firm of brewers recently purchased the house at a large sum and had let the house to a tenant as a "tied" house at a rent less than that which he would pay if it were not tied. It was clear that the sum so nominally paid as rent, but really as part of the terms of a somewhat complicated contract, was no test of the market value of the premises. Even the actual rent paid for a tenement where there were no such complications was only some evidence of the rateable value, and where there were such complications the sum called rent was not any evidence at all. The rating authority, therefore, had to assess this tenement without regard to the sum actually paid by way of rent and without reference to the sum actually paid by the brewer for the purchase of it. What they had to do was to find the annual market value in the way provided by the Parochial Assessment Act, 6 and 7 Wm. IV., c. 96. The contest between the parties was as to what effect, if any, ought to be given to the competition amongst brewers competing to get publichouses into their hands. The contention of the appellants at quarter sessions was that the true test of the net annual value was the rent that an ordinary tenant, intending to occupy the premises from year to year as a "free" house for the purpose of carrying on his own retail business as a publican, would give. That contention did not appear to be precisely correct. It was rather liable to be misunderstood, and could not be adopted in the terms in which it was stated, though, perhaps, there was no substantial inaccuracy in it. The Act said nothing about the hypothetical tenant occupying. The purpose for which a particular tenant wanted the premises might possibly induce him to pay more than the market value for them, but, unless that was the case, the purpose for which the tenant wanted the premises had nothing to do with the matter, except in this way that property was to be rated *rebus sic stantibus*—that was to say, that a publichouse was to be rated on the assumption that it continued a publichouse; and the question was not to be entered into as to whether a higher rent could be got for it by turning it into a bank or any other kind of business premises. To introduce the purposes for which the tenant was going to use the premises, and to consider whether that purpose was to carry on the trade himself or to underlet it to some one else to carry it on, was to introduce extraneous considerations such as those unsuccessfully put forward in "Dodds v. South Shields" ([1895] 2 Q.B., 133; 64 L.J., Q.B., 508). If, in fact, there were so many competitors, whether brewers or others, desiring to obtain possession of publichouses as to raise the value, that fact necessarily affected the sum which any tenant, whether brewer or not, might reasonably be expected to give. He would have to give that which the landlord would expect to get from others or he would not be taken as a tenant. Any circumstance which affected the annual value in the market must be considered in arriving at the gross estimated rental; and, therefore, the demand which existed for publichouses, whether by brewers or others, must be considered, for that demand directly affected the value. The contention of the appellants was, however, well founded to this extent—any sums paid by the tenant, not by reason of the value of the premises, but for reasons personal to himself, ought not to be taken into account. This followed from the Sunderland case (34 L.J., M.C., 135). Suppose

the owner of a publichouse received an offer from a brewer to take it as a tenant from year to year at a certain rent, the owner might say, "I know the house is worth more to you, and you must give me more." If the brewer gave the larger sum, that would be given for reasons personal to the brewer, and it had nothing to do with the market value of the premises, though the possibility of its being given might be a matter tending to raise the market value. Such a rent as that could not be treated as a rent which might reasonably be expected to be got for the premises, and could not be taken as the gross estimated rental. Again, if the owner of a publichouse had an offer from an ordinary tenant of a certain sum, the owner might say that he would not take that sum as there were brewers who would probably give more. If the man gave more, that would be evidence of an increase in the market value of the premises, and, where such a demand for houses by brewers existed as to make it probable that the landlord would get from any one a higher rent than that he would have if that demand of brewers did not exist, then that higher rent might be considered in assessing the rateable value. It was not right, therefore, that the competition of brewers should be wholly excluded from consideration, but the special prices which they might give owing to personal considerations and not on account of the value of the premises should be excluded, except so far as the possibility of such special prices being obtained raised the market value generally. Turning to the contention for the respondents set out in paragraph 12, that seemed correct, subject only to the doubt as to what was meant by the "competition of brewers being taken into consideration." If it meant that the question should be considered whether the brewers' competition had raised the market annual value, then it was right. If, however, it meant that the special values which the brewers might for reasons connected with their own business be willing to give were to be treated as the gross estimated rental of the premises because those sums might be got from brewers, then it was wrong. The decision of the quarter sessions was right in principle. They did not appear to have adopted that part of the appellants' contention which was erroneous. They had not "excluded brewers as competitors," as they were invited to do, but they had for some purpose considered the effects of that competition. Their order must be affirmed.

[Solicitors—Eyre, Dowling, and Co., for C. J. Jones; Berkeley-Calcott, Holloway, and Tudor, for Beaven and Compton, Bradford-on-Avon.]

Court of Appeal (Lindley, M.R.,) 1898.
 Rigby and Collins, L.J.J.) May 25.
 BAWTREE V. THE GREAT NORTH-WEST CENTRAL RAILWAY COMPANY AND OTHERS.*

Practice—Parties—"Necessary or proper party"
 O. XI., r. 1 (g)—Foreign company.

This was an appeal by the plaintiffs, Mr. F. P. Bawtree and others, from a decision of Mr. Justice North's dated May 18 last. The plaintiffs were holders of certain land grant mortgage bonds of the above-named company, a railway company, duly incorporated under the laws of the Dominion of Canada. They brought this action on behalf of themselves and all other holders of such bonds against the company and the Right Hon. Edrie Frederic, Baron Gifford, V.C., and Mr. Robert Lothian Curzon. They claimed (*inter alia*) a declaration that the plaintiffs and the other

holders of land grant mortgage bonds of the defendant company were entitled to the benefit of an indenture, dated June 2, 1890, and made between the defendant company of the one part and the defendants, Lord Gifford and Mr. Curzon, of the other part; and to a first charge on the defendant company's railway land grant, undertaking, and other assets; and to have such charge enforced by foreclosure or sale; and to have the trusts of the said indenture administered and carried into execution. The defendants, Lord Gifford and Mr. Curzon, were within the jurisdiction of the Court, and were duly served with the writ of summons in this action. The registered office of the defendant company was situated at the city of Toronto, in the Province of Ontario. The plaintiffs contended that the defendant company were necessary and proper parties to this action within the meaning of Order XI., Rule 1 (g), of the Rules of Court. That Order provides that "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever (g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." On March 21, 1898, an order was made by Mr. Justice North, sitting at Chambers, on the application of the plaintiffs, giving liberty to the plaintiffs to serve the concurrent writ of summons in this action on the defendant company in the Dominion of Canada. A motion was subsequently made to the learned Judge to discharge the order which he had then made, and asking that the service of the writ on the defendant company and all subsequent proceedings in this action against them might be set aside on the following grounds (*inter alia*):—That the railway, lands, &c., were not situated within the jurisdiction; that the defendant company were not domiciled within the jurisdiction and were not necessary or proper parties to this action. Upon reconsideration of the matter his Lordship was of opinion that he ought to discharge the order which he had previously made. The plaintiffs now appealed. It appeared that the question of the validity of the land grant mortgage bonds had been raised in the Canadian Courts and was still unsettled; and that very many persons were interested in the question what, if any, were the rights of those who claimed to be bondholders and who disputed on various grounds the title of the alleged bondholders.

Mr. Cozens-Hardy, Q.C., and Mr. Beddall were for the appellants; Mr. Everitt, Q.C., and Mr. Hadley were for the respondents.

Their LORDSHIPS reversed the decision of Mr. Justice North and allowed the appeal.

The MASTER of the ROLLS, in giving judgment, said that the case was of importance not only to persons who lent money in this country on debentures issued by colonial companies, but also to the colonial companies themselves. For if they issued debentures payable in London and protected the lenders by deeds here, and the lenders found that they could not get any redress here, it would be a very serious thing for the borrowers, as it would not be so easy to borrow money here as it was now. That was the general view of the matter. [His Lordship referred to the facts of the case and continued.] The plaintiffs said that they wanted to obtain a decree for the execution of the trusts of the indenture of June 2, 1890. The feature in the case was that the validity of the plaintiffs' charge was denied; their security was impeached. In a case of that description how could it be said that the company were not "necessary or proper parties" to the action? Not only were they "proper" parties, but, having regard to that view of the case, they were "necessary" parties. His Lordship could not, there-

fore, agree with the judgment appealed from. It was said that the power to make an order of this kind was discretionary, but his Lordship failed to see that Mr. Justice North's mind was addressed to the cardinal point of this case which impressed him (the Master of the Rolls) so much. If the plaintiffs' security was impeached the case could not get on unless the defendant company were made parties. That being so, the plaintiffs brought their action against them, and then applied for leave to serve the writ upon them. His Lordship thought that Mr. Justice North had failed to appreciate the importance of the denial of the plaintiffs' title, and that the appeal should consequently be allowed.

LORD JUSTICE RIGBY delivered judgment to the like effect.

LORD JUSTICE COLLINS concurred.

[Solicitors—Stevens, Bawtree, and Stevens; Gadsden and Treherne.]

Q.B. Div. (Wills and }
Channell, J.J.) }

1898.
May 25.

LOGSDON V. HOLLAND.*

Local Government—Infectious Diseases—
Common Lodging-houses Act, 1851, sec. 11—
Failure to give notice of infectious disease
Conviction of keeper of lodging-house.

This was a case stated by Mr. J. R. W. Bros, the metropolitan police magistrate, before whom the appellant was charged, on the information of the respondent, for that on October 16, 1897, he, being the registered keeper of a common lodging-house in London, did neglect to give immediate notice to the London County Council or some officer thereof of a person having been ill of fever or infectious or contagious disease in such common lodging-house, contrary to section 11 of the Common Lodging-houses Act, 1851. The facts were shortly as follows. The respondent was the registered keeper of a common lodging-house situate at Nos. 14 and 16, Middle-row, St. Luke's, and one Patrick Breen acted as his deputy at the common lodging-house and had the care and management thereof. On October 14 a son of Patrick Breen was taken ill at the common lodging-house and the same day was removed to St. Bartholomew's Hospital, and on October 16 was brought back to the common lodging-house suffering from scarlet fever, and was afterwards removed to a fever hospital. Patrick Breen knew on October 16 that his son was ill of scarlet fever, but no notice was given to the London County Council as required by section 11 of the Common Lodging-houses Act, 1851, until October 22, when notice was given by the deputy. There was no evidence that the fact of a person being ill of fever in the common lodging-house came to the personal knowledge of the respondent before October 23, 1897, and the learned magistrate found as a fact that he did not previously know of it before that date. The learned magistrate refused to convict upon the ground that the respondent could not give notice of what he did not know, and that there was no neglect of duty by him.

Mr. AVORY appeared for the appellant, and contended that the section imposed a duty on the keeper of a common lodging-house from which he would not escape by leaving the management of the house to a deputy.

The respondent did not appear.

The COURT allowed the appeal, and remitted the

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

case to the learned magistrate with directions to convict.

MR. JUSTICE WILLS said the case was very clear. The section in express terms cast upon the keeper of a common lodging-house the duty of seeing that its provisions were complied with; and, comparing the section with the succeeding sections, it was abundantly clear that the respondent was liable to a penalty under the circumstances.

Q.B. Div. (Wills and }
Channell, J.J.) }

1898.
May 25.

THE QUEEN V. THE JUSTICES OF STAFFORDSHIRE—EX PARTE FIELD AND OTHERS.*

Licensing Acts—Appeal to quarter sessions—Alehouse Act, 1828, sec. 27—Costs—"Boulter v. Kent Justices" ([1897] A.C., 556).

This was an application to make absolute a rule *nisi* that had been granted for a writ of *certiorari* to bring up, for the purpose of having it quashed, an order made by the Quarter Sessions of Staffordshire in an appeal, by one Thomas Loughurst, from the licensing justices of the borough of West Bromwich, whereby the appeal was allowed and the licensing justices were ordered to pay the costs of the appeal. It appeared that on the hearing of the appeal the licensing justices were represented by counsel, who stated that he did not appear for them as litigant parties, but to inform the Court as to the facts and what had taken place before the licensing justices. The notice of appeal having been admitted, counsel for the licensing justices opened the case fully and called Henry Jackson, clerk to the borough justices, as a witness. Upon his evidence three technical objections were raised and argued by counsel for the appellant and the respondent justices. Counsel for the respondent justices then called a witness to the value of the premises. Several witnesses were then called for the appellant; and counsel for the respondent justices did not cross-examine any of them, nor did he address the Court in reply. The quarter sessions allowed the appeal, and, being of opinion that the respondent justices had made themselves "parties" on the hearing of the appeal, they ordered that they should pay the appellant's costs. The appeal to quarter sessions was brought under section 27 of the Alehouse Act, 1828 (9 Geo. IV., c. 61), which gives an appeal to quarter sessions to any person aggrieved by any act of any justice done in or concerning the execution of the Act, and provides, *inter alia*, that the Court of quarter sessions "shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said Court shall seem meet."

Mr. Disturnal appeared to show cause against the rule, and Mr. Avory in support of it. "Reg. v. London Justices" ([1895] 1 Q.B., 616) and "Boulter v. Kent Justices" ([1897] A.C., 556) were cited in the course of the argument.

THE COURT made the rule absolute.

MR. JUSTICE WILLS said the section upon which the case turned was section 27 of the Alehouse Act, 1828, illustrated to some extent by section 29. Before discussing the question he would like to point out what Mr. Disturnal's argument really came to. It was established by the decision of the House of Lords in "Boulter v. Kent Justices" ([1897] A.C., 556) that when the question whether a licence shall be renewed comes in the first instance before the licensing

justices objectors may be heard and effectually heard without the risk of being mulcted in costs. Mr. Disturnal's contention came to this—that when there is an appeal by a person the renewal of whose licence is refused then, unless the licensing justices come forward and effectually fight the question whether the refusal was right or not, at the risk of being made to pay costs, the appellant is to have it all his own way, so far as concerned the examination of witnesses, argument, and so on. Such a conclusion would be so utterly wrong in itself that the Court ought to look very closely to see whether the statute must necessarily be so construed. The interest of the public was just as great on the hearing of the appeal as it was on the hearing of the original objections, and yet if Mr. Disturnal's argument was to prevail the public interests could not be protected on the appeal, because persons who might be willing enough to object in the first instance would not come forward at quarter sessions at the risk of being made to pay costs. And in particular the licensing justices would not come forward to fight such cases at the risk of having to pay costs. Lord Herschell in "Boulter v. Kent Justices" ([1897] A.C., 556), at page 569, had enumerated the considerations which led him to the conclusion that in proceedings before licensing justices there is no litigation and no parties, and that there is, therefore, no person whom the licensing justices can order to pay costs. All these considerations seemed to his Lordship to apply equally to proceedings before quarter sessions on appeal. It followed that quarter sessions had no power to award costs against the justices or any other person objecting to the renewal of the licence. It was said that this could not be so because the quarter sessions were given power to make such order, with or without costs, as to them seemed meet. But there was plenty of material upon which those words would operate as the Act originally stood, because originally the action applied to appeals against convictions and other appeals in which there would be parties in the ordinary way as well as to an appeal against a refusal to renew a licence. "Reg. v. London Justices," which was the authority for the giving of costs in this case, had lost its foundation by reason of the decision of the House of Lords, in "Boulter v. Kent Justices," that licensing justices are not a Court of summary jurisdiction. The view that the quarter sessions had no power to give costs to an appellant was strengthened by the fact that, while in section 29 of the Act of 1828 provision was made for the levy of costs given to the justices against the appellant, there was no corresponding provision for the levy of costs awarded to the appellant.

MR. JUSTICE CHANNELL delivered judgment expressing his concurrence.

[Solicitors—A. S. C. Doyle, for the applicant; Murr and Rusby, for J. S. Sharpe, West Bromwich, for the respondents.]

Q.B. Div. }
(Phillimore, J.) }

1898.
May 25.

FENNER V. LORD.*

Limitations, Statute of—Personal actions—Acknowledgment—Abortive submission to arbitration.

In this case the plaintiff sued as executor of the will of John Fenner, of Brookside, Dedham, and Colchester, in the county of Essex, for £3,616 9s. 10d., balance of the price of goods sold and delivered, and for money lent and interest thereon. The defence was that the

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

*Reported by P. B. DUMFORD, Esq., Barrister-at-Law.

claim was barred by the Statute of Limitations (21 Jas. I., cap. 16. section 3).

Mr. E. Tindal Atkinson, Q.C., and Mr. C. E. Jones appeared for the plaintiff; and Mr. Bosanquet, Q.C., and Mr. Boxall for the defendant.

The plaintiff's case was that the late Mr. John Fenner, who was a farmer and cattle dealer, as a result of transactions extending over several years and concluding in 1886, had a claim against the defendant for £3,616 9s. 10d. The last item of the account being dated July, 1886, the Statute of Limitations would *prima facie* apply, but on April 25, 1896, it being alleged by either party to this action that the other was indebted to him in a large sum of money, it was agreed between them that there should be a reference of the account to two arbitrators, and that either should pay to the other the amount found due by the arbitrators. Both parties agreed not to take any advantage of the Statute of Limitations. The arbitration was held but it proved abortive.

Mr. TINDAL ATKINSON, Q.C., on behalf of the plaintiff, contended that the agreement in the submission to arbitration to pay the sums which should be found due from the parties to each other respectively amounted to a promise to pay, which took the case out of the operation of the statute. In support of this contention he cited the cases of "Prance v. Sympon" (Kay's Reports, (678); and "Banner v. Berridge" (18 Ch. Div., 254).

Mr. BOSANQUET, Q.C., for the defendant, said that the account on which the plaintiff now claimed was a different one from that which was submitted to arbitration, and also that the arbitration having proved abortive the agreement entered into by the parties prior to that arbitration was not an admission sufficient to take the case out of the statute. In order to do so there must be a definite promise to pay. The learned counsel on this head referred to the cases of "Morgan v. Rowlands" (L.R., 7 Q.B., 493); "Cheslyn v. Dalby" (4 Younge and Collyer's Reports, 238); and "Hales v. Stevenson" (7 L.J., N.S.).

Mr. JONES having replied for the plaintiff,

HIS LORDSHIP, in giving judgment for the defendant, said that there was no doubt that if the arbitration had proved effective the Statute of Limitations could not have been set up. At the time the submission to arbitration was signed the debts were not statute barred. The submission was a conditional agreement to pay, if the arbitration was held, the amount found by the arbitrators. The arbitration having proved ineffective, the condition on which the admission was made had not been fulfilled, and there was, therefore, no admission in this case to take it out of the operation of the statute. He therefore gave judgment for the defendant, with costs, but allowed a stay of execution for three weeks, provided that notice of appeal was entered within that time.

Court of Appeal (Lindley, M.R., } 1898.
Rigby and Collins, L.JJ.) } May 26.

IN RE OLYMPIA (LIMITED) (REGISTERED 1893).*

Company—Directors—Liability—Misfeasance
Summons—Companies (Winding Up) Act, 1890,
sec. 10.

Decision of Wright, J. (*ante*, p. 236), reversed.

This was an appeal from an order of Mr. Justice Wright's dismissing a summons taken out by the Official Receiver and liquidator under section 10 of the Companies (Winding Up) Act, 1890, against Mr.

Montague Gluckstein. The summons asked for a declaration that Mr. Gluckstein was guilty of misfeasance or breach of trust, in that he and Messrs. Joseph Lyons, John Hart, and Harold Thomas Hartley, being promoters and directors of the company, had secretly obtained and retained for their own use out of the purchase-money paid by the company for Olympia the sum of £6,341, which was alleged to have been divided among them; and that Mr. Gluckstein might be ordered to pay the whole amount, with interest. The facts are fully stated in the report of the proceedings in the Court below (*ante*, p. 236) and in the judgment of the Master of the Rolls. The appeal was argued on May 12 and 13.

Mr. A. T. Lawrence, Q.C., and Mr. Kirby were for the Official Receiver and liquidator, the appellant; Mr. Cozens-Hardy, Q.C., Mr. Muir Mackenzie, and Mr. Cassell were for the respondent.

The COURT allowed the appeal.

THE MASTER of the ROLLS said,—This is an appeal from the dismissal by Mr. Justice Wright of a summons issued by the liquidators of a company called Olympia (Limited) against a person named Gluckstein, under section 10 of the Companies (Winding Up) Act, 1890. The allegation is that Gluckstein and others, being promoters and directors of the company, made a secret profit of £20,000 at the expense of the company. The defence is that the profit in question arose from a transaction with which the company had no concern, and was, moreover, fully disclosed to the company. The case is important, not only to Mr. Gluckstein and those associated with him, but to all persons engaged in forming companies and who take shares in newly-formed companies. The most ingenious mechanism has been devised in order to bleed this company to the extent of £20,000, without the knowledge of the shareholders, and the question is whether the mechanism will answer its purpose. The facts are not in dispute, and were shortly as follows. In 1893 a company called the National Agricultural-hall Company (Limited) was being wound up. Its property consisted *inter alia* of some land and buildings known as Olympia, and fixtures, machinery, furniture, and effects in and upon the same. This property was used for exhibitions and purposes of amusement, and licences for the sale of beer, wine, and spirits on the premises were held by the company. This property was for sale. The property was subject to heavy encumbrances—viz., £100,000 in debentures and £10,000 on mortgage, and its value was not sufficient to pay off all these charges in full. To what extent these securities could be realized depended mainly, if not entirely, on what could be got by a sale of the above property. It is obvious that the more the property sold for the better for those who held the securities. If the securities could be bought up cheap and the property could be sold for much more than the sum due on them a substantial profit would be made. Further, if the same persons could buy the debentures cheap and could also buy for a sum more than sufficient to pay off the securities, and if they could resell the property at an advanced price, they would make a double profit—viz., first, by paying themselves as holders of the securities the amount due on them; and, secondly, by paying themselves as vendors the advanced price at which they resold the property. Moreover, if it could be arranged that they should not pay for the property until they got paid the advanced price at which they resold it, they would not be under the necessity of making cash advances themselves to any considerable extent. These observations will render what was done quite clear. In January, 1893, what is called the syndicate agreement was entered into. It is an agreement between Hart (described as secretary to the Freehold Syndicate) of the one part and the subscribers of

*Reported by H. B. HEMMING, Esq. Barrister-at-Law.

the other part. It recited that the syndicate proposed to purchase Olympia with a view to a re-sale to a company to be registered or to some other purchaser. The agreement shows that the syndicate here referred to was to be composed of the subscribers to the agreement. The agreement then provides for the formation by the subscribers of a fund for the above purpose, which fund was to be placed in the names of trustees. This fund was to be applied in paying for the purchase, and, secondly, in payment of the expenses of forming the company. It was then agreed by clause 2 that the trustees should do their best to buy Olympia for the syndicate and resell the same at a profit. By clause 3 it was stated that if such company should be formed four persons—viz., Lyons, John Hart, Hartley, and Gluckstein, members of the syndicate—had consented to become directors if duly elected. Clause 4 bound each subscriber to take shares in the company to the amount of his subscription if the capital should not be otherwise fully subscribed or underwritten. Clause 6 nominated the four above-named persons trustees, with full powers of management and to do whatever might be necessary to buy and resell Olympia and to promote and register the company and to purchase “as an interim investment” any first mortgage bonds of the National Agricultural Hall Company (Limited). Clause 7 provided that the sale to the proposed company or any other purchaser should be made subject to and with the benefit of two other provisional contracts of even date. One of these was for the supply of refreshments to the proposed company by J. Lyons and Co. (Limited) (in which Lyons and Gluckstein were stated to be directors and shareholders). The other contract was that J. and H. Hart should be the advertising agents of the new company. These contracts were between the contractors of the one part and H. Hart as secretary or agent for the syndicate of the other part, and they contained recitals showing that the syndicate contemplated buying Olympia and selling it to a new company which they proposed to form for the purpose of taking Olympia from them or their trustees, and that if they did so the company should take subject to and with the benefit of that contract and should enter into an agreement with the contractor adopting the same with or without modification. If the syndicate should sell to any other purchaser such sale should also be subject to, but with the benefit of, the contract. The first clause of each of these documents expressed that the agreements contained in them were made by the syndicate for themselves and, so far as they lawfully could, on behalf of the proposed new company or other purchaser. It is unnecessary to refer further to these contracts. These three documents were contemporaneous documents. The first of them—viz., the syndicate agreement—was signed by several persons for various sums amounting altogether to £35,950, of which, however, only £7,192 10s. was ever actually paid. Pursuant to this agreement the syndicate, by their trustees—Lyons, J. Hart, Hartley, and Gluckstein—bought up £32,000 debentures (on which considerable interest was due) and also the £10,000 mortgage, which were encumbrances on the property known as Olympia. They gave £27,320 for the debentures, which afterwards realized £42,358, and they gave £500 for the mortgage, which afterwards realized £6,096. The profit on this transaction amounted to £20,734. These purchases were made in the course of January and the early part of February, 1893. At about the same time the syndicate agreed to buy the property called Olympia for £140,000, and on February 8, 1893, a formal agreement for sale to the aforesaid trustees at that price was executed; £20,000 was paid by the purchasers as a deposit, and May 8, 1893, was the day fixed for completion of the purchase.

The property was bid for in the Chambers of the Judge who had ordered the sale; £140,000 was the highest bid, and it was higher by £8,000 than that which last preceded it. This last large bid secured the property. No previous bid had exceeded £1,000 over the last before it. By March 20, 1893, all necessary arrangements had been made by the syndicate trustees for the registration of a new company to buy the property thus acquired for £180,000—that is, £40,000 more than the sum for which the trustees had acquired it. There was no concealment about this, nor does any one complain of it except so far as it enabled the syndicate to make a secret profit out of the debenture transaction. In order to carry out the arrangements for forming the company an agreement dated March 20, 1893, was executed between the syndicate trustees called the vendors of the one part and a person called Close, a trustee for the intended company, of the other part. This agreement recites the agreement of February 8, 1893, by which the vendors had agreed to buy the property for £140,000; then it recites that a company is about to be formed for the purchase of such property, and that the memorandum and articles of such company have been prepared with the privity of the vendors, and that the capital of the company shall be £155,000, divided into 31,000 shares of £5 each, and that by the articles of association it is provided that the directors shall adopt and carry out that agreement. Then it is agreed (1) that the company shall buy the property known as Olympia, subject to, and with the benefit of, the two agreements of January 19, 1893, with J. Lyons and Co. for refreshments and with Hart for advertising; (2) that the price shall be £180,000—that is, £20,000 to the vendors in repayment of their deposit, £120,000 into Court in discharge of the unpaid balance of £140,000, and the rest to the vendors; (7) that the vendors shall pay all the expenses of forming and bringing out the company and issuing its capital and of completing the purchase and of the mortgage to secure debentures, and then come these words:—“The validity of this agreement shall not be impeached on the ground that the vendors parties hereto as promoters or otherwise stand in a fiduciary relation to the company, nor shall the vendors parties hereto be required to account for any profit made or to be made by them by the purchase of any debentures of the National Agricultural Hall Company (Limited) or of any other charges upon any of the property of the last-mentioned company which are to be satisfied wholly or in part out of the fund paid or to be paid into Court in the said action.” This clause is naturally relied upon by the defendant as affording a complete answer to the present application. Its effect is obviously one of the principal matters for our consideration, and it will be necessary to return to it. For the present, I pass it over and continue the statement of the material facts of the case. On this same March 20 the new company was registered by the name of Olympia (Limited). Its objects are stated to be (1) to purchase the property known as Olympia; (2) to adopt and carry into effect, with such (if any) modifications as may be agreed, the last-mentioned agreement with Close. The capital is £155,000, divided into 31,000 £5 shares. Seven subscribers signed the memorandum of association for one share each. The articles of association provide (4) that the last-mentioned agreement is ratified and binding, and the directors are directed to carry it into effect with such modifications, if any, as may be agreed on. The directors are also required to adopt and give effect to the refreshment and advertising contracts with J. Lyons and Co. and Hart, already referred to, with or without modification as the directors may think fit. By Act 73 the first directors are named. They are Lyons,

Gluckstein, J. Hart, and Hartley—i.e., the four trustees of the syndicate, and the vendors to the company. Article 40 confers on the directors power to borrow on debentures. Much turns on the constitution of the company. Shortly after the registration of the company a prospectus was issued. It refers to the company as incorporated. The capital is stated to be £155,000 in 31,000 £5 shares, and first mortgage five per cent. debentures £70,000, total £225,000, to be applied as follows. Purchase price £180,000, working capital £45,000. The directors are stated to be Lyons, Hart, Hartley, and Gluckstein. The prospectus contains the following very important statement:—"The promoters of this company, hereinafter called the vendors, who constitute the entire board of the company which lately produced Venice in London, recently entered into a contract on behalf of a syndicate, of which they themselves are members, for the purchase of the entire Olympia property. The vendors effected this purchase on February 8, 1893, at competition before the chief clerk of Mr. Justice North, in the Chancery Division of the High Court of Justice, for £140,000, payable in cash, and they will, acting on behalf of such syndicate, be the vendors of that property to this company. Any other profits made by the syndicate from interim investments are excluded from the sale to the company. A printed form of the memorandum of agreement, which was signed by each member of that syndicate, may be inspected by intending applicants for shares or debentures at the offices of the solicitors of the company." The prospectus also stated that the property had been recently valued at £107,876, and that the vendors had agreed to sell the whole to the company for £180,000, payable as to £155,000 in cash, and the balance in cash or shares of the company. The prospectus then stated that out of the profit to be made by the vendors on behalf of the syndicate the vendors had agreed to pay the promotion expenses and other moneys, and it also stated that the four following agreements had been entered into—viz., those of February 8 and March 20 for the purchase and resale of the property, and the agreements of January 19, 1893, relating to the refreshment and advertising business of the company. The syndicate agreement of the same date was not here enumerated, but the prospectus stated that "applicants for shares will be deemed to have waived the insertion of the dates and names of the parties to that agreement, and to have accepted the above statement as a sufficient compliance with the requirements of section 38 of the Companies Act, 1867, or otherwise, and all allotments will be made on this basis." The rest is soon told. Applications for 17,000 shares and 272 debentures were received, and these were issued. The contracts with Close, Lyons and Co., and Hart were adopted by the directors, with, however, a variation to the effect that £40,000, part of the £180,000, might be paid in shares. The £180,000 was paid as to £171,000 in cash and as to £9,000 in shares. Out of this transaction £40,000, being the disclosed profit on the sale of the property bought by the company and a further profit of £20,134 made by the syndicate by buying up the debentures, went into the pockets of the syndicate. Of this last sum Lyons, Hart, Hartley, and Gluckstein received £6,741, and this sum the liquidator of the company sought to recover from them by the summons which we have to consider. The only person with whom we have to deal is Gluckstein. The other three are not before us. But if any of them are liable they are all liable jointly and severally to make good the sum in question. The question therefore is whether these persons are liable to account to the company for the profit they made out of the purchase of the debentures and mortgage, which were encumbrances on the property sold to the company. It is plain that they

took an active part in forming the company and in framing or approving its memorandum and articles of association and also its prospectus. They were parties to the agreement with Close. They in fact were the creators of the company, and were the persons who brought it into existence fettered by the agreements with Close, Lyons, and Hart, and with themselves as sole directors. The company was skilfully formed, so that it should not be able to escape from the performance of those contracts, and so that no director should have an interest in investigating the conduct of those who created the company, and who were to obtain benefits from the payment of the £180,000 which the company had to pay. But more. All this was done pursuant to the syndicate agreement of January 19, 1893, which provided for the formation of a company of which these four persons should be directors. Everything was done in order to enable the syndicate to make the double profit there contemplated. The formation of some such company as Olympia (Limited) was essential to the carrying out of this agreement, and it was then agreed to form one, if possible, and the persons who then agreed to form a company, and ultimately did form it, in order to carry the agreement into effect, owed duties to that company when it came into existence; and one of such duties was not to make a profit out of it without informing it of the fact and giving the company an opportunity of declining to allow such profit to be made at its expense. These duties are imposed by the plainest dictates of common honesty as well as by well-settled principles of company law. They have invariably been enforced by the Courts of this country. The leading case on the subject is, "*Erlanger v. New Sombrero Phosphate Company*" (3 App. Cas., 1,218, and 5 Ch. D., 73), every judgment in which may be referred to as an authority for the above statement of the law. The next question is, Have the syndicate trustees and promoters of this company performed this duty or have they not? Any evasion of it, however ingenious and skilful, in making that which is not a performance look as if it was will not suffice; and the main question which has to be determined in this case is whether the documents to which I have referred contain a sufficient disclosure of that which it was the duty of the promoters to disclose to the company and to those who were invited to join it. In considering this question we must recollect that we are dealing with matters of daily business, and must have regard to the habits and practical necessities of ordinary business men. Refined equitable doctrines of constructive notice have little, if any, application to such matters as are now being dealt with. To inform a person of a fact is one thing; to give him the means of finding it out, if he will take trouble enough, is another thing. A promoter of a company whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts but containing something which, if followed up by further investigation, will enable the inquirer to ascertain that profits have been made and what they amounted to. I pass now to consider (1) the disclosure which was made; (2) to whom it was made; and (3) its sufficiency. The disclosure made is contained in clause 7 of Close's agreement. If this is enough this will protect the defendants; if it is not nothing else will. The reference in the prospectus to profits made by "interim investments" and to the syndicate agreement may be disregarded as wholly insufficient. The expression "interim investments" hardly points to such a transaction as the purchase and realization of the debentures and mortgage. The utmost that can be said of this part of the prospectus is that it suggests inquiry. Close's agreement is the real document to be considered. The company was formed to

carry this out and the directors were required by the articles to adopt and carry out this agreement with such modifications, if any, as might be agreed upon. Close's agreement, moreover, is referred to in the prospectus. But clause 7, which shows that the promoters and directors were making a profit out of the securities is not referred to, but is left to be discovered by the directors, who have to consider the contract, and by such other persons as may take the trouble to see the contract itself. Whilst the prospectus states clearly that the promoters were making a profit of £40,000, it says nothing about the further £20,000. The contrast is most marked. It comes, therefore, to this, that the fact that the promoters were to make an additional profit was not stated to any one, but might be found out and must become known to the directors if they attended to their business when Close's agreement came before them for adoption. It may be that this would have been enough if the directors had been an independent board and if they had adopted the contract with full knowledge of all the facts. But it is not necessary to determine whether even then the disclosure would have been sufficient. Let us see to whom this clause 7 and the real facts were known. They were known to the four directors who were the creators of the company, and who were to share the profits which would be got from the purchase money which the company was to pay. Clause 7 and the facts were not known to any one else connected with the company except to such members of the syndicate who took shares in the company. What effect, then, has such a knowledge by such persons on the right of the company to claim the profits thus being made by its directors and promoters out of it? My answer is none whatever, except to deprive the directors who shared the profit of all possible defence to such claim. To say that the knowledge of such persons of their own conduct, which from first to last they were doing all they could to conceal, is to be treated as the knowledge of the company or of the shareholders, is to say that which is opposed not only to common sense but also to well-settled principles of law. Having arrived at the conclusion that knowledge of clause 7 of Close's agreement cannot be imputed to the company it is difficult to see upon what principle that clause can be binding on the company as part of the contract of purchase. The contract with Close, including clause 7, is said to be binding on the company by reason of section 11 and section 16 of the Companies Act, 1862, which say that the memorandum and articles of association shall bind the company and the members as if each member had covenanted to observe the conditions and regulations therein contained. But a series of decisions beginning with "Eley v. Positive Assurance Company" (L.R., 1 Ex. D., 20 and 28), including but not ending with "Browne and La Trinidad" (37 Ch. D., 1), show that, notwithstanding these sections, contracts entered into before the formation of a company cannot be enforced against it until the company after its formation has agreed to be bound by them. Then how did clause 7 of Close's agreement become binding on the company? It is said because the directors adopted it, as they had power to do by the articles. This might be a good answer if the directors had been an independent body, but considering who they were and their position the adoption of Close's contract by them with this term in it would not render the contract binding on the company, and the company might have repudiated the contract as soon as the company discovered how it had been tricked. Having regard to the constitution of this company and to the concealment of the real facts I regard clause 7 as absolutely nugatory. Not only does it fail to give notice to the company of the facts really concealed from it, but it also fails to

preclude the company from seeking redress by reason of such concealment. There remains, however, the further difficulty, that the company has not repudiated the contract and is not now in a position to restore the property to the vendors. It is said that in such a case as this rescission of the contract is the only remedy. This is, in my opinion, quite wrong. The same people who saddled the company with the property have prevented its restitution in the condition in which the company acquired it. The company as distinguished from its promoters and directors never was in a position to consider whether it would take or keep the property or return it to the vendors in the condition in which the company took it. The company no doubt got the property; but it got it *volens*, and its inability to return it as it got it does not justify the conclusion that the company has elected to keep it on the terms of complying with clause 7. Upon principle it appears to me clear that there is nothing to prevent the company from claiming the profit secretly got from it by those whose duty it was not to make such profit without informing the company of what they were doing. After discussing the authorities in considerable detail his Lordship continued as follows:—The conclusion at which I have arrived is that the persons who promoted this company and were its sole directors did in fact obtain from it a profit for themselves without letting any persons except themselves and their associates know that they were doing so. No ingenuity is required to disclose the truth, but much is required to disclose it and form a company without frightening persons by the disclosure. But where there is a duty to disclose a fact no mechanism for concealing it, however ingenious, can avail, unless indeed it fails to answer its purpose by really disclosing what it is intended to hide. In my opinion the order appealed from must be reversed and an order be made for the payment by Gluckstein of the sum mentioned in the summons (after deducting what, if anything, may have been recovered from the other defendants) and of interest at 3 per cent. and of the costs here and below.

LORDS JUSTICES RIGBY and COLLINS gave judgment to the like effect.

[Solicitors—Roderic Oliver; Lewis and Lewis.]

Court of Appeal (A. L. Smith and } 1898.
Vaughan Williams, L.J.J.) } May 26.

EX PARTE ELLIS.*

Bill of Sale—Seizure of goods by grantee—Bills of Sale Act, 1882, sec. 7—Application for relief.

The Judge in chambers has no jurisdiction to grant relief under sec. 7 of the Bills of Sale Act, 1882, where the grantee has seized, not for the purpose of realizing his security, but for the purpose of maintaining it.

This was an appeal from an order of Mr. Justice Darling at Chambers. On October 8, 1897, Ellis gave a bill of sale of his furniture to Edward Shuckburgh, who carried on business as the Clerical and Medical Advance Bank, to secure the repayment of an advance of £30 and interest thereon at the rate of 60 per cent. per annum, and the grantor covenanted to pay the principal sum of £30 on October 8, 1899, and in the meantime £1 10s. on the 8th of each month for the interest. The grantor having made default in one of the monthly payments of £1 10s. for interest, the grantee seized the chattels comprised in the bill of

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

sale, the warrant authorizing the bailiff to take and hold possession until payment of the £1 10s. The grantor thereupon applied for relief under section 7 of the Bills of Sale Act, 1882, and Mr. Justice Darling ordered that, upon payment of £31 10s. and the costs of the application, the grantee should release the goods and hand over the bill of sale to the grantor. The grantee appealed, and contended that the Judge had no jurisdiction to make the order.

Mr. Crump, Q.C., and Mr. W. de B. Herbert appeared for the grantee; Mr. Herbert Chitty appeared for the grantor.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that, reading the bill of sale with the Bills of Sale Act, 1882, there was power to seize the goods when any of the contracted payments fell due and were not paid. Here £1 10s. fell due for one month's interest, and was not paid, whereupon the grantee seized for the purpose of maintaining the security so as to get payment of the £1 10s. for interest. He never seized for the purpose of selling or realizing the security. The question was whether the Judge had jurisdiction to order the bill of sale to be given up. He had jurisdiction to order the grantee to withdraw from possession upon payment of the sum due and costs. This Court decided in "*Ex parte Wickens*" ([1898] 1 Q.B., 543), under a bill of sale similar to this one, that when the grantee took possession, not for the purpose of maintaining his security, but for the purpose of realizing it, the Judge had jurisdiction to order the bill of sale to be given up. In his opinion the Judge had no jurisdiction to order the bill of sale to be given up where the grantee took possession for the purpose of maintaining his security, and not for the purpose of realizing it. If the law were otherwise the bill of sale holder would be under this hardship—he would have taken a contract for the payment of interest on the principal sum advanced at the rate of 60 per cent. per annum for a fixed period, and yet he could take no step for the purpose of maintaining his security during that period without exposing himself to the risk of being paid off and the security put an end to. The learned Judge therefore, had no jurisdiction to make the order he did.

LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Pritchard, Englefield, and Co., for J. P. Court, Liverpool, for the grantor; Ford and Ford, for the grantee.]

Q.B. Div. (Wills and)
Channell, JJ.) }

1898.
May 26.

READ V. PUNTER.*

Justices—Jurisdiction.—Precept for rates—
Enforcement—Legality of charges.

Justices to whom application is made to enforce a precept for rates have no jurisdiction to question the legality of the charges for which the precept is issued.

This was a case stated by Justices of the Peace for the County of Bucks, raising a question as to the right of justices, when asked to enforce a precept by a district council, to consider the legality of the charges for the payment of which the precept is issued. The respondents, overseers of the parish of Wendover, were summoned under 2 and 3 Vict., c. 84, s. 1, as applied by section 231 of the Public Health Act, 1875, to show cause why they have not paid the amount required by

a precept of the Wycombe Rural District Council for expenses.

Mr. Bethune (Mr. R. Cunningham Glen with him) appeared for the appellant; Mr. Bonsey for the respondents.

The facts were these:—In February, 1896, the Wendover Parish Council requested their district council—the Wycombe District Council—to repair a certain public footway. As the district council did not proceed with the work application was made to the county council who requested the district council to give the matter attention. The district council accordingly in September, 1896, passed the following resolution, "That the Wendover footpath . . . be repaired at once under the superintendence of Mr. Stevens and the district surveyor." A Mr. Marshall, at that time a member of the Rural District Council, though he had since retired, associated himself with the two gentlemen above named, and supplied materials for the repairs required to the extent of £134 4s. 7d. The Mr. Stevens named was an independent gentleman residing at Wendover. When the work was completed the district council received a bill made out in the name of Mr. Stevens but without his authority, and a cheque for £134 4s. 7d. was drawn payable to Mr. Stevens. The cheque was handed to Mr. Marshall and his son endorsed the same with the name of Mr. Stevens. On July 9, 1897, the expenses in respect of the footpath were declared by order of the Local Government Board to be "special expenses" and to be charged as such to Wendover Parish. On August 9, 1897, a precept was issued by the district council requiring the respondents to pay £229 9s. 8d., in which was included the sum of £134 4s. 7d. Credit had been given for £50 paid by the vicar of Wendover. It was admitted that £95 5s. 1d. was properly due. The district auditor, on November 5, disallowed the payment of £134 4s. 7d., and surcharged the three councillors who had signed the cheque. On behalf of the appellant it was contended that the duty of the magistrates was purely ministerial and that the magistrates could not, if satisfied that the precept was properly made, question its amount; that the mere fact of an item in the precept being disallowed by the district auditor did not affect the validity of the precept, and that therefore the precept should have been enforced. On the part of the respondents it was contended (a) that the magistrates must be satisfied with the validity of the precept, and that it was in respect of legal payments, and that section 231 of the Public Health Act, 1875, was only conclusive as to the amount of the expenses incurred but not as to the legality of any payments included in the precept. (b) That the payment by the rural district council to Mr. Marshall for the materials supplied by him while he was a member of the district council was an illegal payment, and as such had been disallowed by the district auditor. (c) That as the precept included such illegal payment it should not be enforced. The justices held that as a point of law had arisen as to the validity of the precept and this had been clearly raised by the auditor, they did not feel they should issue a distress warrant; but they stated the case as requested, leaving it to the Court, if it should be of opinion that the justices ought to have enforced the precept, to remit the case to the justices.

Mr. BETHUNE argued that the precept was binding. He cited "*Tynemouth Union v. Backworth*" (69 L.T., 178). The payment was not an illegal payment. The fact that a member of a district board supplied materials for repairing the road rendered him liable to a certain disqualification. It did not make the payment of his account illegal. He cited "*Melliss v. Shirley Local Board*" (16 Q.B.D., 446) and "*Reg. v. Handsley*" (7 Q.B.D., 398).

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Mr. BONSEY, for the respondents, said there were two questions. The first was, had the justices power to go behind the precept? He contended that they could under the circumstances of the case. On this he cited "Newbould v. Coltman" (20 L.J., M.C., 149). If the payment was an illegal payment the overseers were entitled to refuse to pay it. "Pedley v. Davis" (5 L.T., N.S., 253). The magistrates were not acting purely ministerially. *Re "Bridgend Union"* (9 L.T., N.S., 720), "*Reg. v. Boteler*" (33 L.J., M.C., 101). The next question was whether there was an illegal payment at all. The material section as to this was section 46 of the Local Government Act, 1894. "*Reg. v. Mayor of Ramsgate*" (23 Q.B.D., 66) was also cited.

Mr. GLEN, in reply, said this was not the kind of illegality the justices could inquire into. The application of the money was not their business. The justices had gone beyond their proper functions in inquiring into it.

The COURT held that the justices ought to have enforced the precept.

MR. JUSTICE WILLS said this was another of those Chinese puzzles, of which he had had 20 or 30 these sittings, in regard to local government. The facts were that the district council had ordered the footpath to be repaired under the superintendence of Mr. Stevens and the surveyor. Stevens had associated with himself Mr. Marshallsay, a member of the district council, and Mr. Marshallsay had supplied materials and perhaps labour to the amount of £134. Now, if Marshallsay had been present at a meeting of a committee which had entered into a contract with himself for the supply of materials, that contract would be a void, because, while voting for the contract *eo instanti*, he would be disqualified from entering into it. But it was not stated that that took place here. There was no meeting of the council at which such point was discussed. Marshallsay had nothing to do with voting. There was no such illegality here as to make the contract void. If that were the right view, the justices had acted erroneously in not enforcing the precept, notwithstanding the surcharge by the auditor. That was really enough to settle the case, but it might be well to add some observations as to the extent to which the justices might inquire into the validity of a precept. The justices had in this case similar powers to justices asked to issue a warrant of distress in respect of poor-rates. It was an obvious convenience that they should not have to inquire into the purpose for which the money was to be expended. Objections on the face of the warrant, objections personal to the person against whom the rate was to be levied, objections that the contributory place was outside the jurisdiction might perhaps be considered; but objections to the composition of the money to be raised ought not to be entertained. Another objection which might be considered would be that the parish had already paid. That did not warrant a notion that there might be a roving inquiry as to what items should be allowed. The appeal must, therefore, succeed.

MR. JUSTICE CHANNELL said the case, put in the strongest way for the respondents, was that there was an item as to which a substantial doubt existed. If that were so, section 231 prevented the question being raised, for by that section the precept was to be conclusive as to amount. On the whole, he agreed that the facts in all probability pointed to the conclusion that the payment was a legal payment. But that did not arise in the present case. The disallowance of the auditor was not conclusive in this case. If the money were paid back the parish would get the benefit. This was really a dispute between Wendover and the other parishes in the union. Until it was paid back it would be the parish that would be out of pocket for the time.

The result of the case was that there was a question as to one item in the precept—a large one, it was true; but that was not a ground for questioning the precept. The justices ought, therefore, to have made the order enforcing it.

[Solicitors—Letts Brothers, for Ed. Wilkins, Aylesbury; Ward, Perks, and Mackay, for Reynolds and Son, for the appellant.]

Q.B. Div. (Wills and)
Channel, J.J.)

1898.
May 26.

RENDELL V. HEMINGWAY.*

Local Government—Offences—Nuisance—Unwholesome meat—Meat not for sale—Public Health Act, 1875, secs. 116 and 117—Conviction quashed.

This was a case stated by the stipendiary magistrate for Bradford raising the question as to the power to convict under sections 116 and 117 of the Public Health Act, 1875, a person who has meat unfit for human food on his premises for consumption by himself, his servants, and workpeople, and not for sale. An information had been preferred by William Hemingway, the respondent, against Albert Rendell, the appellant, under sections 116 and 117 of the Public Health Act, 1875, and part 3 of the Public Health Acts Amendment Act, 1890, section 28, charging Albert Rendell for that William Hemingway at the meat-house, Eldon-lodge, in the said city, in which part 3 of the Act of 1890 had been duly adopted, did find deposited for the purpose of sale the carcase of a sheep unfit for food.

Mr. Tindal Atkinson, Q.C., and Mr. Longstaffe appeared for the appellant; Mr. Lawson Walton, Q.C., Mr. Carson, Q.C., and Mr. Chitty for the respondent, the inspector.

The facts were that Mr. Hemingway, an inspector of nuisances, on January 27 found in the larder of Eldon-lodge deposited and intended for the food of man the carcase of a sheep unfit for food. The carcase was intended to be used by the appellant for food for himself, his family, the servants, and workpeople who were in fact supplied with their food by him. It was not proved that the carcase was deposited for the purpose of sale or of preparation for sale. It was contended on behalf of the inspector, on the authority of the case of "*Mattinson v. Carr*" ([1891] 1 Q.B., 48), that the defendant was liable to be convicted. It was contended on the other side that as the carcase was neither exposed for sale nor deposited for the purpose of sale, but was intended for consumption by himself, his family, and servants, no offence had been committed. The magistrate, considering himself bound by the authority cited, convicted. The question of law for the Court was thus stated:—Is it sufficient to create an offence that the said carcase was on the appellant's premises intended for the food of man, or is it necessary in order to create an offence that the said carcase should have been exposed for sale or deposited for the purpose of sale or of preparation for sale?

Mr. TINDAL ATKINSON said the case was unarguable. The words of the section were that an inspector might inspect a carcase exposed for sale "and," not "or," intended for the food of man. The carcase here was intended for food, but was not for sale. He referred to the 28th section of the Act of 1890, which also dealt with food exposed for sale, and it did not extend the liability. A private individual

* Reported by H. RUSSELL, Esq., Barrister-at-Law.

who had some too high game in his larder or an egg which had gone bad and was kept perhaps for political purposes could not be convicted. He cited "*Vinter v. Hind*" (10 Q.B.D., 63).

Mr. LAWSON WALTON, Q.C., said the machinery under section 116 was different from that under section 117. If the inspector made a seizure it was not for the justices to inquire whether the seizure was right or wrong. The only question left for them was whether it was unfit for human food. Further, the meat was for the food of the workpeople. Therefore it was part payment of the labourers, and constituted a sale.

Mr. JUSTICE WILLS, in giving judgment, said the conviction could not be sustained. It was argued that the inspector who seized the meat, who might not even see the owner of the meat or give him any opportunity of explanation, could give a conclusive decision, which might even have the effect of rendering the owner of the meat liable to a sentence of imprisonment. That was an extravagant proposition. As to the decision of the inspector it might well be that for the purpose of saying whether food should be destroyed or not his decision might be final. The justices had to decide on the state of the food when brought before them. It might be in quite a different condition from what it was when it was seized. It was preposterous to say that the inspector could decide whether the person in whose possession the food was found had been guilty of an offence. That was a matter for the judicial powers of a magistrate. The inquiry was a judicial matter. There was no hardship in making a person who had food to sell give a guarantee that it was fit. That was totally different from the case where meat was in the house for consumption by the owner and his family. The meat here was not for sale. The conviction must be quashed.

Mr. JUSTICE CHANNELL concurred.

[Solicitors—Wynne-Baxter and Keeble, for Freeman, Bradford, for the appellant; and Cann and Son, for Frederick Stevens, Bradford, for the respondents.]

Q.B. Div. (Wills and)
Channell, JJ.)

1898.
May 27.

BRUTTON AND ANOTHER V. BRANSON.*

County Court—Practice—Pleading—"Statutory Defence"—Sale of Goods Act, 1893, sec. 4—County Court Rules, 1889, O. X., 18 (a).

This was an appeal from the City of London Court raising a question as to whether it was necessary in a County Court to plead section 4 of the Sale of Goods Act, 1893 (56 and 57 Vic., c. 71), if a defendant desired to set up a defence under that section, which is practically equivalent to section 17 of the Statute of Frauds.

Mr. W. O. Hodges appeared for the plaintiffs; Mr. C. A. Russell, Q.C., and Mr. C. Godwin appeared for the respondents the defendants.

The Judge of the City of London Court had entered a non-suit in the action, which was a remitted action for whisky supplied for a sum exceeding £20. The following is the material part of the rule on which the question turned:—County Court Rules, 1889, Order X., 18 (a):—"When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute."

Mr. HODGES contended that the judgment of non-suit was wrong. A statutory defence had to be pleaded beforehand. This the defendant had not done in this case. A statutory defence was a defence on which but for the statute a defendant could not rely. If there was no defence at common law and the statute only made a defence the case came within the rule requiring notice. He cited "*Conroy v. Peacock*" ([1897] 2 Q.B., 6) and "*Lewis v. Burrell*" (77 L.T., 626).

Mr. RUSSELL said the rule did not apply. The class of defence aimed at was one which amounted to confession and avoidance—namely, a real defence. This was a matter which was part of the plaintiff's case, for, unless he could prove a memorandum in writing or acceptance, he could not make out his case. The Statute of Frauds had altered the position of the plaintiff. He cited "*Buttermere v. Hayes*" (5 M. and W., at p. 462), "*Leaf v. Tuton*" (10 M. and W., 393), and referred to Order XIX., rules 15 and 20, of the Supreme Court.

The COURT held that such a defence as this was a statutory defence.

Mr. JUSTICE WILLS said the County Court rule in question applied to actions on contracts. On such an action the Statute of Frauds was a very ordinary defence. He was quite at a loss to give any definition of a "statutory defence" which would not include a defence under the Statute of Frauds. In two rules of the High Court it was clearly treated as a special defence, and he thought that, though that was not conclusive in respect of County Court matters, it helped to throw light on the point. He decided on the broad ground above-mentioned.

Mr. JUSTICE CHANNELL concurred. He could conceive no meaning for the words "statutory defence" which would exclude such a defence as this. There was nothing to go by but the words themselves, and they covered a defence under the Statute of Frauds.

[Solicitors—Irvine and Borrowman, for the plaintiffs; Batchelor and Cousins, for the defendant.]

Court of Appeal (Lindley, M.R., }
Chitty and Collins, L.J.J.) }

1898.
June 7.

IN RE WOODS AND LEWIS'S CONTRACT.*

Vendor and Purchaser—Contract—Construction—Default of vendor, what is—Defect in title.

This was an appeal against a decision of Mr. Justice Romer, the question raised being as to the meaning of the word "default" in a condition contained in a contract for the sale of real estate. In the present case the contract provided that the purchase should be completed on August 31, 1897. The purchaser was to pay a deposit of 10 per cent. on the purchase money; and there was a condition that "if from any cause whatever other than the default of the vendor the purchase shall not be completed on the 3rd day of August the purchaser shall pay to the vendor interest, after the rate of £4 per cent. per annum, on the residue of the purchase money from that day until the completion of the purchase." The vendor had purchased the property from the Standard Life Assurance Company, and the purchaser took the objection that the assignment from the company to the vendor was not executed as it ought to have been in accordance with the company's private Act of Parliament, and the purchaser required that a deed of confirmation should be executed. The vendor obtained the execution of this deed, but this led to delay, and the purchase was not completed until

November 24, 1897. The vendor claimed interest from the purchaser for the period from August 31 up to the completion. The purchaser insisted that the delay had arisen from the "default" of the vendor. Mr. Justice Romer decided that there had been no default on the part of the vendor and that the purchaser must pay interest as claimed. The purchaser appealed.

Mr. Neville, Q.C., and Mr. J. W. M. Holmes were for the purchaser. Mr. Farwell, Q.C., and Mr. G. Cave, for the vendor, were not called upon.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that the key to the whole situation was that there had been no want of reasonable care on the part of the vendor in not discovering the blot on the title, which was discovered by the extreme vigilance of the purchaser's advisers. Mr. Neville had argued that every omission on the part of a vendor was a "default" within the meaning of such a condition. But the history of these conditions showed that such an extreme construction had not been given to them. The object of the condition was to give the vendor a hold upon the purchaser, or otherwise the completion might be delayed for ever. But some limitation must be put upon the clause. A vendor could not be allowed to take advantage of his own wrong. In the present case his Lordship did not think that the purchaser would have sustained a farthing's worth of injury if he had not insisted on the deed of confirmation. It was nothing but an extraordinary precaution. To say that under such circumstances there had been a "default" by the vendor within the meaning of the condition would be going too far.

LORD JUSTICE CHITTY was of the same opinion. The question was as to the meaning of "default" in a contract for the sale of real estate. It was not like a contract for the sale of goods. Contracts for the sale of real estate stood on a special footing. His Lordship said this in order to meet Mr. Neville's argument that "default" was equivalent to mere failure to perform. The present case was by no means a difficult one. There was nothing more than that the title might be said to be defective. The purchaser had an excellent title subject to this slight defect. The vendor had no reason to believe or to suspect that there was any defect in his title, and, in his Lordship's opinion, there had been no want of reasonable care on the vendor's part, and there was not enough to establish "default" on his part.

LORD JUSTICE COLLINS delivered judgment to the same effect.

[Solicitors—Ingle, Holmes, and Sons; Hulberts, Hussey, and Metcalfe.]

Q.B. Div. }
(Kennedy, J.) }

1898.
June 7.

MARSHALL V. MACKINTOSH.*

Damages—Measure of—Breach of contract—
Building contract—Forfeiture.

This action, which was brought against a builder to recover damages for breach of a building agreement, raised an important question—namely, whether, when a landowner has exercised the power of re-entry provided by a building agreement in the event of the builder making default and has taken possession of the builder's plant and material on the premises, the landowner is also entitled to recover from the builder the actual damage he has suffered by reason of the latter's breach of contract. The facts of the case are fully stated in the judgment.

Mr. E. Morten appeared for the plaintiff; Mr. G. A. Scott for the defendant.

MR. JUSTICE KENNEDY said that the only point which he had to decide was the question of the damages which the plaintiff was entitled to, and, as Mr. Justice Field said in "Wigsell v. School for Indigent Blind" (8 Q.B.D., 357), few questions as to the principle upon which damages ought to be assessed were free from difficulty. By an agreement in writing of June 10, 1896, the defendant contracted with the plaintiff (in substance) to pull down and remove certain buildings at 47 and 48, Dover-street, Piccadilly, and to build on the site a new structure, which was to be erected "in carcase" before December 25, 1896. Upon that being done the plaintiff contracted to grant to the defendant a lease of the land and buildings for a term of 80 years from June 24, 1896, at a peppercorn rent for the first year, and thereafter at a yearly rent of £1,100. Clause 2 provided that if the defendant made default under the agreement "he shall forfeit all benefit under this agreement, which shall thereupon cease and be determined, and all the materials and buildings on the said premises shall be forfeited to, and become the absolute property of, the lessor." Under Clause 11 there was reserved to the lessor, on default being made by the defendant, a power to re-enter upon, and to the immediate possession of, the premises and plant "without making to the lessee any allowance or compensation in respect thereof." The defendant got possession of the site on June 10, 1896, but, except that he took down and removed £200 worth of materials from the old buildings, he did nothing whatever towards the fulfilment of his contract. The fact was that he had entered upon the undertaking as a speculation without the means of fulfilling it. There being no prospect of anything further being done, the plaintiff re-entered on January 19, 1897, as he had a right to do. It was clear that the mere fact of re-entry did not of itself exonerate the defendant from the liability to damages for breach of contract prior to re-entry; see "Hartshorne v. Watson" (4 Bing., N.C., 178); but it was contended for the defendant that the effect of Clauses 3 and 11 did limit the plaintiff to such compensation as might be afforded to him by taking possession of the materials, plant, and buildings on the premises at the time of re-entry without any allowance or compensation to the defendant, and that the plaintiff could not claim damages beyond that. His Lordship could not accept that view, for that would be to read with these clauses "as and for liquidated damages," or words to the same effect, and his Lordship was not entitled to do that. It was common enough to find the insertion of such words when there was an intention of the parties so to limit the liability for a breach of the contract. Instances of this were to be found in "Reilly v. Jones" (1 Bing., 302), "Lea v. Whitaker" (L.R., 8 C.P., 70), and in "Ex parte Newitt—in re Garrud" (16 Ch. D., 522). His Lordship referred to the judgments in the last case. In the absence of some such express words Clauses 2 and 11 could not be construed so as to deprive the landowner of the right to prove actual damage for the defendant's failure to perform the contract; but the words in Clause 11 "without making any allowance or compensation in respect thereof" would not, his Lordship added, operate to prevent the builder from having included in the damages any value which might exist in the buildings, plant, &c., seized by the landowner when he re-entered. The damages must be assessed *rebus sic stantibus*, and it might be the case that, if the structure was nearly completed "in carcase" at the time of the re-entry, the landowner would fail to prove any substantial damage at all to flow from the breach on which he sued, as he had failed in

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

"*Oldershaw v. Holt*" (12 A. and E., 590). The question of the amount of damages had been referred to the official referee, who had made two alternative assessments. He reported that the plaintiff had, after entering, relet at the best rent he could—viz., £900 a year, after the first year, and he assessed the damages at the loss of two years' rent of £1,100 and the loss of £200 a year from June 24, 1899, at 25 years' purchase amounting to £5,000, making in all £7,200. In the alternative, if the plaintiff was only entitled to recover damages caused by the removal of materials by the defendant and by the loss of possession from June 24, 1896, to January 19, 1897, the official referee found that the amount of such damage was £200, and one year's rent of £900 from June 24, 1896, to June 24, 1897, the earliest date at which the plaintiff was able to relet the premises. The damages must be assessed, his Lordship said, upon well-recognized principles. They must be such as flowed naturally, and, in the circumstances of the case, necessarily from the breach of contract; further, they must be such damages as might reasonably be shown to have been in the contemplation of the parties when they entered into the contract. Subject to this, the plaintiff was, in the language of Mr. Justice Field in "*Wigsell v. School for Indigent Blind*," "entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed." If the defendant had performed this contract before the date of re-entry, the old building would have been removed, and a new and valuable structure erected on the site, and if he had then failed to complete the plaintiff would have had no difficulty in getting some one to take up the undertaking on at least as profitable terms. But, as it was, the plaintiff had only been able to relet on terms involving a loss of £7,200. His Lordship could find no fault of principle in this assessment. "*Oldershaw v. Holt*" was the case most in point, and there it was held, it being a case of re-entry after neglect to build, that the jury might properly give a verdict on an estimate of the plaintiff's real damage, taking into consideration an increased rent secured by the agreement which he had made with a new lessee. Upon the same principle it was right in this case to consider the reduced rent which the plaintiff had been obliged to accept from a new contractor. As to the alternative assessment, his Lordship did not think that the damages could, according to legal principle, be assessed upon that basis. There would, therefore, be judgment for the plaintiff for £7,200.

[Solicitors—Tarry, Sherlock, and King, for the plaintiff; A. M. Bradley, for the defendant.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } June 8.
THE HOME MARINE INSURANCE COMPANY (LIMITED) v.
SMITH.*

Insurance—Marine—Underwriter's slip—Stamp Act, 1891, secs. 91 and 93.

Decision of Mathew, J. (*ante*, p. 366, and [1898] 1 Q.B., 829), affirmed.

This was an appeal from a decision of Mr. Justice Mathew, reported *ante*, p. 366; and in [1898] 1 Q.B., 829. The action was brought to recover the sum of £350 16s. 5d. under a contract of reinsurance underwritten by the defendant and other Lloyd's underwriters, dated July 26, 1896. The plaintiffs'

case was that the defendant agreed to reinsure the plaintiffs to the extent of the excesses over certain amounts upon risks which the plaintiffs had then taken, or might take, on goods by vessels of certain named steamship lines. In June, 1896, goods insured by the plaintiffs per the *Golden Fleeco*, a steamship belonging to one of the named lines, were totally lost, and the plaintiffs paid a total loss in respect of them to the amount of £5,008 4s. 5d. The excess which fell upon the reinsurance contract was £3,808 4s. 5d., of which the defendant's proportion was £350 16s. 5d., the sum claimed in the action. The plaintiffs claimed in the alternative a declaration that under the contract above-mentioned they were entitled to have issued to them by the defendant a duly subscribed policy in respect of the lost goods and to recover under such policy when issued. The defendant contended that the plaintiffs had by their conduct repudiated and terminated the contract of reinsurance, and, further, that there was no contract of reinsurance expressed in a policy sufficient to satisfy the requirements of the 54 and 55 Vict., c. 39, section 93 (the Stamp Act, 1891). The contract sued upon was expressed in words, initial letters, and figures, the signification of which was as follows:—"Open cover, 30-6-96. Dawson Brothers (the plaintiffs' brokers). Cash. Steamer or steamers and steamers. United Kingdom and (or) Continent and (or) America to West Indies. Merchandise. Reinsurance. Rates as per endorsement." Then followed the amounts taken by each underwriter and initialled by them. "F.C.A. and York-Antwerp rules. Detention clause. Old or new bill of lading, including all risks from warehouse lighterage and until delivered at destination. Negligence clause. £4,000." This was explained to be the limit of excess taken on any ship. On the back there was a list of the steamship lines on which excesses on goods were insured and the amount of the line reserved by the plaintiffs and the rate of premium in each case. By an order made in Chambers by Mr. Justice Bigham it was directed that the question raised in the defence on the Stamp Acts should be determined before the trial of the action. Mr. Justice Mathew gave judgment for the defendant. The plaintiffs appealed.

Mr. Carver, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Scruton for the defendant.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said he was of opinion that the appeal failed, and that it failed on one point, with which alone he would deal. They had to consider a document, which was called an open cover, but which in more ordinary language was called a slip. The question was whether the plaintiffs could maintain an action on this slip, no policy having been issued in pursuance of it. Now, what was this slip? It certainly did not cover anything except marine risks. The object of it was to cover the plaintiffs with regard to excesses over certain amounts upon risks which the plaintiffs had taken, or might take, on goods by vessels of certain named lines. It seemed to him impossible to say that it was not a contract of sea insurance. The argument was that it was not valid because, being, as he thought it was, a contract of sea insurance, it did not satisfy the requirements of section 93, subsection 3, of the Stamp Act, 1891, which said that a policy of sea insurance should not be valid unless it specified the sum or sums insured. This slip did not specify any sum as the sum insured. The sum of £4,000 mentioned in the slip was the sum beyond which the underwriters were not to be called upon to pay on any one ship. He could not say that this document specified the sum insured so as to satisfy subsection 3, and so as to be a valid contract. He therefore thought that the appeal

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

must be dismissed, and that it ought to be declared that the plaintiffs could not sue on this document.

LORD JUSTICE RIGBY delivered judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

Q.B. Div. (Day and }
Lawrance, JJ.) }

1898.
June 8.

HOWCROFT V. LAYCOCK.*

Sale of Goods—Goods not according to contract
—Non-warranty clause in invoice—Liability of
vendor.

This was an appeal from his Honour Mr. Lumley Smith, County Court Judge, raising a question as to the effect of a clause very commonly put at the head of seed merchants' bills. The clause was as follows:—"Messrs. — give no warranty, express or implied, as to description, quality, productiveness, or any other matter connected with the seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned." The plaintiffs had supplied some seeds to the defendant's order. The order was for a species of cabbage called Couve Tronchuda. The seed sent when it grew up turned out to be Jersey kale, a species of tree cabbage, only suitable for making walking-sticks. The action was brought for the price of the seeds; the defendant counter-claimed for damages for breach of contract. The County Court Judge had an unreported case named "Reynolds v. Wrench," in the Court of Appeal, cited to him, and he referred to "Bowes v. Shand" (2 A.C. 455). He thought that the non-guarantee clause protected the plaintiffs. But for that he would have found for the defendant.

For the appellant, the defendant, Mr. A. T. LAWRENCE, Q.C., and Mr. G. B. HAMILTON appeared, and cited the cases "Josling v. Kingsford" (13 C.B., N.S., 447) and "Nichol v. Godts" (10 Ex., 191).

Mr. EARLE appeared for the plaintiffs, and cited "Allan v. Lake" (18 Q.B., 560) and "Randall v. Roper" (27 L.J., Q.B., 266). He contended that when, in ordinary cases, goods had been accepted the purchaser could only recover for breach of warranty. Here, however, the purchaser had agreed not to raise any question of warranty and therefore had no remedy. It was an important matter for seed sellers and seed growers all over the country. In this case the seed sellers had bought the seed from some one else, so there was no imputation on their *bona fides*. Seed would be very much dearer if the sellers had to guarantee it.

The COURT allowed the appeal.

MR. JUSTICE DAY was of opinion that the County Court Judge had been misled by a case which had no bearing on the question. The clause in question could not be construed to mean that no action should be brought. When Couve Tronchuda was ordered the seed sellers were not entitled to deliver something quite different. The custom of a trade might qualify a contract, but it could not destroy it. A rational construction must be put on the words relied upon. The construction desired by the respondents to be established was unreasonable.

MR. JUSTICE LAWRENCE concurred.

Leave to appeal was granted if an indemnity to the costs were given to the defendant.

[Solicitors—E., F., and H. Landon, for the respondent; G. E. Webb for the appellant.]

Q.B. Div. (Day and }
Lawrance, JJ.) }

1898.
June 8.

ALTREE V. ALTREE—STAFFORDSHIRE FINANCIAL COMPANY, CLAIMANTS.*

Bill of Sale—Validity—Form in schedule—Address and description of grantee.

This was an appeal from the County Court Judge at Staffordshire sitting at Lichfield, who decided that a bill of sale was void, because neither the address nor the description of the grantees, the Staffordshire Financial Company, was given in the bill of sale.

Mr. J. B. Matthews appeared for the appellants, the grantees of the bill; Mr. Disturnal for the respondent.

The material words of the bill of sale in question were as follows:—"This indenture made the 12th day of March, 1898, between John Altree, of Triangle Farm, Chase Town, in the parish of Hammerwich, in the county of Stafford, farmer, hereinafter called 'the borrower' of the one part, and the Staffordshire Financial Company (Limited) hereinafter called 'the lenders' of the other part."

MR. MATTHEWS contended that the bill of sale was valid. It was necessary in a bill of sale to give the address and description of the grantor; that was clear. But there was no need to put the address of the grantee. The only part of the statute relating to this was that in the form given in the schedule a space was left for the address of a grantee. He referred to the rules of the Supreme Court, 1884. R. 3 dealt with the abstracts of the contents of bills of sale which the registrar had to prepare. The registrar was not bound under them to give the address of the grantee in such abstract. Further, even if a grantee, an individual, had to give an address, a corporation or a limited liability company was under no such necessity. The old and well-known practice of conveyancers was not to put the address of a joint stock company in any conveyance. It was always easy to identify a registered company. He cited the following cases:—"Ex parte Stanford" (17 Q.B.D., 259), "Thomas v. Kelly" (13 App. Ca., at p. 511), "Linfoot v. Pockett" ([1895] 2 Ch., 835), "Simmons v. Woodward" ([1892] App. Ca., 100), "Murray v. Mackenzie" (L.R., 10 C.P., 625), "Maugham v. Sharpe" (34 L.J., C.P., 19), "Parsons v. Brand" (25 Q.B.D., 110), "Sims v. Trollope" ([1897] 1 Q.B., 24), "Dolcini v. Dolcini" ([1895] 1 Q.B., 898), "Smith v. Hammond" ([1896] 1 Q.B., 571) and "Shears v. Jacob" (L.R., 1 C.P., 513).

The COURT, without calling on counsel for the respondent, supported the decision of the County Court Judge.

MR. JUSTICE DAY said the Bill of Sales Act of 1882, by section 9, provided that a bill of sale should be void unless drawn in the form given in the schedule to the Act. Then, turning to the schedule, it would be found that a blank was left in the form for the address of the grantee equally with that of the grantor. That showed that the address of the grantee should appear in the bill. The objection taken by the County Court Judge was quite right.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Pitman and Sons, for Barnes and Son, Lichfield, for the respondent; Smiles and Co., for L. W. Lewis, Walsall, for the appellant.]

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

Q.B. Div. } 1898.
(Mathew, J.) } June 9.

JAYS (LIMITED) V. SALA AND ANOTHER.*

Principal and Surety—Guarantee—Letter—Acceptance of guarantee.

In this action the plaintiffs sued as the assignees of Mr. Tom Simson Jay for £121 16s. 9d., the price of goods sold and delivered to the first defendant, the widow of the late Mr. G. A. Sala, on the guarantee of the second defendant, her sister, Mrs. Crafton Smith. The defence was that the document in question was not a guarantee, that if it was it had never been accepted by Mr. Jay, and that neither it nor the debt had been assigned to the plaintiffs by Mr. Jay.

Mr. Macaskie appeared for the plaintiffs; and Mr. W. E. Hume-Williams for the defendant Mrs. Crafton Smith.

The plaintiffs' case was that early in December, 1895, Mr. George Augustus Sala died. On December 8 in that year Mrs. Crafton Smith wrote to the manager of the widows' mourning department at Messrs. Jays, asking him to send a competent person to Mrs. Sala to take her orders for mourning. That letter was followed by another from Mrs. Smith which contained the sentence "Kindly keep my enclosed card as a guarantee for Mrs. Sala's personal order, should you require it." This was the guarantee relied on by the plaintiffs. The plaintiffs sent one of their assistants to Mrs. Sala, and goods were supplied to her to the amount of £121 16s. 9d., the orders being given for the most part in the presence of Mrs. Smith. Application for payment was made to Mrs. Sala without success, and judgment had been obtained against her and she had become a bankrupt. On her failure to satisfy their claim, the plaintiffs had recourse to Mrs. Smith as surety, and in February, 1897, their solicitor wrote to her for the amount due. In her answer to that letter Mrs. Smith said that, although she had given some sort of a guarantee, it was only intended to cover one suit of mourning to be used at the moment, and eventually, on her refusal to pay, the plaintiffs brought the present action.

Mr. HUME-WILLIAMS, for the defendant Mrs. Smith, contended that this was a guarantee which required to be accepted, and that, no acceptance having been given by them, the plaintiffs could not sue upon it. In support of this view he cited the cases of "Mozley v. Tinkler" (1 C.M. and R., 692) and "McIver v. Richardson" (1 M. and S., 557). He further relied on the fact that the deed of assignment from Mr. Jay to Jays (Limited) purported to assign book debts due on February 2, 1896, and that as Mrs. Smith's name did not appear in the firm's books the plaintiffs had no right as against her transferred to them by the assignment. He also submitted that this was an attempt by one person to sue on a guarantee given to another, and that, even supposing the debt had been assigned to the plaintiffs, no sufficient notice as required by the Judicature Act, section 25, subsection 6, had been given to Mrs. Smith.

His LORDSHIP, at the conclusion of the arguments, reserved his judgment, and, in deciding in favour of the plaintiffs, said that a technical objection had been raised that the alleged guarantee had not been transferred from the old firm to the new. That being a purely technical objection, it ought to be got rid of, and he would accede to an application that Mr. Jay should be joined as a plaintiff in the present action. A second technical objection which had been taken was that no notice of the assignment of the debt and guarantee had been

given to the defendant, but on looking at the circumstances of the case and the letter written to Mrs. Smith by the plaintiffs' solicitor on February 23, 1897, he was satisfied that such notice had been given. With regard to the question of whether there was a guarantee at all, that point had admitted of some discussion. On behalf of the defendant it had been alleged that there was only an offer of a guarantee, and that the goods must be taken to have been supplied on the credit of Mrs. Sala only, and that unless there had been an acceptance of the proposed guarantee by the plaintiff firm no contract of guarantee could be proved. It seemed to him that Mrs. Smith's letter clearly meant that she thought that Messrs. Jays would probably refuse to deliver the goods without a guarantee, and so she gave them hers. It was so understood by the plaintiffs, and they at once sent a person to take the orders, which were given for the most part in the presence of Mrs. Smith. The plaintiffs appeared to him to have acted on that as a guarantee; the subsequent correspondence clearly disclosed that that was the view they took of it, and, further, that Mrs. Smith knew that they were acting on the faith of the guarantee. In these circumstances it appeared to him that there was abundant evidence to show that the letter was far more than a mere offer of a guarantee—it was a contract of guarantee, and was so understood by the plaintiffs and the defendant. The cases of "Mozley v. Tinkler" and "McIver v. Richardson" had been cited in support of the defendant's contention that a guarantee could not be established unless there was an acceptance of it. The first of these cases was distinguishable from the present because it was not shown in it that the alleged guarantee had been acted upon as a guarantee, and the second on the ground that in it the offer of a guarantee was made conditionally. He therefore gave judgment for the plaintiffs for the amount claimed, with costs.

Q.B. Div. } 1898.
(Phillimore, J.) } June 9.

SMITHWHITE V. MOORE AND SONS (LIMITED).*

Master and Servant—Personal injuries—Liability of master—No evidence of negligence—Nonsuit.

This action raised a point of law as to the liability of a master for injury sustained by his servant in the course of his employment. The plaintiff, who sued by his father, was employed at the Cheshire Cheese in Fleet-street, and on November 6 of last year he was sent up, between 6 and 7 in the evening, by James, the head waiter, to clean the windows in a room on the fourth floor. The room was imperfectly lighted, and the plaintiff did not observe a crack in one of the panes. While cleaning this pane the glass fell out, and his right wrist was severely cut, the nerve being severed. He claimed damages from the proprietors of the Cheshire Cheese.

Mr. Witt, Q.C., and Mr. F. S. Cooper appeared for the plaintiff; Mr. Cyril Dodd, Q.C., and Mr. Beaufoi Moore for the defendants.

Mr. DODD, after evidence of the injury had been given, submitted that there was no case to go to the jury. The master at common law was responsible only for personal negligence, and there was no evidence that Mr. C. Moore, the managing director of the defendant company, knew that the window was cracked. If there was any negligence it was the negligence of James, a fellow-servant. He referred to "Wakelin v. London and South-Western Railway Company" (12 A.C., 41).

Mr. WITT, after mentioning "Griffiths v. the London

*Reported by F. B. DRENEED, Esq., Barrister-at-Law.

*Reported by W. HALDANE PORTER, Esq., Barrister-at-Law.

and St. Catharine's Dock Company" (12 Q.B.D., 493) and "Smith v. Baker" ([1891] A.C., 325), submitted that the defendant company were responsible for the actions of James, and that the question of negligence should be left to the jury.

His LORDSHIP held that the plaintiff had no claim in law, and gave judgment for the defendants with costs, but granted, by consent, a stay of execution till June 14 with a view to an appeal.

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.JJ.) } June 10.
ECROYD V. COULTHARD.*

Enclosure Acts—Land abutting on river—Fishery—Right to fish—Effect of enclosure award.

The ownership of common rights over land abutting on a river does not confer any rights over the river.

This was an appeal from a decision of Mr. Justice North, reported in *The Times* of August 12. The object of the action was to determine the ownership of the soil or bed of the river Eden *ad medium flum aqua*, so far as it abutted on an estate called Edenbanks, above Carlisle, and the right of fishing therein as incidental to the ownership of the soil. The plaintiff claimed title under a deed of conveyance dated May 14, 1890, from the then Earl of Carlisle, who was lord of the manor of Cumwhitton, in which the Edenbanks estate was situate. This deed conveyed to the plaintiff, *inter alia*, the several fishery in that part of the river Eden which ran through the parishes of Ainstalle and Cumwhitton. The defendant, Mrs. Leach, derived title under an award of Enclosure Commissioners acting under the provisions of a private Enclosure Act passed in 1796. The other defendants were members of an angling society, and claimed as licensees of Mrs. Leach. It was found to the satisfaction of the Court that at the time when the Enclosure Act was passed the lord of the manor, as owner of one-half of the bed of the part of the river in question had rights of fishing therein and had exercised those rights, and there was no evidence that the tenants of the manor had any commonable rights over the river. The Enclosure Act contained no mention of the river, and it expressly reserved the manorial rights of the lord. By the award of the commissioners, dated April 13, 1801, the property now known as the Edenbanks estate was allotted to William Leach, a predecessor in title of the defendant, Mrs. Leach, and its area was stated in acres. The area so stated was the exact measure of the land if no part of the river bed was included in it. The defendant, Mrs. Leach, claimed that according to the ordinary legal presumption arising on a conveyance of land abutting on a river she was entitled to half of the bed of the river which was adjacent to her estate. The plaintiff, on the other hand, contended that the bed of the river never was part of the waste of the manor, and was not affected by the Enclosure Act, and that, consequently, the ordinary presumption did not apply. And he claimed not only the right of fishing in that part of the river, but also the right of passing along the shore of the river within the Edenbanks estate for fishing purposes. Mr. Justice North held, first, that the half bed of the river did not pass by the award, but belonged to the plaintiff; secondly, that no right of way along the river was reserved to the lord of the manor under the saving clause in the award, and that the defendant, Mrs. Leach, was entitled to an injunction to restrain the plaintiff from trespassing on the Edenbanks estate. Both parties appealed from this decision.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

Mr. Cozens-Hardy, Q.C., and Mr. Micklem were for the defendants; Mr. Cripps, Q.C., Mr. Butcher, Q.C., and Mr. Stuart Moore were for the plaintiff.

The COURT dismissed both appeals.

The MASTER of the ROLLS said that at the date of the passing of the Enclosure Act the then Earl of Carlisle was the owner of the soil of the waste abutting on the river, and he was the owner of the right to fish in the river, and the first question was whether the Enclosure Act had any reference at all to the bed of the river. It was a strange thing to say that an Act passed for the purpose of appointing commissioners to allot portions of the waste of the manor should apply to the bed of the river abutting on the waste, notwithstanding that it contained no mention of the river, at any rate when the soil of the river was enjoyed by the lord as a separate tenement. It was argued that *prima facie* the waste lands extended to one-half the soil of the river, and "Attorney-General v. Harmer" (27 L. J., Ch. 887) was relied on; but that was a case of a grant from the Crown, not an award under an Enclosure Act. It was new to his Lordship that an Enclosure Act could deal with anything except lands over which there were commonable rights, and, looked at from a commonsense point of view, the presumption was against the commoners having anything to do with any other lands. The defendant's case depended entirely upon the assumption that the bed of the river was part of the waste, but, although the owner of land adjoining a river was *prima facie* the owner of half the bed of that part of the river, no decision could be found which went the length of saying that commoners having rights of turbary or other common rights over lands adjoining a river had any rights over the river. No doubt where the waste was bounded by a river and there was evidence that by the custom of the manor the commoners had a right of fishing in the river, one-half of the river might be presumed to be included in the waste. See "Tilbury v. Silva" (45 Ch. D., 98, 110); but here the river was part of the demesne lands, and was not part of the waste for the purpose of this Enclosure Act. His Lordship therefore thought that Mr. Justice North was right in saying that the defendant, Mrs. Leach, did not acquire any right of fishing in this river. With regard to the cross-appeal the case was covered by the "Duke of Devonshire v. O'Connor" (23 Q.B.D., 468), a decision upon a saving clause in another Enclosure Act framed in identical terms. It was there held that the clause did not preserve to the lord of the manor any right of shooting over the allotted lands. There was no difference between such a right and the right of landing fish and walking over the lands for fishing purposes as was claimed in this case. It was to be observed that this right of fishing, being incidental to the ownership of the bed of the river, was a territorial and not a manorial right. The view taken by Mr. Justice North was right on both points, and both appeals should be dismissed.

LORDS JUSTICES CHITTY and COLLINS gave judgment to the like effect.

[Solicitors—E. Flux and Leadbitter, for Dobinson and Watson, Carlisle, for the defendant; Harrison and Powell, for Saul, Carlisle, for the plaintiff.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } June 10.

IN RE CLARK—EX PARTE SCHULZE.*

Bankruptcy—Husband and wife—Money lent by wife to husband—Married Women's Property Act, 1882, sec. 3—Construction.

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

Sec. 3 of the Married Women's Property Act, 1882, applies only to money lent by a wife to her husband for the "purpose of any trade or business."

In this case, Mrs. Clark, the wife of the debtor, Matteo Clark, claimed to prove for a debt of a large sum of money against her husband's estate under a receiving order. The sum in respect of which the claim was made consisted of various items, all of which in substance represented money lent or entrusted by the wife to the husband. The principal question was whether the wife was entitled to prove in respect of money which had been lent or entrusted by her to her husband otherwise than for the purposes of trade or business. The proof was admitted for voting purposes by the chairman at the first meeting of creditors, and Mr. Justice Wright held that it was rightly admitted. From his decision an appeal was brought by Schulze, one of the creditors. Section 3 of the Married Women's Property Act, 1882, enacts that "any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy," and that the wife's claim shall be postponed to the claims of the other creditors. Mr. Justice Wright, following the cases of "*In re Tidswell*" (57 L.T., N.S., 416) and "*In re Tuff—ex parte Nottingham*" (19 Q.B.D., 88), held that the words "or otherwise" in the section merely qualified the words "carried on," and that, inasmuch as the money in question was not lent for the purpose of trade at all, the section did not apply, and the wife was not postponed to the other creditors. In support of the appeal it was argued that the words "or otherwise" ought not to receive so narrow a construction, and that the section applied to any money lent by a wife to her husband, whether it was lent for the purpose of trade or not.

Mr. C. A. Russell, Q.C., and Mr. Hansell appeared for Schulze; Mr. Upjohn, Q.C., and Mr. Frank Mellor for Mrs. Clark.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said he could not read the section as meaning that whenever a wife lent any money to her husband she was in the event of his bankruptcy to be postponed to the general creditors. He felt firmly convinced that that could not be the true construction of the words; for it cut out what seemed to be the most important limitation in the section restricting its application to money lent to the husband "for the purpose of any trade or business carried on by him or otherwise." As to what was the true meaning of the words "or otherwise," on that he did not feel so positive. They might mean carried on by his agents, or carried on by him in partnership with others. He thought that the judgment of Mr. Justice Wright was correct, and that the appeal must be dismissed.

LORD JUSTICE RIGBY said he agreed, though he felt great difficulty in the question. He could not give the words of this section such an interpretation as to make them rational. Any construction of them seemed to be beset with difficulties. But he thought the construction which they were adopting was the least unreasonable.

LORD JUSTICE VAUGHAN WILLIAMS agreed. He said that the construction which the appellant invited them to put on the section would lead to an absurd practical result. But quite independently of that consideration he thought that, according to the general rules of construction, the meaning put on the words by Mr. Justice Wright was the true meaning. The section contained a specific proposition followed by general words. He thought that those general words were ancillary in their nature, and that they ought not to be so construed as to do away with the specific proposition.

Q.B. Div. (Day and }
Lawrance, JJ.) }

1898.
June 10.

BAILEY V. WATSON.*

County Court—Costs—Remitted action—Part recovered under O. 14—Transfer as to remainder of claim—Scale of taxation.

This was an appeal from a decision of the learned County Court Judge of the Swansea County Court as to the scale on which certain costs should be taxed. The action was brought in the Swansea Registry of the High Court for the sum of £44 9s. 11d.; and a summons for judgment was taken out under Order XIV. On the hearing of that summons on January 24, 1898, an order was made by the district Registrar that the plaintiff should be at liberty to sign final judgment for £27 18s. 5d., with costs, that the defendant might defend as to £2 0s. 6d. (the remainder of the claim being abandoned), and that the action should be remitted to the Swansea County Court. The defendant paid the £27 18s. 5d., with taxed costs, and afterwards, on February 25, the plaintiff entered the claim for the £2 0s. 6d. in the County Court. The plaintiff recovered judgment for that sum, with costs. And he claimed that these costs should be taxed upon the scale applicable where the amount recovered is between £20 and £50, on the authority of "*Keble v. Bennett*" (L.R., 1894, 2 Q.B., 329). The Registrar of the County Court held that the costs ought to be taxed on the scale applicable where the amount recovered is between £2 and £5. The learned County Court Judge, however, on appeal to him held, on the authority of "*Keble v. Bennett*," that the plaintiff was entitled to have the costs taxed on the £20 to £50 scale. From this decision the defendant now appealed.

Mr. R. O. B. Lane appeared for the appellant, and Mr. Meager for the respondent.

The Court allowed the appeal.

MR. JUSTICE DAY, after stating the facts, said that when the district Registrar made the order of January 24, 1898, he finally disposed of the claim as to £27 18s. 5d. There remained the claim for £2 0s. 6d., as to which the Registrar gave leave to defend. And it seemed to his Lordship that the order remitting the action to the County Court was in substance an order remitting the action for £2 0s. 6d. Then the plaintiff recovered judgment for that amount. And the question was whether he could add the £2 0s. 6d. to the £27 18s. 5d. and say that he had recovered £29 18s. 11d. in the County Court. In his Lordship's opinion the plaintiff could not do so. The £27 18s. 5d. was recovered in the High Court, and the costs in respect of that sum had been paid, and the only sum recovered in the County Court was £2 0s. 6d. His Lordship entirely accepted the case of "*Keble v. Bennett*," which, in his opinion, was rightly decided. But in that case there was no judgment of the High Court, no order for costs, no taxation of costs, and no payment of costs; and what was there remitted to the County Court was the action for the whole amount of the original claim. The case was therefore entirely distinguishable from the present case, where what was remitted was a portion of the original claim only.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Riddell, Vaizey, and Smith, for Viner Leeder and Morris, Swansea, for the appellant; R. White, for Laurence Richards, Swansea, for the respondent.]

* Reported by A. F. JENKIN, Esq., Barrister-at-Law.

Court of Appeal (Lindley, M.R., }
Rigby and Collins, L.J.J.) }

1898.
June 11.

IN RE PERKINS—POYSER V. BEYFUS.*

Landlord and Tenant.—Lease—Assignment—
Covenant to indemnify against liability for rent
—Sub-assignment—Claim against executors of
sub-assignee.

Decision of North, J. (*ante*, p. 246), affirmed.

This was an appeal from an order of Mr. Justice North declaring the estate of a deceased person named Perkins first to be indebted to the plaintiff in the sum of £215 4s., paid by the plaintiff for rent and insurance of a house comprised in a lease to the plaintiff dated October 5, 1891; and, secondly, to be liable to indemnify the plaintiff against future rent and insurance and damages for breaches of covenant in the same lease. (See *ante*, p. 246.) The facts (as stated by the MASTER of the ROLLS) were as follows:—By a lease dated October 5, 1891, a certain house was leased to the plaintiff for a term still unexpired, and by this lease the plaintiff covenanted to pay rent and to insure the house and perform certain other obligations usual in leases. On May 8, 1893, Poyser, the plaintiff, assigned this lease to Plaistowe, and on April 1, 1895, Plaistowe assigned it to Perkins. Each of these assignments contained a covenant by the assignee with his assignor to pay the rent and perform the covenants reserved and contained in the lease of October 5, 1891, and also to keep him, the assignor, indemnified against the same. In June, 1895, Perkins died. On June 12, 1897, Plaistowe was adjudicated bankrupt, and Berry was appointed his trustee. The plaintiff Poyser was called on to pay, and did pay, the arrears of rent, which became due under the lease of October 5, 1891, and he tendered a proof against Plaistowe's estate for £1,353, the amount paid by the plaintiff and the estimated amount of his liability under his covenants contained in such lease. Thereupon a compromise was agreed to between the plaintiff and the trustee in bankruptcy, and was carried out by a deed of August 31, 1897, which gave rise to the present controversy. This deed was made between the trustee of the one part and the plaintiff of the other part. It recited the facts above stated, and then proceeded as follows:—

"Whereas the said Oscar Berry has, with the permission of the said committee of inspection, testified by a resolution passed at a meeting of the said committee of inspection, held the 31st day of August, 1897, at 8, Southwark-street, Borough, in the county of Surrey, and by way of compromise of the claim of the said E. J. Poyser against the estate of the said bankrupt, agreed to sell and dispose of to the said E. J. Poyser the full benefit of the said covenant on the part of the said G. F. Perkins with the rights and powers hereinafter assigned in consideration of the said E. J. Poyser paying to him the sum of £5, and executing such release as is hereinafter contained. Now this indenture witnesseth that, in pursuance of the said agreement and in consideration of the sum of £5 now paid by the said E. J. Poyser to the said Oscar Berry (the receipt of which is hereby acknowledged) and of the release hereinafter contained, the said O. Berry, as trustee, and with the permission testified as aforesaid of the said committee of inspection, doth hereby assign unto the said E. J. Poyser the full benefit of the covenants by the said G. F. Perkins with the said F. M. E. Plaistowe contained in the hereinafter recited indenture of April 1, 1895, as aforesaid, with the right to recover

and receive from the said G. F. Perkins, his heirs, executors, or administrators estate or effects, and to retain for the benefit of the said E. J. Poyser, his executors, administrators, and assigns all and every such damages, costs, or other sums of money, if any, and to enforce for the like benefit all such other relief by way of indemnity or otherwise as the said F. M. E. Plaistowe, his executors, or administrators, but for his bankruptcy, or the said O. Berry or other the trustee for the time being in the bankruptcy might have been entitled now, or at any time or times hereafter, to recover or to enforce for the benefit of the said F. M. E. Plaistowe or his estate for any breach or breaches committed or hereafter to be committed of the said covenants or any of them, or otherwise under or in respect of the liability of the said G. F. Perkins or his estate by virtue of such covenants or any of them if these presents and the arrangement hereby entered into had not been executed or made and the right to bring, prosecute, carry, or compound, or release any action or proceeding for any such purpose, and all other rights, powers, privileges, and authorities which the said O. Berry, as such trustee, with such permission as aforesaid, can lawfully transfer to the said E. J. Poyser in connexion with the premises to hold the premises unto the said E. J. Poyser, his executors, administrators, and assigns for his and their own benefit absolutely, and this indenture further witnesseth that in further pursuance of the said agreement and in consideration of the assignment herebefore contained the said E. J. Poyser hereby withdraws the said proof for the sum of £1,353 0s. 4d., and releases and discharges the estate of the said bankrupt and the said O. Berry as such trustee as aforesaid from all claims and demands under or in respect of the covenants by the said F. M. E. Plaistowe with the said E. J. Poyser contained in the herebefore recited indenture of May 8, 1893, as aforesaid."

Under this deed the plaintiff carried in a claim against Perkins's estate for payment out of his assets of what the plaintiff had paid for rent and insurance and for future indemnity against liability under the covenants contained in the lease of October 5, 1891. It appeared that shortly after Plaistowe's bankruptcy Perkins's executors assigned the lease to a person named Jay, who, however, did not pay the rent or perform the covenants so as to relieve Perkins's estate from liability to Plaistowe, or, rather, to his trustee in bankruptcy. The defendants were Perkins's executors, and they admitted assets. Mr. Justice North made an order allowing the claim, and from this order Perkins's executors appealed.

Mr. Everitt, Q.C., and Mr. E. Ford were for the appellants; Mr. Vernon Smith, Q.C., and Mr. Wace were for the respondent.

The case was argued in May last.

The MASTER of the ROLLS now delivered the judgment of the Court dismissing the appeal. After stating the facts as above, his Lordship continued:—The appeal raises two questions—viz. (1) whether the rights vested by the Bankruptcy Act in Plaistowe's trustee could be assigned by him to the plaintiff; and (2) whether, having regard to the terms of the deed and the release of Plaistowe's estate, the plaintiff acquired any right to sue Perkins's executors. The first of these questions turns on the Bankruptcy Act, 1883. The material sections are 20, 44, 50 clause 5, 56, 57 and 168, which defines "property." It is plain from sections 20, 44, 50 clause 5 and 168, and from the decision in "Hardy v. Fothergill" (13 A. C., 351), that the plaintiff Poyser had a right of proof against Plaistowe's estate not only for the sums paid by the plaintiff for rent and fire insurance, but also in respect

*Reported by H. B. HERMING, Esq., Barrister-at-Law.

of Plaistowe's future liability under his own covenants with the plaintiff. It is also plain from sections 56 and 57 that it was competent for the trustee in bankruptcy to compromise the claim made by the plaintiff and to assign to the plaintiff any assignable asset vested in the trustee upon the terms that the plaintiff should accept such asset in satisfaction of all demands against Plaistowe's remaining assets. It is also plain that the right of the trustee to sue Perkins upon Perkins's covenant was an asset—i.e., was property within the meaning of section 168, and was assignable to the plaintiff or to any one else (see section 56 and “*Seear v. Lawson*,” 15 Ch.D., 426), and that the damages in an action by the trustee against Perkins's executors would not be confined to the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate. See “*Cruse v. Paine*” (6 Eg., 641, and 4 Ch., 441.) This disposes of the first ground of appeal. The second turns on the true effect of the release contained in the deed of August, 1897. If this release is to be construed as a release by the plaintiff of Plaistowe or of his estate from all liability under his covenants, then the effect will be to discharge Perkins's estate from all liability under his covenant to indemnify Plaistowe. A liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms. A distinction was attempted to be drawn between the covenant by Perkins to pay the rent and perform the covenant to insure on the one hand, and his covenant to indemnify Plaistowe on the other, and it was contended that, although the release might extinguish all liability on the covenant to indemnify, it did not affect the covenant to pay the rent and to insure. Much time was spent in discussing these points and in examining such cases as “*Saward v. Anstey*” (2 Bing., 519), “*Carr v. Roberts*” (5 B. and Ad., 78), and “*Ashdown v. Ingamells*” (L.R. 5, Ex. D., 280), and in considering the amount of damages which could be recovered if the distinction suggested could be drawn and had in fact to be made. But in the view we take of the true construction of the deed of August 31, 1897, these questions do not arise. The release contained in the deed, although couched in very general terms, must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part. The recitals and first witnessing part show that the release cannot be rationally construed as extending to all Plaistowe's estate, including the asset assigned to the plaintiff. The estate released must exclude that asset. Again, the claims and demands from which Plaistowe's estate is released cannot be rationally construed as all claims and demands in respect of Plaistowe's covenants. The claims and demands released must be confined to those against the released assets, and cannot be rationally held to include those the preservation of which is essential to the recovery by the plaintiff of the asset assigned to him and which asset he is to take in satisfaction of all demands. In so construing the release the Court is not departing from well-settled principles applicable to the construction of such documents. General words of release are always controlled by recitals and context which show that, unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in “*Payler v. Homersham*” (4 M. and S., 423) and “*Lindo v. Lindo*” (1 Beav., 496). In our opinion, therefore, the appeal fails on this ground also. It is to be observed that Mr. Justice North has merely given the plaintiff liberty to apply in respect of future breaches of covenant. He has not impounded assets to

meet them, nor attempted to estimate damages in respect of them. The order is right both in substance and in form, and the appeal must be dismissed with costs.

[Solicitors—Beyfus and Beyfus ; El., F., and H. London.]

Q.B. Div. (Day and }
Lawrance, JJ.) }

1898.
June 11.

THE QUEEN V. PEARCE—EX PARTE LONDON SCHOOL BOARD.*

Lands Clauses Acts—Compensation—Lands injuriously affected—Land taken for School Board—Depreciation of adjoining land through noise made by school children.

This was an application to make absolute a rule nisi that had been granted for a *certiorari* to bring up, for the purpose of being quashed, an inquisition, with the verdict and judgment thereon, taken before the Sheriff of London. The case arose out of proceedings for the assessment of the compensation due to Mr. Pearce, certain land belonging to whom was compulsorily taken by the London School Board as the site for a school. The land taken formed part of a building estate in the parish of Paddington belonging to the claimant, Mr. Pearce. The estate was already partly built on, and in the proceedings for the assessment of the compensation, which took place before the learned Under-Sheriff of the county of London and a jury, it was proposed on behalf of the claimant to give evidence that the houses on his estate in the immediate vicinity of the land taken would be depreciated in value owing to the noise that would be caused by the children attending the school. This evidence was objected to on behalf of the School Board on the ground that such depreciation in value did not form a subject for compensation. It was thereupon arranged that the jury should assess the compensation on this head separately in order that the question whether such compensation could properly be given might be brought before the High Court. The jury assessed the compensation on this head at £1,000. The rule nisi in the present case was then obtained.

Mr. FREEMAN, Q.C., and Mr. E. BOYLE appeared to show cause against the rule. They argued that, as part of the claimant's land had been taken, he was entitled to the compensation in question on the principles established in the cases of “*Duke of Buccleuch v. Metropolitan Board of Works*” (L.R., 5 H.L., 418) and “*Cowper Essex v. Acton Local Board*” (L.R., 14 App. Cas., 153).

SIR EDWARD CLARKE, Q.C., Mr. ~~DAY~~, and Mr. MARCHANT appeared in support of the rule. They contended that the damage to the claimant's property would not arise out of the use of the school by the School Board, but from the conduct of the children outside the school—a matter for which the School Board were not responsible—and that the damage, therefore, did not give rise to a claim for compensation. They cited “*Caledonian Railway v. Ogilvy*” (2 Macq., 229), “*City of Glasgow Union Railway v. Hunter*” (L.R., 2 H.L., 58, 78).

The COURT discharged the rule.

MR. JUSTICE DAY said that it seemed to him, without giving any opinion as to whether the amount awarded by the jury was right, that the question had been properly left to the jury in accordance with established principles of law. Part of the claimant's land had been taken, and the jury had found that a

*Reported by A. F. JENKIN, Esq., Barrister-at-Law.

school carried on in the usual way on the land so taken would injure the residue of the claimant's land; and they had assessed the injury at £1,000. That they were entitled to do, and it was not for the Court to say whether the sum awarded was reasonable or not. It appeared to him that there was no ground for disturbing the verdict of the jury.

MR. JUSTICE LAWRENCE concurred.

[Solicitors—Mortimer, for the relators; Moon, Gilks, and Moon, for the defendant.]

Court of Appeal (Lindley, M.R., }
Chitty and Collins, L.J.J.) }

1898.

June 14.

IN RE THE EARL OF SEFTON.*

Lunacy—Property of lunatic—Settlement—Jurisdiction of Court to deal with lunatic's real estate.

In this case an important question was raised as to the jurisdiction of the Court of Lunacy—viz., whether the Court has jurisdiction to direct the committee of the estate of a lunatic to elect on behalf of the lunatic to accept a devise of land made to him, on condition that the devisee should within a year from the death of the testator execute a resettlement of certain family estates and to execute on behalf of the lunatic a resettlement of those estates. The present Earl of Sefton became a lunatic in consequence of a serious accident which he met with, and it was not expected that he would live many months. His father, the late Earl of Sefton, who died in June, 1897, was the tenant for life of settled estates, of which the net rental was about £30,000 a year. The present earl had, in his father's lifetime, and before he became a lunatic, disentailed the settled estates, so far as he could do so without the consent of his father as "protector" of the settlement, and had thus created a "base fee." The late earl was also the absolute owner of some other estates, the net rental of which was about £21,000 a year. By his will, made in 1893, the late earl gave the estates of which he was absolute owner (subject to a term of 1,000 years given to trustees on certain trusts) to the present earl (then Lord Molyneux) and his two younger brothers, the Hon. Osbert and the Hon. Richard Molyneux, as successive tenants for life, with remainders to their issue respectively in tail male after the respective life estates, with remainders over. The testator directed that every person who under the will should become entitled (subject to the term of 1,000 years) as tenant for life or tenant in tail male by purchase to the possession of the devised estates, and who should also become entitled as tenant in tail male or in tail whether by purchase or descent to the possession of the settled estates, should within one year after becoming entitled both under the will and the settlement, or, if an infant, within one year after attaining 21, disentail the settled estates and resettlement them on the same trusts as the devised estates. If the person required to do this should refuse or neglect to do so, then on the expiration of the year the estate given to him by the will was to determine. Power was given to a tenant for life of the devised estates to appoint a jointure not exceeding £5,000, or not exceeding £3,000 if no resettlement should be executed, and to charge portions for younger children to an amount varying, according to the number of the children, from £20,000 to £50,000. The testator also gave a legacy of £10,000 to the present earl if he should execute the resettlement, and also in the same case directed that his executors should, out of the

income of his residuary personal estate, pay the debts of the present earl. The next-of-kin of the lunatic (other than the Hon. Osbert Molyneux) took out a summons asking that the committee of the estate might be directed in the name and on behalf of the lunatic to execute a resettlement pursuant to the testator's will of the settled estates. The master refused the application, and the applicants appealed to this Court. The application was made by the next-of-kin, because they would, if the lunatic should not recover, derive benefit from the legacy of £10,000 given to him and from the payment of his debts. It was opposed by Mr. Osbert Molyneux, because he would be prejudiced if it were granted. The main question was whether the Court had jurisdiction, either original or statutory, to do what was asked, and there was the further question whether it would be for the benefit of the lunatic to do so.

Mr. Farwell, Q.C., and Mr. W. H. Cozens-Hardy were for the next-of-kin; Mr. Warrington, Q.C., and Mr. Arkle were for Mr. Osbert Molyneux; Mr. P. O. Lawrence, Q.C., and Mr. Sargent were for the committee.

The COURT granted the application.

The MASTER of the ROLLS said that he had come to the conclusion that the Court had jurisdiction to make the order asked for, and that the Court ought to exercise its jurisdiction. Lord Sefton, who was unfortunately a lunatic, was entitled to a base fee in certain estates of considerable value, and by his father's will certain other valuable estates were left to him on condition of his resettling the estates which he already had, and so cutting down his interest in those estates. Bearing in mind that, under his father's will, Lord Sefton obtained other benefits besides the valuable estates devised to him, it could not be doubted from any point of view that if this gentleman was at all likely to live and was actuated by respect for his father's wishes, he would accept the condition imposed by the will. His Lordship was not prepared to say that the question of what was for the lunatic's benefit was simply a question of whether he would get a little more money or not, but in this case it was also for the pecuniary interest of the lunatic to accept the condition. It was plain that it was for the benefit and interest of the lunatic to perform the condition upon which alone he could keep the estates devised by his father's will. If the matter were looked at apart from the Lunacy Act, 1890, speaking generally, and without reference to the Statute De Prerogativa Regis, the following propositions were elementary and beyond dispute:—First, that a lunatic could accept a gift or bequest or devise of property; secondly, that he could accept such gift, bequest, or devise subject to conditions, provided that it was for his benefit to do so; and, thirdly, that it was the duty of the committee in such circumstances to perform the conditions; and, if one of the conditions was that the lunatic should give up some interest in real estate to which he was entitled, these general propositions would apply to that case. It was said that the Statute De Prerogativa Regis prevented this. That statute directed the King to provide that the lands and tenements of lunatics should be safely kept without waste or destruction, and that they and their families should be competently maintained out of the income, and that the residue beyond their maintenance should be kept for their use to be delivered to them so soon as they should have recovered their memory, so that such lands and tenements should in no wise be aliened, and the King should take nothing for his own use. That last proviso had received a very narrow construction, and it had been held that the Court had no power to sell or mortgage the property of the lunatic, even to protect him from arrest under a *ca. sa.* But it would be introducing a still narrower

*Reported by H. B. HAMMING, Esq., Barrister-at-Law.

construction to say that it was not competent for the Court to give up an interest in real estate belonging to a lunatic to enable him to obtain a larger estate. That would be to establish a bad precedent and to defeat the object of the statute, which was to preserve the property of the lunatic. In his Lordship's opinion, this application was within the general jurisdiction of the Court. With regard to the Act of 1890, it appeared from a careful examination of all the sections that this case could not be brought within any of them without unduly straining the language. His Lordship therefore based his judgment upon the general jurisdiction of the Court.

LORDS JUSTICES CHITTY and COLLINS gave judgment to the like effect.

[Solicitors—Gedge, Kirby, and Millett; Roscoe and Co., for Gibbons and Arkle, Liverpool.]

Chan. Div. } 1898.
[Stirling, J.] } June 14.
THE GRAND JUNCTION WATERWORKS COMPANY V. THE
HAMPTON URBAN DISTRICT COUNCIL.*

Local Government—Streets—Line of buildings—
Action for a declaratory judgment—Pending
criminal proceedings—Discretion of the Court.

In this action the plaintiffs sought to obtain a declaration that they were entitled to erect an engine-house and any other buildings they might think proper for the purposes of their undertaking upon certain land belonging to them without the consent of the defendants. The circumstances under which the action was brought were shortly as follows:—The plaintiffs were by their Acts of Parliament authorized and bound to supply water to a large district on the western side of London in the counties of London and Middlesex, and had constructed waterworks for that purpose. In 1853 they had, under the powers of the Grand Junction Waterworks Act, 1852, and the Acts incorporated therewith, acquired a piece of land adjoining the Upper Sunbury-road within the defendants' district, upon which the plaintiffs had constructed certain works, and from time to time had added to such works. In 1897, additional pumping accommodation having become necessary, the plaintiffs desired to further extend their works by erecting upon the piece of land referred to an engine-house in connexion with their existing works. A dispute having arisen between the plaintiffs and the defendants as to whether or not the plaintiffs had power to erect the engine-house without the defendants' consent, considerable correspondence took place between them. On October 20, 1897, the plaintiffs gave the defendants notice of their intention to proceed with the construction of the proposed work, and afterwards commenced the same. Upon this the defendants' clerk wrote to the plaintiffs' solicitors that if the work was proceeded with he was directed to take legal proceedings against the plaintiffs for contravening the provisions of the Public Health Act (Buildings in Streets), 1888, by bringing their proposed engine-house beyond the front of the main walls of the buildings on either side. The plaintiffs then issued the writ in this action, in which they contended that under their Act of 1852 they had power to erect buildings on the land in question, and that such power overrode the provisions of the Public Health Act, 1888, with reference to the building line so as to admit of the company erecting their building where they found it necessary, even if it were beyond the general building line. The defendants had on March 15, 1898, laid an information before the Middle-

sex magistrates alleging that the plaintiffs had by the erection of so much of the engine-house as was then erected committed an offence under the Public Health Act, 1888. The magistrates had decided against the company, who had appealed to the Divisional Court, and those proceedings were still pending. In their statement of defence to the action the defendants relied upon section 93 of the Waterworks Clauses Act, 1847, by virtue of which they contended that the plaintiffs were not exempted from the provisions of the Public Health Act, 1888. They further contended that the Court had no jurisdiction to make the declaration asked for, and that, if there was jurisdiction, it was discretionary and ought not to be exercised, but that the plaintiffs should be left to establish their defence before the special tribunal entrusted with the determination of the question involved. The case now came before the Court upon a summons for the determination of the points of law raised upon the pleadings.

Mr. Bosanquet, Q.C., Mr. Macmorran, Q.C., and Mr. R. C. Glen appeared for the plaintiffs; and Mr. C. E. Jenkins, Q.C., and Mr. Courthope-Munroe for the defendants.

MR. JUSTICE STIRLING said that the statement of claim asked simply for a declaration of right. That form of action was justified by reference to Order 65, rule b, of the rules of the Supreme Court, which provided that "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not." The latter part of that rule was expressed in the very widest terms. It was said, however, it must be read with some limitation, and it was suggested that the Court had no jurisdiction to make any declaration, because neither before nor after the passing of the Judicature Act could such relief have been given. His Lordship was not called upon to decide whether any such limitation was to be read into the rule. He was not satisfied that in this case there was an entire absence of jurisdiction, having regard to the authorities. His Lordship then referred to and discussed the cases of "Lord Auckland v. Westminster District Board of Works" (L.R., 7 Ch., 597); "Kerr v. Corporation of Preston" (L.R., 6 Ch. D., 463); and "Stannard v. Vestry of St. Giles, Camberwell" (L.R., 20 Ch. D., 190). In the face of these authorities it could not be said that there was no jurisdiction in the Court to restrain the proceedings before a magistrate. But, assuming the jurisdiction, it seemed to his Lordship it ought to be exercised with the greatest care. He adopted the language of the Master of the Rolls (Sir George Jessel) in "Stannard v. Vestry of St. Giles, Camberwell":—"Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction." His Lordship desired to add that in contests between local authorities and private owners that rule ought to be adhered to very strictly. The Legislature had provided a mode of obtaining a decision, and it would be a matter of regret if a more expensive method were resorted to in such cases. His Lordship's own experience led him to believe that vestries and other local authorities were too ready to embark in costly litigation where there was no equivalent advantage to the public whom they represented, and he would be sorry, in cases where a cheap and speedy method of procedure was pointed out by the Legislature, to see a more expensive one resorted to. The Court, therefore, in the exercise of its discretion, ought to be slow to restrain proceedings before a magistrate where that method of procedure was pointed out by the Legislature. A

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

fortiori the Court ought to be slow, in the absence of special circumstances, to make a declaration in such a case as this. That brought his Lordship to the question whether there were in this case any such special circumstances, and, in his judgment, there were not. He thought he ought not to interfere either by way of injunction or by making a declaration in accordance with the claim. The matter ought to be left to the tribunal pointed out by the Legislature. The action must be dismissed with costs.

[Solicitors—Bircham and Co. ; Kent and Son.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) June 15.

STANGE AND CO. V. LOWITZ.*

Principal and Agent—Stockbrokers—Secret commission—Repudiation of contract.

The defendant discovered that the plaintiffs, who were stockbrokers but not members of the Stock Exchange, besides charging commission had in their contract notes sent to him added something to the price at which they had really bought. *Held*, that he was entitled to repudiate such contracts.

This was an appeal from a judgment of Mr. Justice Ridley at the trial of an action without a jury. The action was brought by a firm of stockbrokers, who were not members of the Stock Exchange, to recover from their customer, the defendant, a sum of money which they alleged to be due to them in respect of transactions for the purchase of shares carried out by them on his behalf. The transactions took place in July and August, 1897. On August 27 the plaintiffs asked for payment of the sum which they alleged to be due—viz., £219. The defendant having discovered that the plaintiffs, besides charging commission, had in their contract notes sent to him added something to the price at which they had bought through a member of the Stock Exchange, claimed the right to repudiate the transactions altogether. The plaintiffs admitted that they were not entitled to recover overcharges, and submitted to have them deducted, but claimed that they were entitled to recover, after such deduction, £178. At the trial of the action Mr. Justice Ridley gave judgment in favour of the plaintiffs. The defendant appealed.

Mr. RUFUS ISAACS, for the defendant, said his contention was that, where an agent employed to carry out a transaction made a secret profit, his principal, on discovery thereof, might either claim the secret profit or, if he thought fit, repudiate the whole transaction ; and where an agent acted as principal, his principal might, on discovery, repudiate the transaction. He would take one instance out of many to show the way in which the plaintiffs acted. Their account showed on one side a purchase of 100 Louisville shares by the plaintiffs through a Mr. Johnson, a member of the Stock Exchange, at 60½ ; and on the other side it showed a sale of 100 Louisville shares by the plaintiffs to the defendant at 60½. The plaintiffs, besides charging commission in the usual way, added one-sixteenth to the price. In a number of cases they made similar overcharges, and in all the other cases they made no purchase at all. They were therefore not entitled to recover anything in this action.

Mr. T. W. CHITTY and Mr. SCHILLER, for the plaintiffs, argued in support of the judgment of the learned Judge.

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that this was an action by outside stockbrokers, who sued the defendant for an indemnity in respect of certain contracts for the purchase of shares. They alleged that they had entered into those contracts with third parties acting on behalf of the defendant as brokers, and had incurred liabilities under them to those parties to the amount claimed in the action. The defendant called on the plaintiffs to show him the contracts which they alleged they had so entered into on his behalf with third parties, and in which they alleged they had incurred the liabilities in respect of which they claimed indemnity. He would take by way of example one of the contracts in respect of which the plaintiffs claimed indemnity—viz., that for the purchase of 100 Louisville shares. The contract which the plaintiffs passed on to the defendant in that case was a contract for the purchase of the shares at the price of 60 10-16ths. When the plaintiffs were called upon to produce the contract to that effect made by them on behalf of the defendant upon which they claimed indemnity, they could produce no such contract. They produced a contract for the purchase of 100 Louisville shares, but at a different price—viz., 60½. That was not the contract which they alleged they had effected for the defendant, and upon which they claimed indemnity. They did, no doubt, effect a contract through a broker named Johnson for the purchase of 100 Louisville shares, but they never passed that contract on to the defendant ; the contract which they passed on to the defendant was not that contract but a different one—viz., a contract for the purchase of 100 Louisville shares at 60 10-16. That was one instance only, but the case was similar with regard to the other contracts in respect of which indemnity was claimed. In no single case could the plaintiffs show that they had effected the contract for the purchase of shares which they alleged they had effected on behalf of the defendant, and upon which they claimed indemnity. That being so, the plaintiffs were not entitled to recover the indemnity which they claimed, because they could not show that they had in fact made upon behalf of the defendant as agents the contracts in respect of which they claimed indemnity.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS delivered judgments to the same effect.

Q.B. Div. }
(Bruce, J.) }

1898.
June 15.

READING V. CHEW.*

Revenue—Income-tax—Enforcing payment—Distress—Liability of occupier of premises—5 and 6 Vict., c. 35, sec. 70—17 and 18 Vict., c. 34, sec. 35.

In this case Mr. Kemp, Q.C., and Mr. J. B. Matthews appeared for the plaintiff ; Mr. Finlay, Q.C. (the Solicitor-General), and Mr. Danckwerts for the defendant.

The action was for damages for wrongful distress and raised a question of considerable importance—namely, the liability of the occupier of premises to pay arrears of income-tax, under Schedule A, which had accrued during previous years during which the premises had been unoccupied. The facts, as given in the evidence for the plaintiff (the defendant's witnesses were not called), were briefly as follows. The plaintiff is a cooper, carrying on an extensive business at various places, including No. 286, High-street, Stratford. The defendant is the district collector of taxes. The plain-

* Reported by F. G. RUCKER, Esq., Barrister-at-Law.

* Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

tiff entered into possession of the premises on April 22, 1897, under a lease for 60 years from December 25, 1896, but in consideration of the plaintiff doing certain repairs rent was only to be paid from June, 1897. For two or three years before the plaintiff took possession the premises had been unoccupied. In August, 1897, a demand for £9 3s. 4d., income-tax under Schedule A for the year from April 6, 1896, to April 5, 1897, was served upon the plaintiff. He went to the office and, as he alleged, satisfied the collector that he was not liable to pay. The demand was, however, made again in October and, upon his refusal to pay, a man was put into his premises, who took an inventory of his goods. The plaintiff complained, and the defendant, coming to the conclusion that the distress was wrongful, withdrew it. Upon these facts the Solicitor-General contended that, it being admitted that the premises were rightly assessed to the amount in question, the plaintiff should have paid it and deducted it from his rent. The assessment not having been appealed against was conclusive. Moreover, the defendant was protected by his warrant ("Henderson v. Preston," 21 Q.B.D., 362). Mr. Kemp and Mr. J. B. Matthews having replied, the Court adjourned, and this morning

His LORDSHIP delivered the following judgment:—The plaintiff complains that the defendant on November 15, 1897, broke and entered premises in the possession of the plaintiff, 286, High-street, Stratford, and took an inventory and left a man in possession of the plaintiff's goods. The question in the case is whether the entry, which it is admitted was made by or under the direction of the defendant as a duly appointed collector for the purpose of the Income-tax Acts, was a lawful entry. I am of opinion that it was and that no action will lie. The question arises in this way:—A lease was granted to the plaintiff by the owners of the premises in question on April 22, 1897, for 60 years from December 25, 1896, at the rent of £65 a year, payable quarterly, the first payment not to be made till September 29. In consideration that the plaintiff had agreed to carry out certain repairs on the premises he was to have the premises rent free until June. An assessment amounting to £9 3s. 4d. had been made on the premises for the year April 6, 1896, to April 5, 1897, inclusive, pursuant to the Finance Act, 1896. The plaintiff did not take possession of the premises in question until the end of April, 1897. On August 9 a demand for the sum of £9 3s. 4d. was made upon the plaintiff, and again about the end of September a demand notice for the same sum was handed to him. He declined to pay, contending that he was not liable, and on November 17 an entry was made upon his premises to enforce the payment of the £9 3s. 4d., which is the entry complained of. The point raised by the plaintiff is that, as he was not in occupation of the premises during any parts of the financial year in respect of which the assessment was made, the defendant had no right to enter the premises for the purpose of making a distress to enforce the payment of the amount assessed. But it seems to me that section 70 of the 5 and 6 Vict., c. 35, meets the case. That section is as follows:—
 "That the said several duties shall be assessed on all lands, tenements, and hereditaments whether occupied at the time of assessment or not; and so far as respects the duties chargeable under Schedule A, in case any lands charged to the said duties shall be unoccupied, and no distress can be found on the same at the time such duties shall be payable, it shall be lawful for the collector of the parish or place where the said lands are situate for the time being, at any time after, to enter upon the said lands when there shall be any distress thereupon to be found, and the distress to seize and sell, under the like powers as he might have distrained on the same lands if in the

occupation of such person at the time the duties became due. Provided always that the said duties or either of them shall not be levied on any house which shall be or become unoccupied for such year or portion of the year as the same shall be unoccupied, but the assessment thereupon for such year or portion of the year as aforesaid shall upon appeal be discharged or diminished by the Commissioners on due proof of the time during which such house remained unoccupied." That seems to me to be an enactment expressly providing for this very case and the only question which arises is how far the provisions of section 70 are qualified by the subsequent provisions contained in the 16 and 17 Vict., c. 34, section 35. That section enacts that tenants of land who are called upon to pay arrears due from former occupiers may deduct the amount from their rent. Then follows this proviso:—"Provided that nothing in the said Act of the 5 and 6 year of her Majesty c. 35, or in this Act contained shall extend to authorize the levying upon any such occupier for the time being any arrear of the duty assessed under Schedule A . . . which ought to have been levied upon and ultimately paid and borne by any former occupier of the same land." This proviso undoubtedly qualifies the former general enactment, but the proviso only applies in terms to cases where the arrear of duty ought to have been ultimately paid and borne by a former occupier of the land. If the tax gatherer has no opportunity of getting the tax from an owner who is the actual occupier and neglects his opportunity then the tax gatherer cannot avail himself of the 70th section of the earlier Act in order to make up for his own neglect. But no such state of things existed in the present case. The owner was not in occupation at the time of the assessment, and there is nothing in the circumstances of this case to qualify the operation of section 70. I should have been glad to have left the question of damages to the jury, so that in the event of the Court of Appeal taking a different view of the law, it would not be necessary to come down again for trial, but the Solicitor-General informs me that several of the facts which may have some bearing on the amount of damages are in dispute and that he has several witnesses to call if the question of damages is gone into. In the circumstances I think I ought to act upon my own view of the law and not to allow time to be taken up in hearing evidence which, according to the view I take, is immaterial. The Solicitor-General agrees if the Court of Appeal should consider that an action will lie to assent to the damages being assessed in any manner the Court of Appeal may direct, and of course the Court of Appeal will have power to direct who shall pay the costs of assessing the damages if an assessment of damages should become necessary.

Judgment was given for the defendant, and, on Mr. Kemp's undertaking not to appeal, the Solicitor-General agreed not to ask for costs.

House of Lords (Lords Herschell, } 1898.
 Watson, Macnaghten, and Shand) } June 16,
 CARLTON STEAMSHIP COMPANY (LIMITED) V. CASTLE
 MAIL PACKETS COMPANY.*

Ship—Charterparty—Construction—Berth
 "always afloat"—Alleged failure to have a
 proper berth.

Decision of the Court of Appeal (13 *The Times*
 L.R., 553) affirmed.

This was an appeal from a decision of the majority of

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

the Court of Appeal, Lord Esher (Master of the Rolls) and Lord Justice Rigby, from whom Lord Justice A. L. Smith dissented. The case was opened on May 23 and the arguments finished on June 14. The case, which involves an important point of commercial law, is reported, 13 *The Times* L.R., 375, 553; [1897] 2 Q.B., 485; 66 L.J., Q.B., 819.

Mr. Robson, Q.C., and Mr. Scrutton appeared for the appellants; Mr. Joseph Walton, Q.C., and Mr. James Fox for the respondents.

The facts are thus stated by LORD WATSON in his judgment:—The respondent company had on February 1, 1897, contracted to provide steam tonnage for the conveyance of a quantity of material to be used in the construction of the Pretoria-Pietersburg Railway from Maryport, and other ports in the United Kingdom or the Continent, to Delagoa Bay. With a view to part fulfilment of that contract they, on February 22, 1897, chartered from the appellant company the steamship *Carlton*, about 4,000 tons burden. At the date of the charterparty the *Carlton* was at Barry taking in her bunker coal; and by its terms she was to proceed “to Senhouse Dock, Maryport, or so near thereto as she may safely get, and there load in the customary manner (Sundays and holidays excepted), always afloat as and when ordered by the said charterers, a full and complete cargo of rails and (or) accessories, say, about 2,850 tons and not more than 3,000 tons, and there-with proceed to Delagoa Bay.” No time is specified for the arrival of the *Carlton* at Maryport beyond the expectation that she would reach that harbour on Wednesday, February 24; but it was stipulated that in the event of the ship not being at their disposal at Maryport not later than March 5 the charterers should have the option of cancelling the charter. It was by the charterparty provided that demurrage, if any, was to be paid for at the rate of £30 for each working day, “except in case of strikes, lock-outs, labour disturbances, trade disputes, accidents, or other hindrance beyond charterers’ control.” The depth of water in the Senhouse Dock, Maryport, depends upon the state of the tides, and may be affected to some extent by the winds which happen to prevail at the time. Each period of high water lasts for about a fortnight, during which there may be a depth of upwards of 14ft. relied on. Between these periods there is an interval of six or seven days during which the depth of water in the dock may not exceed 14ft. 6in. in the morning or 14ft. 7in. in the evening. The *Carlton* arrived in the basin of Maryport harbour on the night of Saturday, February 27, and on the morning of Sunday, the 28th, she went into the Senhouse Dock. At that time, owing to her bunker coal being on board, the ship was not upon an even keel, her draught forward being 11ft. and aft 17ft. 5in. On Monday, March 1, the charterers’ agent gave an order to the master in these terms, “You will please place your steamer into the middle berth east side Senhouse Dock, where your cargo is waiting shipment.” From that time the controversy began which has developed into this litigation. On the evening of Friday, March 5, the *Carlton* was admitted by the harbour-master to the berth to which she had been ordered, which had just been vacated by the *Abermaid*. At that date the current period of spring tides had so far elapsed that it had become impossible to begin and complete the loading of the ship before the return of the neaps. Between the Friday evening and the morning of Tuesday, March 9, 675 tons of cargo were put on board, after which the ship drew 15ft. 9in. forward and 16ft. 11in. aft. The tides were then gradually ebbing, and even with the amount of cargo already on board, the *Carlton* could not have lain afloat in the dock during the neaps. Accordingly, on the Tuesday morning, the *Carlton* left Maryport

Dock and went to Barrow, where she offered to ship the remainder of the cargo. Whilst matters stood in that position an application was made to Mr. Justice Mathew to determine the relative rights and obligations of the shipowners and the charterers; but a compromise was effected by which it was arranged that, without prejudice to the rights of either party, the *Carlton* should return to the Senhouse Dock at Maryport, there load the remainder of her cargo, and get away by the next spring tides after March 17. In pursuance of that arrangement, the *Carlton* returned to her berth in the Senhouse Dock upon the morning of Tuesday, March 16, and immediately commenced loading. On Saturday, March 20, she left the dock with 2,860 tons of rails on board. On March 12, 1897, the appellants brought the present action, in which they claim demurrage or damages, in respect of (1) detention of their ship for 15 days; (2) port and other charges during that period; and (3) dead freight upon the cargo short shipped. The third of these claims is not now insisted on, and need not be further noticed. Mr. Justice Mathew entered judgment for the appellants, for an amount to be agreed upon by the parties, or in case of their differing to be settled by the Court. His order was set aside and judgment entered for the respondents by a majority of the Court of Appeal, consisting of Lord Esher, M.R., with Lord Justice Rigby, Lord Justice A. L. Smith dissenting.

LORD HERSHELL, in moving that the appeal be dismissed, and after stating the facts, said,—It is said that the charterers were bound to know the condition of the harbour, and that they were under some obligation in that respect which did not rest on the shipowner. I do not propose to discuss the extent of the knowledge of one party or the other. But I cannot see that the obligation is different in one case or the other, or that the charterer is specially bound to know the conditions of the harbour; because, without inquiring into the actual knowledge possessed, I can entertain no doubt that the obligations and rights created by the charterparty must be construed with reference to the natural conditions of the particular harbour, which is the place of loading according to the charterparty. It was suggested that there are cases in which particular berths are less favourable than others for loading cargoes, and that where the charterer has the right to name the berth it would be unreasonable that he should name a berth which would prolong the loading to the detriment of the shipowner. That is a question which I do not think it necessary to consider, because considerations would arise in that case which have no place in the present. The difficulty in the present case existed in respect not of a particular berth, but of the entire dock. The charterparty provides no lay days. The obligation, therefore, was to load within a reasonable time. The question is, What elements are to be taken into account where a vessel is to load within a reasonable time? The judgment in the case of “*Hick v. Raymond*” in this House (7 *The Times* L.R., 732; 62 L.J., Q.B. 98; [1893] A.C., 22) clearly lays down the conditions, and it was there held that the obligation is performed within a time which is reasonable when the circumstances which caused the delay are not imputable to personal fault or negligence; and Lord Watson stated that the rule as to reasonable time is not to be confined to contracts for goods to be carried by sea, but that a party must be held to have fulfilled his obligation so long as the delay is attributable to causes beyond his control, and he has acted neither negligently nor unreasonably. If that be the true test, it is difficult to see why the natural conditions of the harbour, which prevented the loading except after some delay, are not to be taken into account in determining whether there was unreasonable delay or not.

It is said you are not to take that into account, because the stipulation is to be inserted for the protection of the shipowner, and you ought to discuss the question of reasonable time as if there were no such stipulation. But there is no such thing as "reasonable time" in the abstract. The question is whether, having regard to all the stipulations of the contract and to all the conditions, there has been anything like negligence or wilful delay. It is quite inadmissible to shut out consideration of the actual circumstances. You must not exclude any terms of the contract between the parties. Taking the law to be as I have stated, is there any case here made out that the charterer took more than a reasonable time to load this vessel? It is admitted that the vessel could not by any human being have been loaded before she was, in fact, loaded. Then it is said that by this charterparty the charterer was bound as soon as the vessel arrived to name a berth where she could lie always afloat. But where is any such obligation to be found in the charterparty? There is no provision to that effect. If it exists, it can only be because that must be inferred to have been the intention of the parties. But it is impossible to find by implication in this contract any such condition. It is obvious that the time of the arrival of the vessel in the port depends largely upon the shipowner. Until she arrives the charterer has no control over her, and it is clear that in such a port the ship might arrive at a time when it would be impossible to name a place where she could load a cargo. It would be unreasonable to suppose that the parties contracted to accomplish the impossible. I am disposed to surmise that these contingencies were not foreseen. But we must consider the charterparty according to its terms. It is urged that it was hard upon the shipowner; that is naturally his view; but it can have no effect on the rights of the parties as they are to be ascertained. For these reasons I confess that I am unable to see any ground for differing from the decision of the Court of Appeal.

LORD WATSON, after stating the facts as above, proceeded:—If the Carlton had reached Maryport, as her owners anticipated, on Wednesday, February 24, she would, if her berth had been then available, have been able to lie afloat from the commencement to the completion of her loading; and it is clear that, had her loading not commenced until March 16, the whole cargo might have been put on board continuously whilst she was afloat. The appellant company maintain that, under the charterparty, as soon as the Carlton arrived at Maryport it was the duty of the respondents forthwith to provide a berth for her in which she could at once, and without any delay proceed to take on board her cargo continuously, and could remain afloat until her loading was completed and she left her port. I do not think that any such obligation is imposed upon the respondents by the language of the charterparty, which is exceptional; and in construing the terms of that instrument it appears to me to be legitimate to take into account the fact, which was not disputed, that the character of the harbour of Maryport was known to the appellants as well as to the respondents. As was pointed out by Lord Justice Rigby, the correspondence produced shows that the owners of the Carlton were quite alive to the risk, if not the certainty, to which their ship was exposed of touching and resting upon the ground at some states of the tide. In my opinion, the construction for which they contend is unreasonable and objectionable. It makes the nature of the obligation incumbent upon the charterers variable, and entirely dependent upon the time at which the Carlton might find it convenient or possible to arrive at the harbour. If she arrived about the commencement of a period of spring tides it might not be difficult to find a berth for her at which she could begin

and complete the loading of her cargo, she being during the whole time afloat. On the other hand, if she arrived towards the termination of the same period, it would be simply impossible to provide a berth for her in the Senhouse Dock, where, if she began to take in cargo at once, she could remain afloat until her loading was completed. The charterparty does not contain any provision to the effect that the ship shall "lie afloat" at all times whilst she is in the harbour of Maryport. It merely provides that she is to "load in the customary manner, always afloat." These words, according to their natural meaning, go no farther than to impose a qualification of the charterer's right to load by negating his right to put cargo on board except at times when the ship is afloat. In these circumstances I concur in the result which commended itself to the majority of the Appeal Court. I think the Carlton was rightly directed to a berth, where if she had chosen to wait, she could have continued afloat until the whole of her cargo was continuously shipped, and that the respondents cannot be held responsible for delay occasioned by natural and physical causes which were beyond their control.

LORD MACNAGHTEN.—I am of the same opinion. Maryport is a tidal harbour. Tables are published showing the expected height of water for every day of the year. A shipowner may be presumed to know the draught of his own ship with a cargo on board which he proposes to carry. It must therefore be taken that the shipowner in this case entered into the charterparty with the knowledge that in the ordinary course of navigation his ship, if she arrived at her destination at certain states of the tide, would be delayed in shipping her cargo, assuming that she was going to ship it (as provided by the contract) "always afloat." The substantial question is, Who is to suffer for that delay—the shipowner or the charterer? There is no special provision throwing the loss on the charterer. The loss has arisen in the ordinary course of navigation, and therefore, as it seems to me, the shipowner must bear it. I quite agree with the Court of Appeal in their view of the order which was given to the shipowner to proceed to the berth in Senhouse Dock. It seems to me to have been a proper and a reasonable order. It was for the shipowner to consider, having regard to the state of the tides, whether he would go to the berth at once and take in part of his cargo or wait until he could ship the whole of it continuously, "always afloat." To complete the loading, whether he began it at once or not, he would have to wait till the next spring tides. That, say Mathew, J., and A. L. Smith, L.J., is an unreasonable time to wait. I cannot understand how it can be unreasonable when it is the period required by the character of the harbour, the laws of nature, and the regular recurrence of spring tides. Having regard to the known accommodation of this harbour and upon this contract, it seems to me that it would be most unreasonable to hold that at the time when this vessel arrived and in the state of the tides the charterers were bound to provide a berth with a depth of water which both parties knew was physically impossible. I agree that the appeal must be dismissed.

LORD SHAND, in the course of his judgment, said,—The charterer has done all that is possible and all that can, I think, be inferred from his obligation under the charterparty if he provides the cargo as soon as, having in view the nature of the harbour, the loading can be proceeded with and effected without grounding the ship. Accordingly I have only to add that the respondents in this case fulfilled this obligation. The contract admitted of being fulfilled in its very terms, although in certain contingencies delay would certainly occur with the loading. I can find no breach of contract on the part of the charterer. He could not, consistently with the

shipowner's stipulation that the loading should take place only when the ship was afloat, do more than he did. The unfortunate delay was the result of a stipulation by the shipowner, necessary no doubt for the safety of his ship, but having made that stipulation he must bear the loss consequent on its fulfilment. The learned Judge in the Court of Appeal who differed from the majority of the Court put the case of a delay in the loading which might last for six months or one month under such a charterparty as the present. It is difficult to suppose that any shipowner would make a contract so improvident as to produce this result. But, with the utmost deference to the very learned Judge, I can only say that, even with such a case, the responsibility of the charterer would not thereby be enlarged. The shipowner must still bear the consequence of the delay. But it may very well be that, as the consequence of the adventure was found to be so disastrous to the shipowner, on the authority of the cases cited by Mr. Robson, he might be held entitled to abandon the contract and leave the harbour unloaded, a course which would certainly not entitle him to make a claim for damages like the present, in which no provision is made for such a contingency or even for a limited number of lay days on the expiry of which a claim for demurrage would arise.

[Solicitors—Botterell and Roche, for the appellants; Parker, Garrett, and Co., for the respondents.]

Court of Appeal (Lindley, M.R., }
Chitty and Collins, L.J.J.) } 1898.
June 16.

WARD V. PORTSMOUTH CORPORATION.*

Burial Ground—Burial Acts, 1852 and 1853—Construction—"New burial ground"—Burial authority—Power to buy land—Approval of Secretary of State.

A burial authority may buy land for purposes of interment at a future date without the sanction of the Secretary of State.

Decision of Byrne, J. (*ante*, p. 321), reversed.

This was an appeal from a decision of Mr. Justice Byrne (reported *ante*, p. 321), in which he held that under the Burial Acts, 1852 and 1853, a burial authority had no power to buy land intended to provide at a future date for interment without the previous sanction of a Secretary of State. The decision of the case turned on the meaning of the expression "provide and use" a burial ground, which by force of certain sections of those Acts a burial authority is prohibited from doing without the sanction of a Secretary of State. The short facts of the case were as follows:—The plaintiff, Mr. William Ward, being then the owner of certain land in the parish of Portsea, in August, 1889, agreed with the burial board for the parish of Portsmouth for the purchase of the land for £6,270, of which £100 was to be (and, in fact, was) paid at the time and the balance on completion of the purchase on June 24, 1896. Before the agreement was entered into the consent of the Portsmouth Vestry was obtained, as required by section 26 of the Burial Act, 1852. In January, 1895, the Corporation of Portsmouth, as the urban sanitary authority, passed a resolution under section 62 of the Local Government Act, 1894, in pursuance of which the corporation became the statutory successors of the burial board on June 11, 1896. The corporation intimated to the plaintiff, Mr. Ward, that it did not intend to com-

plete the contract. The land had been agreed to be bought for the purpose of enlarging the then existing cemetery for the parish of Portsmouth, but the Home Secretary had refused to give to the corporation the approval required by the Burial Act, 1853. The plaintiff contended that this refusal did not justify the corporation in refusing to complete their contract to purchase, and brought the present action for specific performance of the contract, or, alternatively, for damages. Mr. Justice Byrne gave judgment for the defendant corporation, and the plaintiff appealed.

Their LORDSHIPS unanimously reversed the decision. They gave damages instead of specific performance.

Mr. Warrington, Q.C., Mr. Astbury, Q.C., and Mr. Methold were for the appellant; Mr. Robson, Q.C., Mr. Eve, Q.C., and Mr. George Williamson for the respondent corporation.

The MASTER of the ROLLS said,—The Burial Act, 1853, extends the Burial Act, 1852, with some modifications, to the whole of England and Wales, and is the Act on which the decision of this Court turns, and it is impossible to understand the Act of 1853 without understanding the Act of 1852 and the machinery provided for carrying it out within the limits to which, until extended, it was confined. I will first, therefore, examine that Act. Sections 2 to 8 provide for closing burial grounds where the continued use of them may be injurious to public health. This part of the Act introduces the Secretary of State and Orders in Council. Sections 9 to 32 relate to the provision of new burial grounds. It is first necessary to constitute some authority to provide a ground. This is done by sections 10, 11, and 24. The first step is to convene a meeting to consider whether a burial ground shall be provided; and if it is resolved to provide one a copy of the resolution is to be sent to the Secretary of State (see section 10), but no approval by him of the proceeding is required; if the resolution is passed then a burial board is to be formed (section 11), and when formed it is incorporated (section 24). As soon as a burial board is formed it is to provide a burial ground (section 25). This necessarily involves obtaining or appropriating land for the purpose. Section 24 authorizes the board to take and hold land for such purpose, and this section therefore enables the board to accept a gift of land from any one who may be willing to make such gift, whether by deed or will. But the Act further empowers the board, with the consent of the vestry, to buy land for providing a burial ground (section 26); and with the consent of the vestry and the guardians to appropriate parish land for the purpose of a burial ground (section 29). Further, the board is empowered to lay out and embellish any burial ground provided by the board (section 30), and to build a chapel on any land purchased or appropriated for a burial ground (section 30), and such burial ground may be consecrated when in a fit and proper condition for interment (section 30); and in providing any burial ground the board is required to set apart a portion which shall not be consecrated. Supposing all this to be done, the land does not become the burial ground of the parish until the Bishop has consecrated it, or, if no consecration is necessary, has fixed a time for its becoming such burial ground (see section 32). Provision is made by section 23 for providing burial grounds for several parishes; and by section 20 for borrowing money with the sanction of the vestry and the Treasury for providing and laying out burial grounds and building chapels upon them. Then by section 28 the board is empowered, with the approval of the vestry, to sell land purchased by the board under the Act and in which no interment has been made, and which the board may consider to be sold. Such being the scheme of the Act, I return to the prohibition contained in section 9. The word "provide," as applied to new burial

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

grounds, clearly in some cases includes purchase—*e.g.*, under section 20 money may be borrowed for providing, which must include buying. So in section 25 as regards access providing seems to include buying. But buying and providing are not synonymous expressions. Burial grounds may be acquired without buying, and the words "in providing" which occur in the proviso at the end of section 30 can hardly mean in buying or acquiring; they point to a later stage in the process of rendering the land referred to fit for a burial ground. The process of providing a parochial burial ground begins with acquiring it and ends with its consecration or the appointment by the Bishop of the time fixed for its becoming a burial ground under section 32. Section 26 clearly authorizes the purchase of lands out of the metropolis and the two-mile limit without the consent of the Secretary of State. When, now, we turn back to section 9 and consider the language of the prohibition contained in it I cannot think it prevents a burial board from taking the first step towards providing a burial ground without the sanction of a Secretary of State. The prohibition is not against acquiring land, but against providing and using burial grounds, and does not, I think, control section 26 even within the metropolitan limits. The Secretary is brought in to protect public health and the maintenance of public decency (see sections 2 and 34) and the prohibition against "providing and using" serves every useful purpose if it is held to apply to some later step than the first in the process of providing. Mr. Justice Byrne was impressed by the difficulty that, unless the prohibition includes acquiring, the prohibition might just as well have been confined to "using." But, feeling as I do the full force of this observation, I feel greater difficulty still in cutting down the plain language of sections 26 and 29, which are addressed specifically to the first step in providing a burial ground—*viz.*, buying land or setting apart parochial land for that purpose. Upon this Act of 1852 the only conclusion at which I can arrive is that a burial board can buy land or appropriate parish land or accept a gift or devise of land for the purpose of a burial ground without the sanction of the Secretary of State, and that, whatever "providing" means in section 9, the prohibition therein contained does not extend to the acquisition by purchase or otherwise of land for a burial ground. The Act of 1853 extends the Act of 1852 to places to which that Act did not apply. But the prohibition contained in section 6 of the Act of 1853 is a mere repetition of and is open to the same observations as section 9 of the earlier Act. I cannot accede to the argument that section 6 does not apply to new additions to burial grounds as distinguished from new burial grounds. The Burial Act, 1855 (18 and 19 Vict., c. 128), amends the two former Acts, but throws no light on the construction of the prohibitory sections contained in them. The end of section 6 tends to show that the consent of the Secretary of State is not wanted for purchasing if they do not want to borrow under section 30 of the Act of 1852. Further, section 17 of this Act of 1855 enables burial boards, with the sanction of a Secretary of State, to let land purchased for burial purposes, and not consecrated, and in which no interment has taken place. This shows that land may be purchased before being consecrated or used. This really disposes of the case. It follows that the contract of August 1, 1889, was and is a valid and binding contract enforceable by action. Specific performance is not insisted on, the plaintiff being content with damages. The appeal must be allowed, with costs here and below, and there must be an inquiry as to damages and an order for their payment when ascertained.

The LORDS JUSTICES gave judgments to the same effect.

Q.B. Div. }
(Bigham, J.) }

1898.
June 16.

THE RHYMNAY STEAMSHIP COMPANY (LIMITED) v.
THE IBERIAN IRON ORE COMPANY (LIMITED).—THE
FOREST STEAMSHIP COMPANY (LIMITED) v. SAME.*

Ship—Charterparty—Construction—Demurrage
—"Working day of 24 hours"—Meaning of.

The questions raised in these two cases being the same they were heard together before his Lordship on Monday last. In each case the action was brought to recover demurrage under a charterparty in the same form; the questions raised turned upon the construction of certain clauses in the charterparties. At the close of the arguments his Lordship reserved judgment until Thursday morning. The facts of the case and the material terms of the charterparty appear fully from his Lordship's judgment.

Mr. Boyd, Q.C., appeared with Mr. J. E. Banks for the plaintiffs in the first case and with Mr. Montague Lush for the plaintiffs in the second case; Mr. Joseph Walton, Q.C., and Mr. Rufus Isaacs appeared for the defendants in both cases.

His LORDSHIP read the following judgment:—By a contract dated December 14, 1897, the plaintiffs undertook with the defendants to provide ships for the carriage of 50,000 tons of iron ore from Seville, in Spain, to ports in the United Kingdom and elsewhere over a period of 12 months. The contract was drawn up on an ordinary printed charterparty form as used for single voyages, alterations being introduced in writing for the purpose of adapting the form to the particular contract in question. Disputes have arisen as to the meaning of the provisions in this contract as to demurrage. Those provisions are as follows:—"Charterers or their agents to be allowed 350 tons per working day of 24 hours, weather permitting (Sundays and holidays excepted), for loading and discharging, same to be reversible and to be averaged voyage by voyage to avoid demurrage, and to count from 6 a.m. of the day following the day when steamer is reported at the Custom-house, unless she be reported before noon, in which case time to count from notice of readiness and in every respect ready to load or discharge respectively and in free pratique. Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." The plaintiffs contend that these words mean that the defendants are to perform the loading and discharging at the rate of 350 tons per working day, such days to be made up of periods of 24 hours reckoned from the hour when the vessel starts the one operation or the other. The defendants, on the other hand, say that the words mean that 24 working hours are to be allowed for loading or discharging each 350 tons. I am of opinion that the defendants' contention is the right one. The important words are "charterers to be allowed 350 tons per working day of 24 hours for loading and discharging." What in this connexion is a "working day of 24 hours?" All days, whether they are working days or holidays, are days of 24 hours. Therefore I do not think the words "of 24 hours" are introduced to explain the word "day." It seems to me that they are introduced to show of what duration the working is to be before a so-called day is to count; and that they mean that 24 hours in which work is usually done at the port of loading or discharging, as the case may be, are to elapse before a day can be reckoned against the charterers. This view, I think, is strengthened by the provisions as to night work and

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

work on Sundays and holidays. The charterers may, if they choose, work only at night, or on Sundays or holidays, and, if they do, such time is to count as lay days. How could hours of night work count as lay days except by treating the time as so many working hours going to form part of the stipulated periods of days made up of 24 working hours? A further contention of the plaintiffs is that in ascertaining whether any demurrage is payable each voyage must be treated separately. The defendants, on the other hand, insist that the plaintiffs must wait until the whole 50,000 tons have been carried and then see whether, on the average of the whole, demurrage has been incurred. I think the expression "voyage by voyage" clearly shows that the plaintiffs' contention is right. Mr. Walton suggested that the use of the word "averaged" in the printed form involved the notion that more than one voyage was to be taken into consideration. I think the answer is that the word is introduced into a form which was intended to apply to one voyage only and that, therefore, it cannot be said to involve the meaning suggested. The word "averaged" merely relates, in my opinion, to averaging the work done in the two operations of loading and discharging on the one voyage. Further, I agree with Mr. Boyd that the lien clause in the contract supports the plaintiffs' contention on this point. If the defendants are right the last cargo of the 50,000 tons would be subject to all the arrears of demurrage which might have accumulated during the past 12 months—a result which I do not think either party contemplated. As each party has succeeded upon one of the questions raised, there will be no order as to costs. Judgment to be entered, upon the ascertaining of the figures, in accordance with the principles laid down.

[Solicitors—Downing, Bolam, and Co., for Downing and Hancock, Cardiff, for the Rhymney Steamship Company; Botterell and Roche, for Vaughan and Hornby, Cardiff, for the Forest Steamship Company; Cattams and De Vesian, for the defendants.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } June 17.

SEA INSURANCE COMPANY V. BLOGG.*

Insurance—Marine—Policy on goods in vessels
"sailing" on and after a certain date—"Sail-
ing," what constitutes—Intention of master.
Decision of Mathew, J. (*ante*, p. 20), affirmed.

This was an appeal by the defendant from the judgment of Mr. Justice Mathew at the trial of the action without a jury (reported *ante*, p. 20; 3 Com. Cas., 1; [1898] 1 Q.B., 27). The action was brought on a policy of reinsurance effected by the plaintiff company with the defendant on goods in steamers "at and from ports in the United States to ports in Europe . . . sailing on and after March 1, 1896." Between 9 and 10 p.m. on February 29 the steamship *Massasoit* finished loading a cargo of flour, which was covered by the reinsurance, at a wharf at Newport News, Virginia, on the James River. By a rule of the pilotage commissioners of that port vessels were not allowed to go to sea after dark. On the completion of her loading the ship was moved out about 500 yards into the river and there anchored till the following morning. The ship's husband had given orders that she should not start on her voyage before

daylight on March 1. Soon after 8 on the morning of that day the ship proceeded to sea, and was eventually lost with all hands. The defence was that the *Massasoit* sailed on February 29, and that therefore the loss in respect of which the action was brought was not covered by the policy. The learned Judge gave judgment for the plaintiffs, being of opinion that the master, in moving the vessel into the stream, had no intention to commence the voyage, but that his object was to keep his crew together and prevent their going ashore. It appeared that vessels sometimes anchored in mid-stream during the night before they proceeded to sea, and that they thereby obtained an advantage of a few minutes in getting under way. The learned Judge, however, thought there was no reason to suppose that that consideration entered into the calculations of the master.

Mr. Pickford, Q.C., and Mr. T. E. Scrutton appeared for the defendant in support of the appeal; Mr. Joseph Walton, Q.C., and Mr. T. G. Carver, Q.C., for the plaintiffs.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether or not the ship sailed on February 29. If she sailed on that day the loss was not covered by the policy, whereas if she sailed on March 1 the loss was covered by the policy. Whether a ship sailed as soon as she left the wharf where she was loading depended upon the intention of the master. "*Cockrane v. Fisher*" (1 C. M. and R., 809). The question then arose whether there was evidence in this case that, when the ship moved from the quay into the river, it was the intention of the captain that the ship should then sail. In his opinion the evidence did not show any such intention. No doubt a ship might leave a quay with the intention of doing a little bit of the voyage, but that was not the intention in the present case. The ship, therefore, did not commence her voyage on February 29, and the loss was covered by the policy.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Rowcliffes, Rawle, and Co., for Hill, Dickinson, Dickinson, and Hill, for the plaintiffs; Waltons, Johnson, Bubb, and Whatton, for the defendant.]

Chan. Div. } 1898.
(Romer, J.) } June 17.

TOMS V. THE GLACTON URBAN DISTRICT COUNCIL.*
Practice—Costs—Solicitor and client costs—
Public Authorities Protection Act, 1903.

This was an action for an injunction to restrain the defendants from using land as a cemetery on the ground that the plaintiff was entitled to the benefit of a prohibition in section 5 of the Burial Act, 1855, against burying within 100 yards of a dwelling-house. His Lordship, however, held that it was unnecessary to decide that point, as the plaintiff was the tenant of the vendor who had sold the land to the defendants for the purposes of being used as a cemetery and was plaintiff in name only, being the vendor's nominee for the purposes of the action. Taking, therefore, the view that the case fell within the maxim that a grantor cannot derogate from his own grant his Lordship dismissed the action with costs. The question was, however, reserved whether the defendants were entitled as of right to costs as between solicitor and client by virtue of the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by R. D. SCHOMBERG, Esq., Barrister-at-Law.

Public Authorities Protection Act, 1893. (See *The Times*, June 10, 1898.)

MR. LEVETT, Q.C., and Mr. C. E. JONES, for the plaintiff, had argued on the question of solicitor and client costs that the Act of 1893 only conferred its benefit on public authorities in cases where the cause of action involved a public duty. Here the cause of action was one of private right, as was shown by the judgment of his Lordship. In the case of the *Somersetshire Drainage Commissioners v. Corporation of Bridgwater* before the Court of Appeal on April 4, 1898, the plaintiffs were unsuccessful in a claim for an injunction restraining the defendants from carrying out public sewerage works so as to interfere with the banks and bed of the river Parrett, the Court being of opinion that the defendants had a customary right to do the acts complained of. Counsel for the defendants in that action having asked for solicitor and client costs on the ground that they were entitled to them under the Act, their Lordships looked at the Act and held that the Act was not applicable, inasmuch as the question in dispute was on a custom, and that the Act was meant to apply only to frivolous prosecutions and actions. The question, however, was not argued.

Mr. Neville, Q.C., and Mr. Ingpen appeared for the defendants.

MR. JUSTICE ROMER said:—I have considered the matter as to the question of costs, and I cannot see in the Act any limitation beyond that imposed by the very words of the Act. This action appears to me to be one against the defendants for using or being about to use certain land for burial purposes, and is in my opinion within the words of the Act an action against the defendants for an "act done in pursuance of public duty," and I cannot see, therefore, why the Act does not apply. I shall direct the Registrar to draw up the order with costs to be taxed as between solicitor and client. I should like to have a decision of the Court of Appeal to guide me in determining the classes of cases to which the Act is not to apply.

Chan. Div. }
(Stirling, J.) }

1898.
June 18.

JOHNSTON V. BOYES.*

Practice—Injunction—Sale of real estate—
Specific performance.

Application for an injunction to enforce an agreement to enter into a contract for the sale of real estate refused.

This was a somewhat peculiar case. It was a motion by the plaintiff, a married woman, for an injunction to restrain the defendants from selling certain premises known as the White Hart, South Mimms, in the county of Middlesex, to any person other than the plaintiff, her case being that she had bought the same at a public auction. The plaintiff had, with the assistance of her husband, formerly carried on the business of an hotel-keeper at Finchley in a house which belonged to her for her separate use. She had recently sold the house and business, and, being desirous of acquiring another, she ascertained that the White Hart was to be sold by auction, and arranged with her husband that he should attend the sale as her agent and bid for the property. The husband accordingly attended the sale, which was

held on May 24 last in the City of London. According to his evidence he commenced bidding at £4,500 and was declared the purchaser of the property at £4,900. He immediately went up to the rostrum of the auctioneer for the purpose of paying the necessary deposit, when the auctioneer asked the name of his solicitor. Upon his giving the name one of the defendants, the vendors, who was present at the sale, said, "Oh, I know him," and then went to the other end of the room. On coming back he inquired how the deposit would be paid, and upon being told by cheque he thereupon said he could not accept it or permit the plaintiff's husband to sign the formal contract, and he then told the auctioneer not to accept the cheque nor to permit the husband to sign the contract. The next day the plaintiff's husband wired to the defendant that he would attend at his office and pay the deposit in cash. He kept the appointment, and waited three hours, with the necessary money, but the defendant did not come. The conditions of sale under which the property was put up to auction provided (*inter alia*) as follows:—"1. The highest bidder shall be the purchaser, and if any dispute shall arise respecting a bidding the property shall be put up again at the last undisputed bidding. No person shall advance at any bidding a less sum than shall be fixed by the auctioneers at the time of sale, and no bidding shall be retracted. There will be a reserved price. The vendors reserve the right to bid either by themselves or their agent. 2. The purchaser shall immediately after the sale pay to the auctioneers a deposit of £10 per cent. on the amount and in part payment of his purchase money and sign the subjoined agreement to complete the purchase according to these conditions." The subjoined agreement was in the following form:—"At the sale by auction made this day of the property described in these particulars — of — was the highest bidder for and was declared the purchaser of the said property at the price of £ , and he has paid to Messrs. Rodwell and Son, of Watford, Herts, as agents for and on behalf of William Osborn Boyes, of Barnet, and A. W. Adams, of 98, Ladbroke-grove, Notting-hill, the vendors, the sum of £ by way of deposit and in part payment of the purchase money, and hereby agrees to complete the purchase in accordance with the above conditions; and the said Messrs. Rodwell and Son, as the vendors' agents, hereby confirm the said sale and acknowledge the receipt of the said deposit." The defendants subsequently entered into a contract to sell the property at a higher price to a firm of brewers, and the plaintiff then commenced this action, in which she claimed (1) a declaration that, by reason of her having been by her agent the highest bidder at the sale, she was entitled to be regarded as the purchaser of the property at the price of £4,900; (2) an order on the defendants directing them to accept from the plaintiff or her agent the deposit of £10 per cent. on the amount of the purchase money, and to allow the plaintiff personally or by her agent to sign a copy properly filled in of the agreement annexed to the conditions of sale; and (3) an injunction as above stated.

MR. UPJOHN, Q.C., and Mr. ONSLOW, for the plaintiff, contended that the defendants were bound to perform the contract which they had entered into for the signature of the memorandum annexed to the conditions of sale. If the Statute of Frauds was relied upon, then that statute could not be used to cover a fraud, and under the circumstances the setting up of that defence would be a breach of good faith, and ought not to prevail against the plaintiff's right to become the purchaser of the property.

MR. JENKINS, Q.C., and Mr. INGPEN argued that on the question of law the motion was untenable. When

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

evidence was given at the trial a different complexion would be put upon the facts. The plaintiff in order to succeed upon the motion must make out a *prima facie* case that she had some interest legal or equitable in the property. So that she was in a dilemma, because if she had no interest in the land then she could not get an injunction, and if she had, then the Statute of Frauds applied, and there was no written contract upon which she could sue. In fact, she set up a contract which would not satisfy the statute to enter into a contract which would do so. Such a contract as that could not be specifically enforced.

MR. JUSTICE STIRLING said that the motion was made in an action which was of a very unusual character. The action was framed on the view that there was not yet a complete contract for sale, but that a preliminary contract had been entered into which the plaintiff was entitled to have performed. His Lordship then stated the facts of the case as disclosed by the plaintiff's evidence, and said that the defendants had not thought fit to file any evidence in opposition to the motion, and it must be taken that the defendants had deliberately and wilfully prevented the auctioneers from filling up the agreement in accordance with the conditions of sale. It was said that at the trial an explanation of this course of conduct would be forthcoming, but if the plaintiff's account turned out to be true, his Lordship hoped the law was such that she would be able to recover substantial damages. But the defendants said, and were entitled to say, that the plaintiff had made out no case for an injunction. In order that the Court might grant an injunction, it was necessary for the plaintiff in such a case to show that he was the owner of the land whose rights would be interfered with by the defendant. The law was stated by Lord Justice Turner in the case of "Hadley v. the London Bank of Scotland" (3 D.J. and S., 63). Having regard to that statement, the general rule in cases between vendor and purchaser was that the Court would not interfere unless a valid contract was proved. But the plaintiff was not in the position of a purchaser. By her writ she asked for a declaration that she is entitled to be treated as the purchaser, and for specific performance of an agreement by the defendant to accept a deposit and sign the contract. Various cases had been referred to in support of the contention of the plaintiff, that by reason of what took place, such a preliminary agreement had been entered into. It might be that she would, at the trial, establish the existence of such a contract, but would it be in accordance with the practice of the Court to grant specific performance of such a contract. His Lordship had never met with such an action before—an action to enforce an agreement to enter into a contract for the sale of real estate. It was better for the Court in such a case to leave the plaintiff to recover damages. There was considerable doubt that the plaintiff would succeed in obtaining specific performance of such a contract as was suggested in the claim of the writ. Then it was said that the Statute of Frauds ought not to be set up in such a case as this. His Lordship was unable to accede to that. No doubt the Court had said that it would not allow the statute to be used to cover a fraud, but his Lordship was unable to see that the conduct of the defendants brought them within that rule. It could not be said that it was fraudulent so as to prevent them from having the benefit of the statute. No case had been made out for the granting of an injunction. The motion must, therefore, be refused, but the costs would be reserved.

[Solicitors—T. Allingham ; Simey and Simey.]

Chan. Div. }
(Stirling, J.) }

1898.
June 18.

HOLFORD V. URBAN DISTRICT COUNCIL OF ACTON.*

Vendor and Purchaser—Conditions of sale—
Affirmative covenant—Injunction refused.

This was an action for an injunction restraining the defendants from erecting upon certain plots of land belonging to them a fire-engine station or any buildings other than shops and dwelling-houses of a certain value in alleged breach of a condition of sale under which the plaintiffs had bought from the defendants an adjoining plot of land. The land in question, together with other land, was originally acquired by the defendants under their compulsory power for the purpose of street improvements in their district. In 1894 they sold a portion of the land so acquired by auction under conditions of sale which provided (*inter alia*) that the respective purchasers of certain specified lots should in their respective conveyances enter into covenants with the vendors to erect within two years from the day of sale upon each of the lots bought by them a shop and dwelling-house of not less value than £650. The plaintiff bought one of the plots at the sale and erected thereon a shop and dwelling-house in compliance with the condition. Certain of the plots were not sold, and the defendants had since been unable to sell the same. The defendants had recently determined to erect upon the plots remaining in their possession a fire-engine station which was required for the purposes of their district, and had obtained the sanction of the Local Government Board to the issue of a loan for the purpose of providing the necessary funds. The plaintiff thereupon brought this action, contending that the proposed erection of the fire-engine station would be a breach of the condition under which he had bought his property and by which the defendants were themselves bound.

MR. JENKINS, Q.C., and Mr. TANNER appeared for the plaintiff, and contended that he was entitled to restrain the defendants from dealing with the land in any way inconsistent with the condition.

MR. BUTCHER, Q.C., and Mr. MACSWINNEY, for the defendants, argued, first, that the covenant was affirmative in form, and there was no negative stipulation not to erect upon the land any buildings other than shops or dwelling-houses, and as no such negative stipulation could be implied the defendants could not be restrained by injunction. Secondly, they contended that even if the covenant could be enforced as between the respective purchasers, it was not binding as against the defendants, inasmuch as it would be beyond their powers to subject the land in their hands to a restrictive condition which would have the effect of preventing them dealing with it for the purposes of the requirements of their district.

MR. JUSTICE STIRLING gave judgment, and came to the conclusion that, having regard to the authorities, no negative stipulation could be implied in the condition. That being so, the restrictive covenant could not be enforced against the defendants and the action failed and must be dismissed, and (except as to a special direction on one point) with costs as between solicitor and client pursuant to the powers of the Public Authorities Protection Act, 1893.

[Solicitors—Burton, Yeates, and Hart ; Hemsley and Hemsley.]

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

Q.B. Div. }
(Bruce, J.) }

1898.
June 18.

PENNY V. WIMBLEDON URBAN DISTRICT COUNCIL AND
ILES.*

Principal and Agent—Contractor—Liability of
principal for negligence of contractor—Public
body—Personal injuries.

In this action, the hearing of which began on June 15, Lord Coleridge, Q.C., and Mr. Stephen Lynch appeared for the plaintiff; Mr. Rawlinson, Q.C., and Mr. Newson for the defendant Iles; and Mr. C. T. Giles for the district council.

It appeared that the plaintiff, an elderly widow lady residing at Cromwell-road, Wimbledon, went out shopping on October 23, 1897. While returning home she was passing down Queen's-road, when she stumbled and fell over a heap of soil and grass left on the roadway unprotected. The accident happened about 7 p.m. on a dark evening, and resulted in severe injuries, for which she claimed damages. At the time of the accident the district council had not taken over the road, but had served notice on the owner, under section 150 of the Public Health Act, 1875, to make up the road, and on his failure to do so had taken the matter in hand and entered into a contract with the defendant Iles that he should do the work. By the terms of the contract Iles was to provide all materials, plant, labour, watching, lighting, fencing, and everything necessary for the speedy and effectual completion of the work. The work was to be carried out in the best and most workmanlike manner. It was to be in accordance with the specification and certain plans and drawings prepared by the surveyor and such working and explanatory drawings and instructions as he might from time to time furnish. The surveyor could require improper materials to be removed and others substituted, and could procure the discharge of incompetent workmen. The work was commenced on the day before the accident, and the heaps were of dirt and grass formed in the course of the preliminary process of "cleaning-up" the road. After the accident lights were placed on some of the heaps by order of the surveyor. The defendants delivered separate defences. Both denied liability. The defendant Iles paid £75 into Court. The defendant district council paid nothing into Court, but pleaded that "the defendant Iles, while denying liability, has paid into Court £75, and these defendants say that sum is sufficient to satisfy the plaintiff's claim."

The jury returned a verdict for £50, and judgment was thereupon ordered to be entered for the defendant Iles; £25 to be paid out to him, together with the £50 on account of costs.

On the following morning LORD COLERIDGE moved that judgment should be entered against the district council. He argued, first, that they were liable for their contractor's negligence ("Hardsaker v. the Idle District Council," (1896) 1 Q.B., 335); and, secondly, that they could not take advantage of the money paid into Court by their co-defendant, Iles.

Mr. GILES argued that they were not liable for the negligence of an independent contractor, citing "Reedie v. London and North-Western Railway" (4 Ex., 244); and, secondly, that, the verdict having been satisfied by the payment into Court of a joint tort-feasor, they were, on their pleadings, entitled to judgment.

HIS LORDSHIP delivered the following written judgment this morning:—In this case the action is brought against the Wimbledon Urban District Council and

Edmund Iles to recover damages for personal injuries sustained by the plaintiff by falling over a heap of surface soil and grass placed by the defendant Iles in Queen's-road, Wimbledon, and left there on the evening of October 23 after dark without any light or precaution to warn persons passing along the road of the obstruction caused by the heap. Queen's-road is a road within the jurisdiction of the Wimbledon Urban District Council, which, although for some considerable time prior to the happening of the matter complained of it had been set out as a road by the owner of the land and used by the public, had not become repairable by the inhabitants at large, and had not been taken over by the district council. The district council had given notice under section 150 of the Public Health Act, 1875, to the owner requiring the road to be sewered, levelled, paved, metalled, flagged, channelled, and made good, and, the requirements of such notice not having been complied with, the district council proceeded to procure the works to be carried out under their direction. With this view they entered into a contract with the defendant Iles, who is a contractor, and, in the course of carrying out his contract, he trimmed up the surface of the road, took away the grass which had been allowed to grow on the "haunches" of the road and in the waterways, and put the surface soil and grass in heaps on the side of the road. The plaintiff on the night when the accident happened had walked down the path on the south side of Queen's-road, and at the foot of the road she proceeded to cross the road in order to get over to Cromwell-road, where she lived, when she fell over one of the heaps. The district council and Iles, the contractor, delivered separate defences. Both denied liability, but the defendant Iles paid a sum of money into Court. The defendants the district council did not bring any money into Court, and they pleaded that the money paid into Court by Iles was sufficient to satisfy the plaintiff's claim. The jury found that the leaving of the heaps in the position in which they were left after dark without a light or other warning was an act of negligence, and they assessed at damages a sum of money less than the amount paid into Court by the defendant Iles. I thereupon directed judgment to be entered for the defendant Iles. The question arises, Are the defendants the district council entitled to have judgment entered for them? Mr. Giles, who argued the case on behalf of the district council, contended that they were not liable, said that Iles was an independent contractor employed by the district council to do work which was in itself lawful, and that the district council was not liable for any negligence that Iles or his men may have been guilty of in the course of the execution of the work. This question resolves itself, I think, to a large extent into a question of fact depending upon the terms of the employment of Iles. The question is whether Iles was an independent contractor or whether the district board reserved the power of controlling the contractor and of regulating the manner in which he did the work. I have looked carefully at the terms of the contract between the district council and Iles, and I have come to the conclusion, having regard to the whole terms of the contract, that the district council, by their surveyor, reserved powers which conferred upon them entire control over the work and the manner in which it was to be done. I do not rely upon the clauses giving power to the surveyor to require incompetent workmen to be dismissed or unsound work to be removed, because those clauses standing alone would not, I think, give the district council such control over the work as to make the contractor their agent or servant. But the first operative clause in the contract, which requires Iles to execute all the works mentioned in the specification and the signed plans

according to such explanatory drawings and instructions as may from time to time be furnished to the contractor by the surveyor, seems to me in effect to give the surveyor of the district council complete control over the work and over the manner in which it is to be done. There is, further, a circumstance in the case which I think is not without its bearing on this part of the case. As soon as the attention of the officers of the district council was called to the circumstance that the plaintiff had fallen over one of the heaps, lights were ordered to be placed near the heaps at night, and lights were placed accordingly. That seems to me to show that the district council not only had the power, but they did in fact during the continuance of the contract exercise the power, of directing lights to be placed as a warning to the public. I have come to the conclusion that the defendants, the district council, having the control of the works, are liable for the negligent acts which they permitted. But there is another ground upon which the plaintiff argued that the defendants were liable. It is contended by Lord Coleridge, who argued the case for the plaintiff, that, even if lles is to be regarded as an independent contractor, still, upon the principle of "*Hardaker v. Idle District Council*" (1896, 1 Q.B., 335), the district council in this case is liable. In that case of the Idle District Council the works which were being executed were being executed by the contractor of the local board pursuant to the powers of the same section of the Public Health Act, 1875 (section 150), as applied in the present case, and I find it difficult to draw a distinction between the two cases. "*Pickard v. Smith*" (10 C.B., N.S., 470) is another case that closely resembles the present. In that case the defendant was the lessee of refreshment rooms and a coal-cellar, and there was an opening for putting coals into the coal-cellar on the arrival platform at a railway station. The defendant employed a coal merchant to put coals into the cellar, and the coal merchant's servants, while putting coals into the cellar, left the hole insufficiently guarded. The plaintiff, whilst passing in the usual way out of the station, fell into the coal-cellar and was injured. It was held that the defendant was liable. The principle of the decision, I think, is this—that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. "*Pickard v. Smith*" is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do. The district council employ the contractor to do work upon the surface of a road which they know is being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the traffic and some danger unless means were taken to give due warning to the public. The duty of affording protection to the public was in the circumstances incurred by the district council, and the district council could not avoid the obligation of the duty by entering into a contract with lles. The question remains, Can the defendants, the district council, avail themselves of the separate defence which is pleaded by lles? The two defendants might, if they had pleased, have joined in a defence of payment into Court which would have been available for both. But the district council have chosen to put in a

separate defence. I cannot see in the circumstances that they can avail themselves of the payment into Court by lles. So far as their defence is concerned it simply amounts to a denial of liability, but in that defence they have failed. The plaintiff is therefore entitled to judgment for £50 and costs. Of course, as the £50 has been obtained from the other defendant, lles, the judgment against the district council will be confined to costs only.

House of Lords (Lord Halsbury, L.C.,
Lords Herschell, Macnaghten, Morris,
and Shand) 1898.
June 21.

SAMUEL HEATH AND SONS V. ROLLASON AND ANOTHER.*

Copyright—Design—Novelty—Pattern—Patents,
Designs, and Trade Marks Act, 1883, secs. 47,
51, 60.

Decision of the Court of Appeal (*ante*, p. 71,
and [1898] 1 Ch. 237) affirmed.

This was an appeal from a decision of the Court of Appeal dated November 27, 1897, and reported 14 *The Times Law Reports*, 71; 1898, 1 Ch., 237; 67 *L.J.*, Ch., 100, under the title of "*Rollason's Design*." The appellants are manufacturers at Birmingham and their business includes a coffin furniture department. The respondent is a coffin furniture manufacturer of the same place and is the registered proprietor of the design No. 232,908, the registration of which is dated May 28, 1894. In August, 1896, discovering, as he alleged, that the appellants were infringing his design, Rollason complained to them and subsequently, in April, 1897, brought an action for infringement in the County Court. The question, however, was not to be tried before the local tribunal, as the appellants gave notice of motion on May 31, 1897, that the Register of Designs might be rectified by expunging therefrom the respondent's design, on the grounds that the design was not a new or original one at the date of registration and, further, that Rollason had delivered on sale articles to which the design had been applied without having caused the same to be marked with the prescribed word or words and figures as required by section 51 of the Patents, Designs, and Trade Marks Act, 1883. These articles had other marks and figures than those which ought to have been marked thereon. Mr. Justice Kekewich held that the respondent Rollason had taken all proper steps to ensure the correct marking of the articles, and therefore brought himself within the protective proviso of section 51, but that the design was not new or original, but virtually the same with one previously registered by Messrs. Sanders, Son, and Payne. The Court of Appeal, consisting of the Master of the Rolls and Lords Justices Chitty and Vaughan Williams, held that the design was new and original, but agreed with the Judge below on the question under section 51.

Mr. Renshaw, Q.C., and Mr. W. N. Lawson appeared for the appellants; Mr. Warrington, Q.C., and Mr. E. P. Hewitt for the respondents were not heard.

LORD HERSCHELL, in moving that the appeal be dismissed with costs, said that the sole question on that part of the case which was an application for the removal of the respondent's trade design from the register was whether it was a new and original design. The respondent, in accordance with the rules, was on registration required to state the nature of the design and whether it was applicable to the pattern, shape, or configuration, and stated that it was applicable to the

pattern. The appellants contended that the respondent could not be said to be registered only as applicable to pattern, inasmuch as the depression in the centre was "shape" or "configuration," and not pattern; and, secondly, the drawings did not indicate that the centre was to be depressed. These words "applicable for the pattern or for the shape or configuration" were to be found only in the interpretation clause of the Act. The word used in the other sections was "design." The intention was to ensure that the word "design" should be sufficiently extensive, and it was not intended to draw a hard and fast distinction between each of these words and the others. The object was to use words which would include everything ordinarily falling within the meaning of the word "design," and all that the applicant for registration was required to do was to state the nature of the design. Then certain rules were made to the effect that design should include such matters as shape and configuration. But the rules did not intend that an applicant should be so limited as to be obliged to indicate which part was pattern, which shape, which was configuration or ornament. It was not necessary on that occasion to say whether the drawings did or did not indicate that the centre was to be depressed, because, in his judgment, this design ought to be upheld as new or original whether or not the centre was depressed. As to Sanders's pattern, it was, in his opinion, not identical with the respondent's, but it was not necessary to analyse the points of difference, or to decide which was the more attractive of the two. As to the point under section 51 which requires that "before delivery on sale of any articles to which a registered design has been applied the proprietor of the design shall cause each such article to be marked with the prescribed mark, &c., . . . denoting that the design is registered," he did not think that the omission so to mark in the case of some of the plates was fatal to the respondent, inasmuch as it was by inadvertence, and as soon as the omission was pointed out Mr. Rollason took steps to rectify it.

The other noble and learned LORDS concurred, and the appeal was dismissed with costs.

[Solicitors—Stibbard, Gibson, and Co., for the appellants; Preston, Stow, and Preston, for C. Rollason, for respondents.]

Q.B. Div. } 1898.
(Kennedy, J.) } June 21.

EASTERN TELEGRAPH COMPANY (LIMITED) V. DENT AND OTHERS.*

Landlord and Tenant—Forfeiture—Breach of covenant not to sublet without lessor's consent.

This was an action of ejectment for breach of a covenant not to sublet without the lessors' consent. The defendants were Sir Alfred Dent and Edward Dent (trading as Dent Brothers) and Messrs. Burn and Berridge, solicitors.

Mr. Bray, Q.C., and Mr. Roskill appeared for the plaintiffs; Mr. Dickens, Q.C., and Mr. Muir Mackenzie for the defendants.

The plaintiff company had let to Dent Brothers certain rooms on the upper floors of the company's offices, 11, Old Broad-street, under a lease which contained a covenant that the lessees should not "underlet, assign, or part with possession of" any part of the rooms without the consent in writing of the com-

pany first obtained, such consent not to be unreasonably withheld; and there was a proviso for re-entry in case of breach. Messrs. Burn and Berridge also occupied some rooms on the same floors as tenants of the company, and it was admitted that they were desirable tenants. In 1889 Dent Brothers (with the company's consent) sublet a room on the third floor to the Amsterdam Tobacco Company. In January, 1898, Burn and Berridge applied to Dent Brothers for the use of a portion of this room. Dent Brothers accordingly (having arranged with the Amsterdam Company) erected a partition to divide the room into two parts, so arranged that one part could only be approached from Burn and Berridge's office in the adjacent room by a door cut at the cost of the latter firm. This part Dent Brothers let to Burn and Berridge without obtaining or asking the plaintiffs' consent. On January 14, 1898, Messrs. Burn and Berridge wrote to Dent Brothers a letter in which they put on record the terms of the agreement, stating the time of the letting as follows:—"The term to commence from the date of your giving us possession." About February 4 Burn and Berridge sent some furniture and a clerk into the new room, but Dent Brothers were unaware of it until, on February 10, their attention was called by the plaintiffs to the fact that they had not obtained permission to sublet. This was the breach now sued upon. The agreement to sublet had been immediately cancelled, therefore no relief was claimed against the defendants Burn and Berridge.

Mr. DICKENS, Q.C., for the defendants, contended that the plaintiffs could not have refused their consent to the underlease to such tenants as Burn and Berridge, and that in such a case it was immaterial that the defendants had not asked for it—"Hyde v. Warden" (3 Ex. D. at p. 81) and "Bates v. Donaldson" (1896, 2 Q.B., 241). "Barrow v. Isaacs" (1891, 1 Q.B., 417) only decided that the Court would not grant equitable relief in the circumstances of that particular case. Secondly, there had been no underletting in law. The only agreement was contained in the letter of January 14, 1898. There the term was not stated with sufficient certainty in point of time to constitute a letting without part performance, and possession had never been given. Giving up possession implied an act on the part of Dent Brothers, and there was no such act. Thirdly, this was a case for equitable relief.

Mr. BRAY, Q.C., in reply, relied on "Barrow v. Isaacs," in which "Hyde v. Warden" was quoted and disregarded. As to the second point, the question was the same as if Burn and Berridge were suing for specific performance of their agreement with Dent Brothers. On February 10 Burn and Berridge were in actual possession under the agreement, and could not have been turned out. Any work done on the premises referable only to the agreement was sufficient part performance to complete the lessees' title, and after Burn and Berridge had cut the door they could not have been turned out. Since their possession was rightful Dent Brothers must have "parted with possession."

Mr. JUSTICE KENNEDY gave judgment for the plaintiffs. In his opinion it was impossible to deny that Dent Brothers both underlet and parted with possession. The letter of January 14 amounted to an agreement which would have been enforceable. In that letter the date of the term was sufficiently expressed by reference. That being so, the question arose whether, seeing Burn and Berridge could not have been objected to as tenants, non-compliance with the letter of the lease necessarily led to forfeiture. It was not easy to reconcile "Hyde v. Warden" with "Barrow v. Isaacs," but in face of the latter case it was impossible to say that there was no forfeiture. The

*Reported by H. O. BUCKLE, Esq., Barrister-at-Law.

same case was conclusive against Dent Brothers' claim to equitable relief. But it was fair and proper that the defendants should contest such a case, and judgment would be for the plaintiffs without costs.

A stay of execution was granted pending appeal.

Q.B. Div. }
(Bigham, J.) }

1898.
June 21.

HOTEL AND GENERAL ADVERTISING COMPANY V.
WICKENDEN AND STENE.*

Contract—Agreement—Construction—Personal
contract terminated by death.

This was an action brought to recover damages for breach of a contract in writing dated November 29, 1893, and made between the plaintiffs and one John Braby, formerly proprietor of the Wellington Hotel, Tunbridge Wells. The defendants were the executors of John Braby. The facts were as follows:—The plaintiff company was formed to carry out a scheme of advertising by means of "hotel tariff frames." The manner in which the scheme was worked was that the plaintiffs printed and prepared for different hotels a tariff frame consisting of a framed printed tariff surrounded by advertisements of local and other tradesmen and containing a list of hotels recommended by the management. The contract sued upon was in the form of a letter signed by John Braby and addressed to the plaintiffs, and was so far as material in these terms:—"Wellington Hotel, Tunbridge Wells. Upon the Hotel and General Advertising Company (Limited) delivering at their convenience to this hotel 50 of their hotel tariff frames I agree to give a receipt for the same and properly hang and maintain them in the first-floor bed and dressing rooms and also (in certain other parts of the hotel) during five years to commence from the date of delivery of the frames. In consideration the company agrees to insert a recommendatory notice of this hotel in 2,000 of their hotel tariff frames to be exhibited in other hotels during the like term of five years, commencing as to 500 notices within six months from the delivery of the frames in this hotel, and the remainder to be published within the term of this agreement." The 50 tariff frames were delivered to the Wellington Hotel in the summer of 1894, and were duly exhibited. The plaintiffs entered into contracts with various tradesmen to insert advertisements in these tariff frames during the period of five years from the delivery of the frames at the hotel, for which they were to be paid certain sums annually in advance. On July 15, 1896, John Braby died. His executors, the defendants, obtained a continuation of his licence until the next licensing sessions and sold the hotel to a company, who removed the tariff frames in the spring of 1897 and refused to continue to exhibit them. Owing to this refusal the tradesmen who had made agreements for advertisements in the tariff frames refused to continue their annual payments, and it was for the loss thus sustained that the plaintiffs claimed to recover in this action.

Mr. Rufus Isaacs appeared for the plaintiffs; Mr. Hohler (Mr. H. F. Dickens, Q.C., with him) for the defendants.

The following cases were referred to in the course of the arguments:—"Hamlyn v. Wood" (1891, 2 Q.B., 488), "Taylor v. Caldwell" (3 B. and S., 826), and "Finlay v. Chirney" (20 Q.B.D., p. 494).

His LORDSHIP, in giving judgment, said he thought that the parties to the contract in question contemplated that Mr. Braby would continue to be the proprietor of the Wellington Hotel, and therefore he

ought to imply a condition into the contract that it was only to be performed so long as Braby was alive. The contract was a somewhat peculiar one (his Lordship referred to its terms); no time was mentioned during which delivery of the frames was to be made. It might not suit the convenience of the plaintiffs to deliver them for ten years, and the time during which the contract was to remain in operation did not begin to run until the plaintiffs had found it convenient to make delivery, and that was so although the 2,000 frames which the plaintiffs were to deliver about the country advertising Braby's hotel were to be delivered as to 500 within six months from the delivery of the frames at Braby's hotel, and as to the remainder within the currency of the agreement. That might mean ten years or more, or it might mean long after the hotel had ceased to be an hotel and long after Braby was dead. The learned Judge could not help coming to the conclusion that this was a contract intended to be operative only so long as Braby was the proprietor of the hotel and personally able to do that which he had personally undertaken to do and so long as he had control of the place where those things had to be done. The contract was personal in its terms, and could not be meant to continue after Braby's death. There would therefore be judgment for the defendants, but in case there should be an appeal he would assess the damages at £60.

Prob., Divorce, and Adm. Div. }
(Gorell Barnes, J.) }

1898.
June 21.

ARMYTAGH V. ARMYTAGH.*

Divorce—Judicial separation—Cruelty—Jurisdiction of Court.

The Court has jurisdiction to entertain a suit for judicial separation where the parties are not domiciled but are only resident in this country.

MR. JUSTICE GORELL BARNES delivered the following considered judgment in this case. The facts and arguments have already been reported in *The Times* for March 10 and May 13 and 18:—This is a suit for judicial separation by Mrs. Armytage against her husband on the ground of his alleged cruelty towards her. By his answer the respondent has denied the alleged cruelty, and by an act on petition he has further pleaded that the Court has no jurisdiction to entertain the suit. I have, therefore, to determine a question of fact, whether there has been cruelty by the respondent to the petitioner, and a question of law whether the Court has jurisdiction in the circumstances to entertain the suit. The second question raises a point of considerable importance in private international law. The parties were married at Toorak, near Melbourne, Australia, on April 11, 1888, and there are two children of the marriage, whose custody the petitioner seeks to obtain. The respondent is by birth an Australian, and his domicile is in the colony of Victoria. He was educated at Cambridge, and has been called to the English Bar. The petitioner is an Englishwoman, born in England, of parents residing at Blackheath, near London. The respondent and petitioner became acquainted on board ship on passage from this country to Melbourne, and their marriage was celebrated shortly afterwards. They cohabited in Australia and in England, and afterwards in Italy, and the occurrences which give rise to this suit took place at Florence in April and May, 1897. The letters put in at the hearing show that as late as the year 1896 the

*Reported by S. MAYBOARD, Esq., Barrister-at-Law.

husband and wife were living on terms of affection, but between that date and the spring of 1897 a state of friction seems to have arisen between them, the precise causes of which I have some difficulty in determining, the wife attributing it partly to temper on the part of the respondent, and partly to certain differences which she referred to in her evidence, and the husband, as I understand, attributing it to a dislike on his wife's part to residence in Australia. He also referred to correspondence in which she blamed herself for loss of self-control. The petitioner alleges that in April and May, 1897, her husband committed certain acts of violence towards her which caused her to leave him and come over to England with her children to seek her father's protection. These acts are denied by the husband, and he alleges that his wife has merely come to this country to endeavour to give this Court jurisdiction in the matter. It is unnecessary to go into the charges made in this case in detail. The petitioner gave her evidence very clearly, and is corroborated by her sister and a servant, and her story is supported by the strong fact that she wrote letters to her sister after that lady left her in Florence, which she stated gave accounts of what was taking place, for the purpose of obtaining advice as to her position, and that, after advice had been obtained from counsel on her behalf, her brother went over to Florence and brought her and her children to this country. The respondent, in his evidence, gave his account of what he stated had taken place between his wife and himself, and he also put in, with the consent of the petitioner's counsel, an affidavit by another servant, which he had obtained. The respondent's evidence and this affidavit do not really answer the petitioner's case; statements and admissions are contained in them which tend to confirm her story, and after making due allowance for any exaggeration there may not unnaturally be in accounts given of what has taken place when those present have been excited by the occurrences, I have come to the conclusion that the petitioner has established a case of cruelty on the part of the respondent towards her at Florence in April and May, 1897. I further find that she left him in Florence and came to England *bona fide* in order to shelter herself under the care of her parents, and is now resident in this country. No acts of cruelty in this country were alleged or proved, but the petitioner stated that she remained in fear of her husband. I have now to deal with the question of jurisdiction. The further facts necessary to refer to are these:—The petitioner came to this country with her children on or about May 25, 1897, and she and the children have since resided under her parents' roof and at Bexhill. The respondent's solicitor on May 31, 1897, wrote on behalf of the respondent to the petitioner and her father requesting the petitioner to return with the children to her husband, but she declined to comply with this request. At the end of June, 1897, the respondent came to, and has since resided in, England, but I understand he has not taken up a permanent residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the petitioner with regard to the children. In the month of November, 1897, he settled the sum of £100 on each of his children, and made them wards of Court in Chancery. He thereupon applied to Mr. Justice North for an order for the custody of the children, which was met by a cross-application on the part of the petitioner. In the meantime these proceedings were commenced, and the respondent was served with the citation and petition in this country. Mr. Justice North ordered the application before him to stand over until after the determination of this suit. The question to be decided, therefore, is whether or

not this Court can entertain a suit for judicial separation by the petitioner against the respondent in the circumstances above stated. It may now be taken as settled that this Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not domiciled in this country at the commencement of the proceedings. Although in the case of "*Niboyet v. Niboyet*" (L.R. 4, P.D., p. 1) it was held by the majority of the Court of Appeal that residence not amounting to domicile may give the Court jurisdiction, that case, which, if followed, would have the effect of giving the Court a jurisdiction which it does not concede to foreign tribunals, is opposed to the general current of the cases in this Court, and has been practically overruled by the decision of the Privy Council in the case of "*Le Mesurier v. Le Mesurier*" (L.R., A.C., 1895, p. 517). Lord Watson, in delivering their Lordships' judgment after a review of the authorities, stated that "their Lordships have . . . come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who up to the time when she was deserted or began so to be justified was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicile of her own in the country of the matrimonial home, it is considered that in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country. The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act does not expressly make domicile a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in "*Wilson v. Wilson*" (L.R. 2, P. and D., 442), to "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's *status* ought to depend on the law of his domicile, though there may be limitations and exceptions to this principle—see Dicey's "*Conflict of Laws*," 1896, cap. 18, p. 474, *et seq.* (conf. Savigny, section 362, Guthrie's translation, second edition, p. 148). The jurisdiction in suits other than suits for dissolution of marriage is conferred on the Court by the sixth section of the Act aforesaid. By other sections judicial separation is substituted for the old divorce *a mensa et thoro*, and a new ground for separation, viz.—desertion without cause for two years and upwards, is added. Section 22 provides as follows:—"In all suits and proceedings other than proceedings to dissolve any marriage the said Court shall proceed, and act, and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act." There are no special provisions of the Act or rules or orders which directly affect the present question. The present suit is for judicial separation on the ground of cruelty.

Before the Act it would have been a suit for divorce *a mensa et thoro* on the same ground, and the inquiry is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances. The petitioner maintains that the test of domicile is not applicable as in a suit for dissolution of marriage, and that the Ecclesiastical Courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the respondent maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction. In support of her contention the petitioner's counsel cited the judgments of Lords Justices James and Cotton in the case of "Niboyet v. Niboyet," and certain passages from the abovementioned judgment of Lord Watson. "Niboyet v. Niboyet" was a case in which a marriage was solemnized at Gibraltar between a Frenchman and an Englishwoman, and the husband resided for several years in England, but, being a Consul for France, he retained his domicile of origin. The wife presented a petition for a divorce, alleging adultery committed in England and desertion. The husband appeared under protest, and prayed to be dismissed. It was held, reversing the decision of Sir R. Phillimore (by Lords Justices James and Cotton, Lord Justice Brett dissenting), that the Court had jurisdiction to grant a divorce. I have already pointed out that this decision is virtually overruled, but Lord Watson, in "Le Mesurier v. Le Mesurier," said,— "The main reason assigned for their decision by the learned Judges of the majority was that before the Act of 1857 became law the petitioner would have been entitled to sue her husband in the Bishops' Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights or for a divorce *a mensa et thoro*, and in either case for proper alimony, and consequently that after the Act of 1857 passed jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation or for alimony, but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe section 27 of the Act of 1857 as giving the English Court jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishops' Court." The reasons given by Lord Justice James for holding the wife entitled to sue for a divorce *a mensa et thoro* in the Bishops' Court fully appear at pp. 4-6 of the report; but his observations appear to me to be limited to the case of the parties being resident though not domiciled in a matrimonial home within the jurisdiction and a matrimonial offence being committed during such residence either within or outside the jurisdiction. Lord Justice Cotton proceeded on very much the same grounds except that he does not seem to include the case of offences committed outside the jurisdiction. Lord Esher, who differed from the other Lords Justices, was of opinion that the domicile of the husband in England at the institution of the suit is the fact which gives jurisdiction to the English Divorce Court to decree divorce, and that the same rule applies to suits for judicial separation and to suits for the restitution of conjugal rights. This case cannot, therefore, be considered a distinct authority in the petitioner's favour, but her counsel, in addition to the last-quoted passage from Lord Watson's judgment, placed reliance on the following passage from the same judgment at page 526 of the report:—"No authority can have a material bearing upon that point" (viz.—

whether the Courts of a colony have a jurisdiction to dissolve a marriage contracted in England by British subjects who, though resident within the forum, still retain their English domicile) "which does not relate to the dissolution of marriage; because there are unquestionably other remedies for matrimonial misconduct short of dissolution which, according to the rules of the *jus gentium*, may be administered by the Courts of the country in which spouses domiciled elsewhere are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her; and in cases where the residence is of a more permanent character and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation without reference to the domicile of the parties. But the circumstances which justify the Courts of the residence in administering remedies for the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings taken for the purpose of putting an end to the marriage and remanding the spouses to the condition of single persons." It is to be observed that the cases referred to in this passage, in which the remedy of judicial separation may be given, are the same as those contemplated by Lord Justice James and do not necessarily include the present case, where the parties, though within the jurisdiction at the commencement of the suit, had no joint matrimonial home of any kind in this country. Counsel for the petitioner did not cite the works of any jurists who may have been referred to by Lord Watson. The published works of several eminent writers which I have consulted show that doubt has been expressed upon the question which Lord Watson does not consider doubtful. Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriages depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce *a mensa et thoro* of married persons who are residing but not domiciled in the country of the forum. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others and has been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the forum which ought to take cognizance of the question of divorce and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted or only permitted on certain grounds have in order to obtain divorces temporarily resided or assumed domicile in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage. But in practice suits for judicial separation or divorce *a mensa et thoro* and restitution of conjugal rights do not appear to have given rise to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the tribunals of the country in which the parties are in fact domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be

found residing for more or less lengthy periods away from the place of their domicile. Sir R. Phillimore, in his work on International Law (1861), vol. 4, p. 338 *et seq.*, does not enter upon the question of the validity of a decree of divorce *a mensa et thoro* by the Court of a State in which the parties are living but not domiciled, though he makes mention of the case of "Connelly v. Connelly" (7 Moore's P.C., p. 438), where, in answer to a suit in the Arches Court of Canterbury for restitution of conjugal rights, a wife relied for her answer partly on a decree of separation between the parties at Rome, and, after her plea had been rejected by the Court of Arches, the Privy Council allowed her to amend her plea by stating that she and her husband were domiciled at Rome at the time when the alleged sentence was passed, and that by the law of their American domicile (the *lex loci contractus*) that sentence would be held valid, but gave no opinion as to what the effect of such further pleading might be. Burge, in his Commentaries on Colonial and Foreign Laws (1838), section 2, confines his inquiring to the conflict between the law of the one country which treats marriage as indissoluble and that of the other which authorizes its dissolution by judicial sentence. He states that the obligatory effect of a sentence of separation *a mensa et thoro* by a foreign tribunal will be the subject of inquiry by him in a subsequent part of his work when the nature and effect of foreign judgments and sentences are considered, but I cannot find that he reverts to the subject. He observes, however (p. 669), that generally the law of the actual domicile of the parties is admitted to be competent to decree their separation *a mensa et thoro*. Bishop, in his Commentaries on the Law of Marriage and Divorce (Boston, 1881), section 158, discusses the jurisdiction of the Ecclesiastical Courts in England and shows how the Bishop's jurisdiction did not extend beyond his diocese, and concludes with this passage:—"Besides the English Courts had no authority to dissolve valid marriages, and it may be doubted whether a suit for separation from bed and board involves a question of *status* within the principle we are considering. If it does, still no one would seek such a divorce under circumstances to give the decree no personal effect upon the defendant." Dr. Bar considers fully the subject of jurisdiction in divorce in his Theory and Practice of Private International Law, translated by Gillespie, 1892. At p. 381 he says:—"The result in practice will probably be found to coincide pretty much with the doctrine of the text, because wives claiming aliment or demanding protection will resort to the forum of the place of residence, while these Courts will not determine any question of rights so as permanently to affect the marriage relations, unless they have jurisdiction *ratione domicilii*." And, again, at p. 384, in notes, "The Court of the domicile or even of the place of residence in cases of necessity are competent to lay down provisional rules, e.g., to regulate a provisional separation, to protect the wife from cruelty or to make temporary provision for her aliment, to restore for a time at the husband's instance the domicile conjugal. French practice recognizes this." Professor Westlake (Private International Law, 1890) states that the jurisdiction of the English Court to decree judicial separation depends on the same circumstances as its jurisdiction to grant a divorce (see 47), but he adds:—"If the matter be considered on the ground of social rather than legal principle, a doubt may be suggested whether it is necessary to identify the jurisdiction for judicial separation with that for divorce. The former decree leaves the parties man and wife, but gives to the injured party a protection against some of the consequences of that *status*, and it may therefore be reasonable to allow its benefit to be enjoyed within the territory by those who are resident in it, even though

the Court of their country or domicile should alone be held competent to dissolve the tie of marriage between them." He further appears to consider that the English Court has jurisdiction to decree restitution of conjugal rights where both parties are in England at the time of the commencement of the action (see 48). Dr. Fraser, in his Treatise on Husband and Wife according to the Law of Scotland, 2nd edition, 1878, p. 1,294, under the title of Actions of Separation and Alimment, points out that different considerations come into play when the object is not permanently to affect the *status* of parties, but to obtain immediate protection from cruel treatment, or the means of daily subsistence, and the hardship which would arise if the rule were established that jurisdiction in actions of separation only exists in the forum of the husband's domicile. I do not find that the point in question is expressly dealt with in Foote's Private International Jurisprudence (1890), Dicey's Conflict of Laws, 1896, Eversley on Domestic Relations, 1885, Story's Conflict of Laws, 1872, or Kent's Commentaries, 1873. But in Wharton's Conflict of Laws, 1881, there is the following passage, section 210, p. 294:—"Cruelty or other misconduct gives jurisdiction for police purposes to the Court of the place where such misconduct takes place and where the offender may be cited though he be not then domiciled; but without such domicile the Court, while it will interpose for the protection of the injured party and for a provisional separation, can grant no permanent dissolution of the marriage tie." And in a note on the same page it is stated that there is much doubt in France whether the Courts have jurisdiction to decree a *séparation de corps* between foreigners not domiciled but resident in France, and that this jurisdiction is maintained in Switzerland. I conclude from the writers to whom I have referred that most of them are disposed to consider that the Courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party. Lord Hannen may possibly have had such a case in his mind when, in giving judgment in "Firebrace v. Firebrace" (L.R., 4 P.D., 63), he said:—"The domicile of the wife is that of her husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicile"; but added:—"It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country where she is resident, though not domiciled." This was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the Court had not jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from the cases of "Newton v. Newton" (L.R., 11 P.D., 11) and "Thornton v. Thornton" (*ib.*, p. 176) that the suit could have been maintained. In the recent case of "Christian v. Christian" (78 L.T., p. 86), the President said that a suit for judicial separation may be founded upon matrimonial residence only as distinguished by our law from domicile. Having considered sufficiently for the purposes of the case the opinions of the jurists above mentioned, it is necessary that I should revert to the 22nd section of the Act of 1857, which requires the Court in such a suit as the present to act conformably to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief. There are several works which deal more particularly with the jurisdiction and mode of proceeding in the Ecclesiastical Courts—e.g., Burn's Ecclesiastical Law, 1842, Roger's Ecclesiastical Law.

1849, Shelford's Law of Marriage and Divorce, 1841, and older works, such as Godolphin's Abridgment; but I cannot trace in them any statement upon the precise point in question, and the principles to govern it must be deduced from the general principles and practice of the Courts. These are stated in general terms so far as concerns the matter under consideration by Lord Justice James in his judgment above referred to, where the jurisdiction of the Court Christian is considered, and it is pointed out that the Church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, that residence as distinct from casual presence on a visit or *in itinere* was an important element, but that residence had no connexion with or little analogy to the question of a person's domicile. In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the respondent's counsel that such interference would be limited to cases where the offence complained of was committed within the jurisdiction. In "Warrender v. Warrender" (1835, 2 Cl. and Fin., at p. 562) Lord Brougham said:—"The law either in this country or in Scotland makes no distinction in respect of the place of the commission of the offence." Although the Ecclesiastical Courts could not extinguish the mutual obligations of husband and wife they, acting *pro anima salute*, suspended these obligations in order to protect and relieve the injured party. It could make no difference where the parties were residing within the jurisdiction that the necessity for protection and relief arose in consequence of adultery committed by the wrongdoer while temporarily outside the jurisdiction, or of cruelty committed while the parties were temporarily outside the jurisdiction and the apprehension of further acts of cruelty remained. If the parties were within the jurisdiction, and the necessities of the case demanded that one of them should be protected against a matrimonial wrong done by the other of which the Courts would take cognizance, I cannot doubt that the Courts would have interfered. The case of "Manning v. Manning" (L.R. 2 P. and D., 223), which was relied upon by the respondent's counsel, is no authority against this view, because in that case the respondent was not within the jurisdiction of the Court and the petitioner was held not to be *bona fide* resident in England. If the respondent's contention is correct no decree of judicial separation could be made even in cases like "Niboyet v. Niboyet," where the parties, though not domiciled, were resident for years in this country. Then does the present case fall within the principles and rules upon which the Courts have acted? I think it does. The wife, an Englishwoman, whose domicile of origin was English, and who has resided at times in England with her husband, is forced, by the cruelty committed in Italy of her husband a domiciled Australian, to seek the protection of her parents in England. Though legally domiciled in Australia, as a matter of fact she has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction. She has been required to return with her children to her husband and is afraid to do so owing to her apprehension of the repetition of the acts of cruelty which have been committed against her while they were living together abroad. It is against the repetition of apprehended acts of cruelty that the Court grants its protection, and unless the Court interferes there is nothing to prevent

the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognized. Performance of the duties arising from the marriage tie should be required and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy. It may be objected that a decree of judicial separation affects the status of the parties and that a change of status ought on principle only to be effected by the Courts of the domicile. But the relief is to be given on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules cruelty and adultery were only grounds for a sentence of divorce *a mensa et thoro* which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other. The relation of marriage still subsisted, and the wife remained a *feme covert*. A woman divorced by the Court *a mensa et thoro* and living separate and apart from her husband could not be sued as a *feme sole* (see "Lewis v. Lee," 3 B. and C., 291). The effect of the sentence was to leave the legal status of the parties unchanged. Although a sentence of judicial separation is to have the effect of a divorce *a mensa et thoro* under the old law (section 16 of the Act of 1857), and also the further effect of placing the wife in the position of a *feme sole* with respect to property which she may acquire or which may come to or devolve upon her from the date of the sentence and whilst the separation continues, and also for the purposes of contract and wrongs and injuries and suing and being sued during that period (sections 25 and 26 of the said Act of 1857); yet as the relief to be given now is to be given according to the principles and rules in force in the Ecclesiastical Courts, I am of opinion that the effect of the said sections 25 and 26, if they affect a wife's status within the meaning of the term as applied to the principles under consideration, which is doubtful, is not to deprive the Court of the power to grant relief in cases where it would have been granted by the Ecclesiastical Courts. It may be further objected that as domicile is considered a test of jurisdiction in cases of dissolution of marriage in order that the decree may be recognized in countries other than that of the domicile for the same reason a similar test should be applied in cases of judicial separation. But the reasons which apply in the one case are not applicable to the other; and even if the principle should be established that the Courts of the country of the domicile of the parties are the only Courts which can pronounce a decree of judicial separation which ought to be recognized in other countries, in my opinion no valid reason can be urged against the Courts of a country in which a husband and wife are actually living pronouncing a decree which will protect the one against the other as long as they remain within the jurisdiction. In the present case the wife's domicile is legally in Australia, but, as a matter of fact, she has justifiably separated herself from her husband and made her home in England, and it is in England that she now requires protection. He has come here and subjected himself to the jurisdiction of the Courts of this country. Could anything be more unreasonable than for this Court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country and leave her to proceed in the Courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly and this Court will now interfere to protect the wife

against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention. I therefore hold that this Court has jurisdiction to entertain this suit, and I pronounce a decree of judicial separation in favour of the petitioner with costs. Having held that the Court has jurisdiction to entertain the suit, I think it follows that the Court has jurisdiction under the powers expressly conferred upon it by the 35th section of the said Act of 1857, and the 4th section of the Matrimonial Causes Act, 1859, to make provision for the custody of the children of the marriage; and having heard the case it is probably more convenient that I should dispose of this matter rather than leave it for further contest in the Chancery proceedings. I will hear any application relating to the children in Chambers.

Mr. Bargrave Deane, Q.C., and Mr. Barnard appeared for the petitioner; and Mr. Inderwick, Q.C., and Mr. Lewis Thomas for the respondent.

[Solicitors—Jackson and Prince; William Negus.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } June 23.

MACKINNON V. CLARK.*

Election Law—Parliament—Return of election expenses—Duty to transmit within time limited—“Transmit,” meaning of—Corrupt and Illegal Practices Prevention Act, 1883, sec. 33. Decision of Kennedy, J. (*ante*, p. 90), reversed.

This was an appeal by the defendant, and there was also a cross-appeal by the plaintiff, against the judgment of Mr. Justice Kennedy without a jury, reported *ante*, p. 90. The action was brought against Dr. Gavin Brown Clark, M.P. for the county of Caithness, to recover £4,900 penalties for having sat and voted in the House of Commons on 49 days without having transmitted a proper return and declaration respecting his election expenses. Mr. Justice Kennedy gave judgment for the plaintiff for one penalty of £100. The facts are fully stated in the judgment hereunder.

The defendant appeared in person. Mr. A. T. Lawrence, Q.C., and Mr. Courthope-Munroe appeared for the plaintiff.

The arguments were reported in *The Times* of the 18th inst.

The COURT, having taken time to consider, delivered judgment, allowing the appeal of the defendant, and dismissing that of the plaintiff.

LORD JUSTICE A. L. SMITH read the following judgment of the Court:—This is an action by the plaintiff, as a common informer, to recover from the sitting member for the county of Caithness penalties amounting to the sum of £4,900, for having sat and voted in the House of Commons as member for that county 49 times without, as it is alleged, having made a return of his election expenses, pursuant to section 33 of the Corrupt and Illegal Practices Prevention Act, 1883 (46 and 47 Vict., c. 51). My brother Kennedy has held that the defendant is liable for one penalty of £100, that is, for voting upon August 28, 1895, and the defendant appeals against this judgment of the learned Judge. The plaintiff appeals against the learned Judge for having held that the plaintiff was not entitled to 48 other penalties of £100 each, amounting to the sum of £4,800, for having voted after the return reached the returning officer upon August 29, 1895. The facts are extremely short. Upon July 23, 1895, the defendant, Dr. Clark, was declared elected to represent the county of Caith-

ness in the House of Commons. At midnight of August 27, 1895, the 35 days within which Dr. Clark, who was his own election agent, had to make (I use here advisedly a neutral word) his return of election expenses to the returning officer expired. Before midnight of that day—viz., at 10 45 p.m. upon August 27, 1895—Dr. Clark in London posted his return to the returning officer, who was resident at Wick, in Caithness. Upon the next day (August 28, 1895) Dr. Clark sat and voted in the House of Commons, and also upon 48 occasions subsequent to the receipt of the return by the returning officer, which reached him upon August 29, 1895. The question is, in these circumstances, has Dr. Clark become liable to any, and what, penalties under the Act of 1883? This depends, first of all, upon what in section 33 of the Act is the meaning of the words “transmit to the returning officer.” Subsection 1 of that section runs thus:—“Within 35 days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return (in this Act referred to as a return respecting election expenses)”; and by subsection 5 the candidate is liable to a penalty of £100 for each day he votes without having done so. It is said on behalf of the plaintiff that the words “transmit to the returning officer” mean not only that the return shall be sent off to the returning officer within the 35 days, but that it shall actually be delivered to or lodged with him within that period. It will be observed that the section says nothing about delivery to or lodgment of the return with the returning officer within the 35 days. This is remarkable, for if lodgment with the returning officer is what the Legislature was aiming at, why has it not said so in distinct terms? All the section enacts is, that the agent shall within the prescribed period transmit the return to the returning officer. This is what the agent has to do from where he happens to be, and I can find no obligation cast by this section upon the agent to go, as in the present case, from London to the other end of the United Kingdom to ascertain whether the returning officer has received the return; nor in the Act is there to be found any obligation upon the returning officer to forward to the agent an acknowledgment of the receipt of the return. The word “transmit” in this section in my judgment means the same thing as the word “send” or “remit,” and, for reasons I will presently give, it does not mean “lodge,” as the plaintiff contends. The plaintiff’s construction of the word “transmit” brings about the extraordinary result that if the return is sent off, say, a week before the expiration of the 35 days, and in ample time to reach its destination within the 35 days, yet the candidate is guilty of an illegal practice (see section 33, subsection 6) if the return happens to perish upon its way and does not reach the returning officer within the prescribed time and the member votes, unless he can obtain an “authorized excuse.” It is said by the plaintiff that section 33, subsection 6, makes the non-lodgment of the return within the 35 days an illegal practice only if the candidate does not get an “authorized excuse” as provided by that section, and if the return perished upon the way through no fault of the candidate he could always obtain such an excuse. Is this correct? We must look to section 34 of the Act to see in what cases the Court can make an order allowing an “authorized excuse.” Now it appears to me strange that the statute should make the failure to transmit the return within the 35 days within the meaning of the section an illegal practice dependent upon whether an “authorized excuse” for not doing so can be obtained or not. But in respect of what can an “authorized excuse” be obtained? Section 34 is explicit upon the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

point. It enacts by subsection 1 (a) that "if the candidate . . . shows that the failure to transmit such return . . . has arisen by reason of his illness . . . or misconduct of his election agent or sub-agent, or of any clerk or officer of such agent, or by reason of inadvertence, or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant," the Court may grant an "authorized excuse." Take the case of the return being destroyed whilst in transit to the returning officer, say, in the Abergele railway accident or in the Tay-bridge accident, under what head of "authorized excuse" in this section does this come? It seems to me under none, and if this be so it is cogent, if not conclusive, to show that the plaintiff's reading of the word "transmit" is erroneous, for if it means lodgment of the return with the returning officer within the 35 days, and not the sending off of the return within that time, there would surely have been an "authorized excuse" obtainable under section 34 for what might happen to the return during its transit to the returning officer, so that if it arrived with the officer outside the 35 days by reason of circumstances beyond the control of the candidate he might be able to obtain the "authorized excuse" provided for by the section; for it must be admitted that under section 33, subsection 6, without obtaining an "authorized excuse," the candidate in such circumstances would be guilty of an illegal practice and liable to the consequences thereof. It is said that the words in section 34, subsection 1 (a), "by reason of inadvertence," cover the case of the return perishing during transit, but this, in my judgment, is not the meaning of those words, for they mean the overlooking or forgetting of something, and not accidents which may happen to the return itself after it is sent off, and whilst on its way to the returning officer. It also appears to me that such a loss of the return is not covered by the words "any reasonable cause of a like nature" in the section, for the perishing of the return is not of a like nature to the other matters mentioned in the section. In my judgment, the "authorized excuses" in section 34 do not cover the case of a return perishing during transit. By section 23 of the Act power is given to the Court, irrespective of granting an "authorized excuse," to except innocent acts from being illegal practices, and under this the candidates might obtain relief, but this in no way affects the question, What are the acts for which "authorized excuses" are to be given under section 34, subsection 1 (a), so as to cause the non-sending of the return within the prescribed period not to be an illegal practice within section 33, subsection 6? I do not myself think that the cases cited—viz., "Pennell v. Uxbridge" (31 L.J., M.C., 92) and "Banks v. Goodman" (32 L.J., M.C., 87) and others—throw any real light upon what is the meaning of the word "transmit" in section 33 of the Corrupt and Illegal Practices Act, 1883, and if I were to refer to cases I would cite the case of "Comber v. Leyland," recently decided, but not yet reported, by the House of Lords upon the word "remit" in the contract in that case. The word "transmit" may well have a different meaning in different statutes and in different contracts. For the reasons above I cannot agree with my brother Kennedy in thinking that the word "transmit" in this section means "lodge," and, in my opinion, Dr. Clark did not violate section 33, subsection 1, when he voted upon August 28, 1895, having sent off his return to the returning officer at 10 45 p.m. upon the day before—viz., August 27, 1895. Another point was taken by the learned counsel for the plaintiff, which has only to be stated to show that it is utterly untenable. It is this—that a return with an error in it is no return at all; that although an agent of the candidate has sent

off to the returning officer the return of the candidate's election expenses within the 35 days, and such return has reached the returning officer within that period, yet if it be subsequently discovered that an expense, say, of 2s., which should have been returned, has by error been omitted, nevertheless, if the sitting member in utter ignorance of this omission has voted, say, ten, 20, or even 100 times in the House of Commons, he is liable to a penalty of £100 upon each day upon which he votes. This notion is to me preposterous. I entirely agree with what my brother Kennedy has held as to this. It is said that section 33, subsection 1, enacts that the return to be made within the 35 days is to be a true return, and that a return with a blunder in it is therefore no return at all within the Act. But section 34, subsection 1, shows clearly that this is not so, for by it the Court may grant an authorized excuse for the failure to "transmit such return," and also for "any error . . . in such return," which shows to demonstration that a return with errors in it is still a return within the Act. For the errors which did exist in the return sent in by Dr. Clark he has obtained "authorized excuses" in the Court in Scotland, excepting as to a sum of £2 9s. which was overlooked when "authorized excuses" were applied for and obtained. We have nothing to do with any proceedings which may be taken as regards the £2 9s. item, for it in no way affects the claim of the plaintiff for penalties against Dr. Clark for having voted either before or after the return with the omission in it reached the returning officer. For the reasons above I think that Dr. Clark has not brought himself within the meshes of the Act so far as to be liable to penalties for having voted without having made a return within the Act, and that the appeal of Dr. Clark, the defendant, succeeds, and should be allowed with costs here and below, and that the appeal of the plaintiff fails and should be dismissed with costs.

[Solicitors—Leggatt, Rubinstein, and Co., for the plaintiff.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) June 23.

HARROLD V. WATNEY.*

Nuisance—Highway—Defective fence—Personal injuries—Liability.

Decision of Ridley, J. (*ante*, p. 364), reversed.

This was an application by the plaintiff for judgment or a new trial in an action tried before Mr. Justice Ridley and a common jury, reported *ante*, p. 364. The action was brought by the plaintiff, a boy of four years of age, by his next friend, to recover damages for personal injuries alleged to have been sustained through the defendant's negligence. The defendant was the owner of a piece of waste land in South-street, Wandsworth, separated from the highway by a wooden fence belonging to him. Upon June 27, 1897, the plaintiff was in the act of climbing on to the fence to look at some children playing on the other side, when the fence fell, and the plaintiff was injured. The jury found that "the fence was very defective, but actually fell through the child standing wholly or partly on the fence not for the purpose of climbing over." The jury assessed the damages at £45. The learned Judge, upon further consideration, entered judgment for the defendant.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Mr. CHAMIER (Mr. Moyses with him), for the plaintiff, contended that the defendant was bound to keep his fence adjoining the highway in a safe condition. This fence, being dangerous to those using the highway, including children, amounted to a nuisance. He referred to "Jewson v. Gatti" (2 *The Times Law Reports*, 441), "Barnes v. Ward" (19 *L.J.*, C.P., 195), "Lynch v. Nurdin" (1 Q.B., 29), "Tlott v. Wilkes" (3 B. and A., 304), "Clark v. Chambers" (3 Q.B.D., 327). The fact that the boy was a trespasser did not prevent him from recovering. "Maugan v. Atterton" (L.R. 1, Ex., 239) and "Abbott v. Macfie" (33 *L.J.*, Ex., 177) were not applicable even if they were good law.

Mr. A. J. DAVID, for the defendant, said that the case at the trial was fought upon negligence, and not upon nuisance. He contended that the climbing of the fence was a purely voluntary act on the part of the boy, and that to give a right of action for a nuisance it must be shown that what happened to the person injured was the result of an involuntary act on his part. He contended that the case of "Abbott v. Macfie" was in point and covered this case. The boy had no right to touch the fence for the purpose of climbing on to it.

The COURT allowed the application.

LORD JUSTICE A. L. SMITH said that, speaking for himself, it did not seem to him that the real question upon which the action ought to have been fought—namely, nuisance, was by name mentioned at the trial. The facts were these:—The defendant was the owner of a fence alongside the highway, and the evidence was overwhelming that the fence was rotten, and the jury so found. The plaintiff, a boy of four years of age, was using the highway, and in order to look over the fence at some boys who were playing in a piece of waste ground on the other side of the fence, he put his foot upon the fence, when the fence came down and injured him. He (the Lord Justice) could not agree with Mr. Justice Ridley, who entered judgment for the defendant. In the first place, this rotten fence was close to the highway, and was obviously a nuisance to the highway. If a person passing along the highway had felt tired and leant against the fence and it came down, that person would have a right of action. Here the boy was lawfully using the highway. The decisions in "Lynch v. Nurdin" and "Jewson v. Gatti" were in point. In the latter case the defendant owned an open cellar alongside the highway, and some painting was going on in the cellar. The cellar was protected by a bar, and a child going along the highway looked down the cellar and leant against the bar, when the bar gave way and she fell in. Mr. Justice Day nonsuited the plaintiff, but this Court set aside the nonsuit. That case was in point. For these reasons they would enter judgment for the plaintiff for the £45 damages awarded by the jury.

LORD JUSTICE RIGBY concurred.

LORD JUSTICE VAUGHAN WILLIAMS concurred. The jury were not asked the specific question whether the fence was in such a condition as to be a danger to persons using the highway. But when the evidence and the finding of the jury were looked at the only conclusion possible was that the fence, in the condition in which it was, constituted a danger to persons using the highway—that was, it constituted a nuisance. The plaintiff had further to prove that this nuisance caused the injury. It was said that the child ought not to have put his foot on the fence; but that in reality a suggestion that the conduct of the child caused the accident. The defendant created this nuisance, and when one asked oneself whether the nuisance was the cause of the accident, one got such a test as this, Was that which the child did here something which ought to

have been present to the mind of the defendant as the probable result of leaving the fence in a dangerous condition? If the defendant were to say that what happened was not fairly the result of the fence being left in a dangerous condition, as no grown-up person would think of touching it, the answer would be that the Queen's highway was not intended for grown-up people only, and that a fence of this sort would be most likely to cause injury to children using the highway. If so, the nuisance was the cause of the injury, and not the act of the child.

[Solicitors—C. F. Appleton, for the plaintiff; Pownall and Co., for the defendant.]

House of Lords (Lords Herschell, } 1898.
Macnaghten, Morris, and Shand) } June 24.

MAXIM-NORDENFELT GUNS AND AMMUNITION COMPANY
AND H. S. MAXIM V. ANDERSON.*

Patent—Validity—Alleged Infringement—Explosives—Cordite.

Decision of the Court of Appeal (13 *The Times L.R.*, 510) affirmed.

This was an appeal from an order of the Court of Appeal (13 *The Times L.R.*, 510) dated July 12, 1897, which affirmed the judgment of Mr. Justice Wright dated March 14, 1897. The action was brought by the appellants as owners of letters patent granted in March, 1889, for an invention of "Improvements in the manufacture of explosive compounds," for an injunction to restrain the respondent, who is her Majesty's Director-General of Ordnance Factories, from infringing the patent. This was the final stage in the hearing of the well-known cordite case. The arguments were necessarily of a highly technical character, and were directed to ascertain the true construction of the appellants' specification. The appellants' contention was that the use of a mineral oil (such as the "mineral jelly" used by the respondent) in combination with nitro-glycerine and tri-nitro-cellulose was an infringement of their patent, and that the proportions used of the several ingredients of the explosive were not the only proportions protected by the patent. For the respondent it was argued that the invention, which was alone disclosed and claimed, was one for the production of an explosive compound consisting of gun cotton, nitro-glycerine, and castor oil, in or about the proportions specified in the body of the specification, and that if the specification was construed so as to be irrespective of proportions, the patent was invalid for want of precision.

Mr. Moulton, Q.C., Mr. Roger Wallace, Q.C., Mr. A. J. Walter, and Mr. Felix Cassel were counsel for the appellants; the Attorney-General, the Solicitor-General, Mr. Haldane, Q.C., Mr. Ingle Joyce, and Mr. Henry Sutton, for the respondent, were not called upon to address their Lordships.

LORD HERSCHELL, in moving that the appeal be dismissed, said that the question was whether the defendant had infringed Mr. Maxim's patent by the use of the explosive which was known as cordite. The validity of the patent was not in question. The point in issue was the extent of the operation of the words in the specification. If those words were to be restricted as the respondent contended, cordite would not be an infringement. On the other hand, it was argued that if they were to have so general an application as the appellants claimed for them, the patent itself could

not be sustained. The patentee declared that his invention related to the manufacture of an explosive "produced by mixing gun-cotton, nitro-glycerine, and castor oil in or about in the following proportions." Then the proportions were given. It was, in his opinion, impossible to dissociate the claim from the specification. Both these substances were known to be explosives; it was known there was a solvent; but it was said that it was not, previously to Mr. Maxim's invention, known that they could be safely combined so as to make a useful powder. But to allow a patentee to have a monopoly in the combination, however effected, of these substances would be unreasonable, because if experiments in various proportions of these substances were to lead to fresh and valuable discoveries, the inventor could not have the benefit of his researches. The proportions "in or about in" which the ingredients were combined were of the essence of the patent. There were other points in the argument upon which it was not necessary that he should express any opinion.

LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred.

The appeal was dismissed with costs.

[Solicitors—Littledale and Lefroy, for the appellants; The Treasury Solicitor, for the respondent.]

Judicial Committee of the Privy Council } 1898.
(Lords Watson, Hobbouse, and Davey, } June 24.
and Sir R. Couch)

HARDING AND ANOTHER V. THE COMMISSIONERS OF STAMPS FOR QUEENSLAND.*

Privy Council Appeals—Queensland—Revenue—Succession duty—Foreign domicile—Will.

The Succession and Probate Duties Act, 1892, Amendment Act, 1895, of Queensland, is not retrospective.

This was an appeal from a decision of the Supreme Court of Queensland of December 18, 1896.

Sir Robert Reid, Q.C., Mr. Warrington, Q.C., and Mr. Samuel Dickinson were counsel for the appellants; Mr. Haldane, Q.C., Mr. Bray, Q.C., and Mr. W. W. Grantham for the respondents.

LORD HOBHOUSE, in giving their Lordships' judgment, said the appeal arose out of a claim by the Crown to charge succession duty on the estate of Silas Harding. The appellants were his executors and the respondents were the Stamp Commissioners, who claimed the duty. The Supreme Court decided that duty was chargeable. The executors maintained that no duty was payable at all. Mr. Harding died in 1894, domiciled in the colony of Victoria. In September, 1894, his will was proved in Victoria, and in April, 1895, ancillary letters of probate were granted by the Supreme Court of Queensland. He had a large property and among it were the following particulars:—(1) A debt of £102,036 due from a Mr. Doneley; (2) a debt of £20,868 due from the Queensland Brewery; and (3) 3,000 shares in the Royal Bank of Queensland. The two debts were secured by mortgages on land, stock, and goods in Queensland. It is on these three items that the Supreme Court has held duty to be chargeable under the terms of the Succession and Probate Duties Act, 1892, as amended in 1895. From the written reasons of the learned Judges their lordships collected that if the Act of 1892 had stood alone they would have felt constrained by the course of decisions in England, though

not fully assenting to them, to hold that no duty was chargeable. Their judgment in effect turned on the application of the Act of 1895, and the first question was, What was the law immediately before that Act was passed? Section 4 of the Act of 1892 is in effect, as the learned Judges pointed out, a transcript of Section 2 of the English Succession Duty Act of 1853. The material words are "Every . . . disposition of property by reason of which any person . . . shall become beneficially entitled to any property upon the death of any person . . . shall be deemed . . . to confer on the person entitled by reason of such disposition . . . a succession," and on that succession the duties are fastened. The literal force of those expressions included the estate of Silas Harding. But then it included a great deal more which nobody could suppose that the legislature intended to tax; it included all persons and all property all over the world, and if not confined within reasonable limits would enable the Queensland authorities to levy a tax in respect of foreign property on foreigners when within their power. Abnormal consequences such as those have been avoided by judicial decisions in England. In "Thompson v. The Advocate General" (12 Cl. and Fin. 1) the question arose under words of a similar character in the Act of 55 Geo. III., cap. 184. That Act imposed duties on "every legacy given by any will of any person." A gentleman domiciled in Demerara owned money locally situate in Scotland on which the Crown claimed legacy duty. The case was ultimately decided in the House of Lords. The Judges were consulted and their joint opinion delivered by Chief Justice Tindal, who pointed out the absolute necessity of limiting the sense of the words, and laid it down that such necessary limitation was that the statute did not extend to the will of any person domiciled out of Great Britain whether the assets were locally situate there or not. That opinion was adopted by the House. In "Wallace v. the Attorney-General" (L.R., 1 Ch., 1.) a similar question arose under section 2 of the English Succession Duty Act of 1853, which defined a succession in the same way as the Queensland Act, 1892. A gentleman domiciled in France owned personal property in England consisting of a sum in Consols. The Crown claimed succession duty on that property. Lord Cranworth held that the same limitation which had been put on the words "every legacy given by any will of any person" must be put on the words "every disposition whereby any person becomes entitled," and that the person intended was a person who became entitled by the laws of this country. The soundness of that principle of construction had never been impugned, nor had the British Legislature thought fit to put any different limitation upon the generality of the terms in which legacy duty and succession duty were imposed. The matter appeared to be well summed up in Mr. Dicey's work on "The Conflict of Laws" (p. 785), in which he paraphrased Lord Cranworth's application of the principle "*Mobilia sequuntur personam*" by saying that the law of domicile prevailed over that of situation. It was, of course, a maintainable opinion that the law of situation should prevail and that a law which brought under the general words of taxation property which was protected by the taxing State and which in case of dispute was administered by it would form a more reasonable limitation of such words than the limitation by domicile. The learned Judges below inclined to that principle, and the Queensland Legislature had adopted it. But the Court had only to decide what the Legislature meant when it passed the Act of 1892. Now the decision in Thompson's case was given in 1845, that in Wallace's case just 20 years later, and it had been taken over since

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

that the expressions in question did not apply to movable property belonging to persons of foreign domicile. Nearly 30 years after the later decision the Queensland Legislature passed their Succession Duty Act in terms identical with those of the English Act of 1853. It was impossible to suppose that they did not intend those terms to be read in the sense affixed to them by the English tribunals, and in which they would be read by every lawyer and every official conversant with the subject matter. Arguments had been presented at the bar which were founded on definitions of real estate in Queensland statutes, and on decisions respecting the locality of mortgage debts and similar property. Their Lordships failed to see that the definitions were intended to apply or did apply to the principle that movables follow the person. And as regarded locality, it was clear that the assets now in question had locality in Queensland, but that did not affect the beneficial interest to which succession duty was attached and which devolved according to the law of the owner's domicile. It remained to see whether the Act of 1895 alters the incidence of the Act of 1892 upon a will which took effect in 1894, and the probate of which was granted in Queensland several months before the latter Act came into force; in other words, whether the Act of 1895 was retrospective. The Act was entitled "An Act to amend the Succession and Probate Duties Act, 1892," and section 1 provided that it might be cited as "The Succession and Probate Duties Act, 1892, Amendment Act of 1895." The important section was the second, which ran thus:—"2. It is hereby declared that upon the issue of any grant of probate or administration in Queensland, succession duty is chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicile in Queensland." That enactment was calculated to meet such cases as the present; and, if retrospective, would be conclusive in favour of the respondents. The Supreme Court thought that the section was declaratory because of the opening expression "it is declared"; and then they go on to reason that a declaratory Act was *prima facie* retrospective, and confined themselves to examining whether it contained anything of a contrary nature so as to neutralize its declaratory and retrospective character. Their Lordships could not take such a view of the Act. The use of the expression "it is declared" to introduce new rules of law was not incorrect, and far from uncommon. The nature of the Act must be determined from its provisions. Now the Act did not contain any words to show that it purport to construe the Act of 1892; it did purport to amend it; every other of its provisions was in language prospective, and in section 2 itself the new rule was to take effect "upon the issue of any grant of probate," which was not fitting language to apply to estates for which probate has already been granted. In fact, the language of the Act pointed, as their Lordships thought, distinctly to future operations. And, inasmuch as it fell under two well-established canons of construction, both requiring that, as against the persons sought to be affected, it should be shown quite clearly and strictly to affect them—first, that which related to statutes imposing liabilities, and, secondly, that which related to retrospective statutes, their Lordships felt no hesitation in deciding that the Act could not be retrospective. The result was that, when the will of Mr. Harding took effect and when the Queensland letters of probate were granted, the law of 1892 did not subject his moveable assets to succession duty, and that the state of things so existing had not been disturbed by subsequent legislation. They would humbly advise her Majesty to discharge the order appealed from, so far as it declared that the succession duty was chargeable

on all the property of the testator which was in Queensland at the time of his death, and, instead thereof, to declare that no succession duty was payable on the three items of the testator's property which were the subject of the appeal. The respondents must bear the costs of the appeal.

[Solicitors—Murray, Hutchins, and Co., for the appellants; Freshfields and Williams, for the respondents.]

Court of Appeal (Lindley, M.R., }
Chitty and Collins, L.JJ.) }

1898.
June 24.

ANDERSON V. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY—MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY V. ANDERSON.*

Railway Company—Statutory powers—Demised premises—Purchase of reversion—Covenant for quiet enjoyment—Liability.

Decision of Byrne, J. (*ante*, p. 317), affirmed.

This was an appeal from a decision of Mr. Justice Byrne, reported *ante*, p. 317, but the appeal related to the second action only.

In the first of these actions the plaintiff claimed an injunction to restrain the defendant company from interfering with the support of a certain passage or otherwise with the peaceable enjoyment by the plaintiff of his right of user of such passage, and he claimed damages in respect of that matter as well as in respect of the injury done by the company in excavating the ground adjoining the plaintiff's premises, whereby, as he alleged, they had caused the walls and ceilings of his premises to crack. The plaintiff was the lessee and occupier of No. 1, Goldhurst-terrace, Hampstead, under a lease dated April 7, 1894, and made between James Findlay of the one part and the plaintiff of the other part, whereby the premises in question, together with a right of way in common with all other parties then entitled or thereafter to be entitled to a like right over the passage above mentioned at the side of the premises, were demised to the plaintiff for a term of 21 years from March 25, 1894, determinable at the option of the tenant at the end of seven or 14 years, at a yearly rent rising from £180 to £250 and subject to the covenants and conditions contained in the lease. The lease contained a covenant on the part of the lessor that the lessee, on paying the rent reserved and performing the covenants, might peaceably hold and enjoy the demised premises without any interruption by the lessor or any person claiming through him. The ground floor of the house was used as a shop, where the plaintiff carried on the business of a plumber and other businesses of a kindred nature. By the Manchester, Sheffield, and Lincolnshire Railway (Extension to London) Act, 1893, the defendant company were authorized to make and maintain a certain railway, and for that purpose were empowered to enter upon, take, and use the property demised by the lease, but that property did not form any portion of the actual site of the railway as constructed. The company, however, acquired by agreement the reversionary interest of the plaintiff's lessor in the demised premises, and by an arrangement made in October, 1895, the lessor assigned the property to the company subject to the plaintiff's lease. The company proceeded with the construction of their railway in pursuance of their statutory powers, and in the course of such construction they to some extent injured the structure of the plaintiff's premises, but, as was ad-

*Reported by H. B. HAMMING, Esq., Barrister-at-Law.

mitted, without negligence on the company's part. The plaintiff claimed to be entitled to damages for such injury on the ground that the company, by taking an assignment of the reversion, had rendered themselves liable under the covenant for quiet enjoyment. The second action was brought by the company against Anderson for rent due under his lease, and in this action the defendant set up the covenant for quiet enjoyment as a defence, and counterclaimed for damages for its breach on the ground that the company had by their hoardings, machinery, and carts blocked the access to his premises and interfered with the use and occupation thereof. On behalf of Mr. Anderson it was conceded that but for the covenant for quiet enjoyment he would not be entitled to sue for damages in respect of the injury, but would be relegated to such remedy as he might have under section 6 of the Railway Clauses Act, 1845, and section 68 of the Lands Clauses Act, 1846; but it was contended that the company, having neglected to acquire his interest in the property, and having put themselves into the position of assignees of the reversion, were liable by reason of the existence of the covenant. Mr. Justice Byrne held that the company had acted within their legal rights and that Mr. Anderson's remedy, if any, was under his statutory right to compensation. He therefore dismissed the first action so far as it related to injury to the structure of the house and dismissed the counter-claim in the second action, and he also gave judgment for the company for the rent claimed, but stayed execution pending the appeal. Mr. Anderson appealed from this decision in respect of the second action, but did not appeal as to the first action.

Mr. Witt, Q.C., and Mr. Statham were for the appellant; Mr. Eve, Q.C., the Hon. E. C. Macnaghten, Q.C., and Mr. S. A. Sampson were for the company.

The Court dismissed the appeal.

The MASTER of the ROLLS said that the railway company, in the course of constructing their railway, had done that which had led to the structural injury of Mr. Anderson's house; they had also more or less obstructed the public thoroughfare; they had taken up one half of the road, leaving the other half free for traffic, as was usual in such cases; they also had a great number of horses and carts in front of Mr. Anderson's premises, which caused some injury to his shop; they had also temporarily blocked up with rubbish, &c., a passage which led to the house. That was the kind of act which Mr. Anderson said entitled him to bring an action in the High Court for breach of his covenant for quiet enjoyment. The answer of the company was that everything they had done was done in the exercise of their statutory powers and without negligence, and that Mr. Anderson's remedy was under the Railway Clauses Act and the Lands Clauses Act. That was the view taken by the learned Judge below, and it appeared to his Lordship to be a complete answer, but there were some observations of the learned Judge which might be construed as meaning that, in his opinion, the covenant was gone. The railway company bought the reversion on the lease, and, like any other assignee, they were bound by the covenant. This was not a question of right but of remedy. The objection of the company was that no action could be brought against them for anything lawfully done under their Act; but it did not follow that the covenant was useless, because a lessee might prove, having regard to the covenant for quiet enjoyment, that his land was injuriously affected, though it would not be if there were no such covenant. Moreover, an action would lie against the company for any breach which was not authorized by their statutory

powers. The fact that the company were acting under their statutory powers was sufficient to dispose of this appeal, but his Lordship desired to add that a mere temporary inconvenience which for a short time rendered the access to the lessee's house a little less easy could not be said to interfere with his possession or his title and was not a breach of a covenant for quiet enjoyment. The language of Sir Edward Fry in the case of "Sanderson v. Corporation of Berwick-upon-Tweed" (13 Q.B.D., 547), which was the case most in favour of the appellant, must be taken in connexion with the facts of that case, which differed materially from the present. In the opinion of the Master of the Rolls none of the acts done by the railway company here amounted to a breach of the covenant, but even if a breach had been committed the answer was that the acts were done by the company in the exercise of their statutory powers, and the remedy was under the Act of Parliament.

LORDS JUSTICES CHITTY and COLLINS concurred.

[Solicitors—Ford, Lloyd, and Co.; Cunliffe and Davenport, for Lingard-Monk, Manchester.]

Judicial Committee of the Privy Council } 1898.
(Lords Watson, Hobhouse, and Davey, } June 25.
and Sir R. Couch)

KING V. HENDERSON.*

Privy Council Appeals—New South Wales—
Bankruptcy—Action for maliciously and without reasonable or probable cause instituting bankruptcy proceedings—Motive.

This was an appeal from a judgment of the Supreme Court of New South Wales of February 17, 1897.

Mr. C. A. Russell, Q.C., and Mr. John Andrew Hamilton appeared for the appellant; Mr. Herbert Reed, Q.C., Mr. Montague Shearman, and Mr. J. M. Easton for the respondent.

LORD WATSON, in delivering their Lordships' judgment, said the appellant in August, 1896, brought the present action against the respondent, alleging that the latter falsely and maliciously and without reasonable or probable cause presented a petition to the Judge in Bankruptcy praying that a sequestration order might be made in respect of his estate, on the allegation that he had committed an act of bankruptcy in not complying with the terms of a bankruptcy notice. The case was tried before Mr. Justice Cohen and a jury. At the close of the appellant's evidence the respondent moved for a non-suit, which was allowed. The appellant thereupon filed a rule nisi in the Supreme Court calling upon the respondent to show cause why the non-suit should not be set aside and a new trial granted, and the Court, by a majority, refused the rule. The appellant entered into partnership in August, 1893, with Mr. W. Collins, under the name of H. J. King and Co., as wool-pressers, stevedores, and shipping agents, at Sydney and elsewhere. The respondent was the manager of the German Australian Steamship Company, and through him advances were made to the firm by a Mr. Wood, amounting in all to £1,599 to March 26, 1896. In July, 1894, Mr. C. Taylor, who had been introduced by the respondent, became a member of the firm, and in June, 1895, Mr. Collins left it. In the beginning of 1896 the firm of H. J. King and Co. was evidently not in a prosperous condition. One of their employees named Hallen, who had been injured on board a ship which they were loading, recovered judgment against them for

*Reported by W. J. SOULAMY, Esq., Barrister-at-Law.

£341. The injured man had been insured by the firm, but the office with which the insurance had been effected had gone into liquidation. The respondent in March, 1896, acting on behalf of his constituent, Mr. Wood, gave formal notice to the firm that in default of immediate payment of £1,599 then due to Mr. Wood he would take possession of the goods and chattels comprised in the indenture, which he did. On April 7 Hallen, the injured *employee*, took out a bankruptcy notice against the appellant, requiring the firm to pay the £341 due to him. The evidence was not conclusive to support the allegation of the appellant that such notice was procured by the respondent. The appellant's partner, Taylor, by a loan from the respondent, discharged his share of the indebtedness, and on May 7, 1896, the appellant paid Hallen the balance with costs, and the sequestration notice was withdrawn. The next day the respondent, who was a creditor of the appellant for £260 under a promissory note, filed a petition for sequestration, alleging that the appellant had committed an act of bankruptcy by failing, within the period prescribed by the Act, to comply with the notice in the previous demand of Hallen. That petition was dismissed, and later on the bankruptcy notice in Hallen's matter was set aside, the Judge holding that no act of bankruptcy had been committed. Their Lordships were of opinion that the order of the learned Judge, in so far as it declared that no act of bankruptcy had been committed by the appellant, went beyond his jurisdiction, and was unwarranted by the Bankruptcy Act of the colony. Those Acts defined with great minuteness the various ways in which an act of bankruptcy might be constituted, one of them being by a bankruptcy notice under section 4 (2) of the principal Act. When an application was made for a sequestration order, which complied with the requirements of sections 6, 7, and 8 of the same Act, ample discretion was vested in the Judge either to grant or refuse the petition; and, if a sequestration order be made, it might subsequently—section 5 (II.)—be discharged or annulled. But, whilst the Judge might, in his discretion, competently refuse to follow up an act of bankruptcy by issuing a sequestration order, the statutes gave him no jurisdiction to annul an act of bankruptcy or to declare that it had never been committed. There was no authority to be found for the procedure of the learned Judge save in the 51st of the General Rules framed by the Court, which provided that "when the Judge makes an order setting aside the bankruptcy notice, he may at the same time declare that no act of bankruptcy has been committed by the debtor under such notice." Now the only power which the Court had to frame rules was confirmed by section 119 of the principal Act, and it was strictly limited to rules "for the purpose of regulating any matter under this Act." In the opinion of their Lordships, a rule empowering the Judge to make a declaration that no act of bankruptcy had been committed under the notice was in no sense a regulation either framed or calculated to carry out the objects of the Act. It was, in their opinion, the new creation of a jurisdiction which the Legislature withheld, it was inconsistent with and so far repealed the plain enactments of the statute, and it took away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice. Upon the hearing of this appeal it was maintained for the appellant that the orders of the Court below ought to be reversed and the action remitted for new trial upon two separate grounds, the first of those being that certain documentary evidence had been unduly rejected by the presiding Judge, and the second that the learned Judge, instead of directing a nonsuit, ought to have submitted to the jury certain issues which were only fitted for their consideration.

Their Lordships did not think that either of those objections was well-founded. The appellant's counsel mainly contended that in presenting his petition for a sequestration order the respondent was actuated, not by an honest wish to secure payment of the debt which the appellant owed him, but by a desire to effect the exclusion of the appellant from the firm of H. J. King and Co. He maintained that the respondent's resort to sequestration in bankruptcy with that object and motive constituted an abuse of the process of the Court and a fraud, and that the Judge ought, in some form, to have remitted to the jury the question whether the respondent had been guilty of such abuse and fraud, with the direction that, in the event of their answering the question in the affirmative, they ought to return a verdict for the appellant. Their Lordships did not dispute the soundness of the proposition that a plaintiff or petitioner who instituted and insisted in a process before the Bankruptcy or any other Court in circumstances which made it an abuse of the remedy sought or a fraud upon the Court could not be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it became necessary to consider what would, in the proper legal sense of the words, be sufficient to constitute what was generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, would not be sufficient for that purpose; it must be shown that in the circumstances in which the interposition of the Court was sought the remedy would be unsuitable and would enable the person obtaining it fraudulently to defeat the rights of others. Citing the cases "*ex parte* Gallimore (2 Rose, 424), "*ex parte* Wilbran (5 Maddock, L.), and "*ex parte* Harcourt" (2 Rose, 208), their Lordships went on to say that motive could not in itself constitute fraud, although it might incite the person who entertained it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result, and it was not the motive, but the course of procedure which led to that result, which the law regarded as constituting fraud. In "*ex parte* Davis" (3 Ch. Div., 461), the Court of Appeal refused to make an adjudication in bankruptcy where it was clearly shown that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose of extorting money from the debtor. And, again, in "*ex parte* Griffin (12 Ch. Div., 480) the same Court, although there was a good petitioning creditor's debt, and an act of bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by Lord Justice James,—“I think I never knew a case so transparent as to the fraud with which the whole thing was conceived, and the oppression which it was intended to exercise. It would, I think, be a shocking thing for any Court of justice in a civilized country to be made the instrument of proceedings like these.” Counsel for the appellant argued, with great plausibility, that on the trial of a case like the present, involving the inquiry whether the proceedings complained of were taken without reasonable and probable cause, it was within the province of the jury, and not of the Judge, to find the facts upon which the question of probable cause depended, and that it was for the Judge, upon those facts, to determine the question of law. The rule was so laid down by the House of Lords in "*Lister v. Perryman*" (4 E. and L. Ap., 521). Their Lordships admitted the propriety and cogency of the rule in any and every case where the facts admitted of its application. But it appeared to them that the circumstances of the present case, as disclosed in the evidence of the appellant, were very different in their character from the facts, as appearing in the evidence, with which the House of Lords had to

deal in "Lister v. Perryman." It certainly was not the duty of the presiding Judge to submit any issue of fact to the jury which was not fairly raised by the evidence. There was, no doubt, evidence by the appellant tending to show that the respondent, in petitioning for a sequestration order, was influenced by a desire to get him out of the firm of King and Co., but their Lordships were unable to find in the evidence any fact or circumstance calculated to raise the question whether, in petitioning for sequestration of the appellant's estate, the respondent had committed a fraud upon the law or upon the Court, and in their opinion the learned Judge would not have been justified in raising such an issue even if he had been invited to do so. Their Lordships would humbly advise her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

[Solicitors—Clapham, Fitch, and Co., for the appellant; Snow, Snow, and Fox, for the respondent.]

Q.B. Div. }
(Day, J.) }

1898.
June 27.

THOMAS WOOD (TRADING AS STEPHENS AND CO.) V.
FEVEZ.*

Stock Exchange—Outside broker—Defence of gaming and wagering.

This was an action by an outside stockbroker to recover £257 6s. 8d., money alleged to be due in the purchase and sale of stocks and shares by the plaintiff for and on behalf of the defendant.

Mr. CANNOT, in opening the plaintiff's case, said that the plaintiff only acted as an agent for the defendant, and employed another broker to buy and sell for him on the defendant's behalf. He could prove that the stocks and shares were purchased for the defendant, and the plaintiff was liable to pay the broker he employed in the transaction and had given him security. He ought to mention that in three instances the plaintiff had overcharged the defendant £20, for which sum he was willing to give the defendant credit in the account. It was not an ordinary gaming and wagering transaction such as a speculation in differences. The case was like "Forget v. Ostigny" ([1895] App. Cas., 318), where a broker was employed to make purchases and sales on behalf of a principal when it was not held to be gaming and wagering. He put in the contract notes between plaintiff and defendant and he had also all the bought and sold notes between the plaintiff and the broker he employed.

Mr. MONTAGUE SHEARMAN, for the defendant, contended that the only intention was to pay differences. It was proved in three instances that plaintiff had charged a different price to what the broker had charged him, and therefore he could not be taken to be an agent. The gaming and wagering defence was a good one. It was not intended that any stock should be delivered. "The Universal Stock Exchange v. Strachan" ([1896] App. Cas., 166).

Mr. JUSTICE DAY said he had to answer the question put by Mr. Justice Cave in the "Universal Stock Exchange v. Strachan" (*supra*), "Were the transactions real bargains for the purchase of stock or were they simply gambling transactions intended to end in the payment of differences?" In his mind they were simply gambling transactions in the price of shares. To say that these were not gambling transactions would nullify the Act of Parliament. The items in three instances were fictitious, and not real. He therefore gave judgment for the defendant with costs.

*Reported by R. BARBER, Esq., Barrister-at-Law.

Q.B. Div. }
(Bigham, J.) }

1898,
June 27.

INNES V. SHORT AND REAL.*

Patent—Validity—Infringement—Inviting the public to use zinc powder so as to infringe patent—Injunction.

In this cause the plaintiff claimed a declaration that a patent granted to him in 1895 was valid and an injunction restraining the defendants from infringing the same. The defence was that the invention was not new and that there had been no infringement.

Mr. Colam appeared for the plaintiff; Mr. J. C. Graham for the defendants.

The plaintiff's invention was an improved method of preventing corrosion and incrustation in steam boilers by the introduction of metallic zinc into the boilers in a powdered state in order to obtain a much greater surface for the action of the water than if the zinc was in the solid or plate form. The defendants relied on a patent granted in 1880 to Messrs. Weir as being an anticipation of the plaintiff's patent. The Weir patent was also intended to prevent corrosion in boilers by introducing zinc into boilers either in the form of a rod through a stuffing-box, or it might be introduced in small pieces or in a granular form through a pipe or passage fitted with two valves. The facts as to the alleged infringement were as follows:—The defendant Short was the patentee of an injector for injecting Innes's zinc powder or any boiler-preserving or scale-removing composition into boilers. From May, 1895, to July, 1897, Short acted as agent for the sale of the plaintiff's zinc powder, and he drew up and issued a circular headed "Innes's Patent Metallic Zinc Powder: Directions for Use." After Short had ceased to be the plaintiff's agent he continued to sell zinc powder, the defendant Beal acting as his agent. With each packet of the powder sold he issued a copy of the above circular, with the words "Innes's Patent" struck out. The circular also contained an advertisement of Short's patent injector.

Mr. GRAHAM contended that there had been no infringement. Zinc powder was an ordinary commercial article which was not the subject of a patent, and which the defendants were entitled to sell. The fact that the purchaser of the powder purposed to use it in such a way that he would infringe the patent did not make the sale an infringement on the part of the vendor, even if the latter knew the purpose with which the powder was bought. "Sykes v. Howarth" (12 Ch.D., 826) and "Townsend v. Howarth" (unreported, but cited in a note to the former case) were decisive authorities in the defendants' favour.

Mr. JUSTICE BIGHAM said that the essential part of the plaintiff's patent was that, whereas the earlier processes only acted locally, the powdered zinc used by the plaintiff acted generally through the whole of the water. By the use of zinc in a powdered condition the zinc was held in a state of suspension and operated far more effectively than when introduced in small pieces or in granular form. There was sufficient novelty in the plaintiff's patent to distinguish it from Weir's patent, and it was therefore valid. His Lordship also came to the conclusion that there had been an infringement by the defendants. He found as a fact that the defendant Short had invited and requested people to use zinc powder in such a way as to infringe the plaintiff's patent, and on that ground the case was distinguishable from "Sykes v. Howarth" and "Townsend v. Howarth." In the latter case Sir George Jessel said:—"You cannot make out the proposition that any

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

person selling any article, either organic or inorganic, either produced by nature or produced by art, which could in any way be used in the making of a patented article can be sued as an infringer, because he knows that the purchaser intends to make use of it for that purpose." It would be nonsense to say that a person must be restrained from legitimate trade in an article because he knew that the buyer meant to put it to an improper purpose. The seller had nothing to do with the buyer's purpose; but it was a very different case when the seller asked and invited the buyer to use the article in such a way as to infringe a patent. That was what the defendant had done in this case. There would, therefore, be judgment for the plaintiff for a declaration that his patent was valid, and for an injunction restraining the defendants from selling powdered zinc with an invitation to the purchaser to use it so as to infringe the plaintiff's patent.

[Solicitors—Fritchard and Sons, for A. M. Jackson and Co., Hull, for the plaintiff; Rowcliffes, Rawle, and Co., for Appleby, Newcastle-on-Tyne, for the defendants.]

Q.B. Div. } 1898.
(Channell, J.) } June 27.

BAYLIS AND ANOTHER V. JIGGENS AND ANOTHER.*
Landlord and Tenant—Lessee's covenants—
Covenant to pay all rates, taxes, and assess-
ments—Certain expenses of paving held not
within covenant.

The facts and arguments in this case sufficiently appear from the following judgment of MR. JUSTICE CHANNELL:—This was a case argued before me a few days ago by Mr. Galbraith for the plaintiffs and by Mr. Turner for the defendants. The question is whether expenses of paving, &c., recovered in a summary manner from the owner of premises outside the metropolis under section 150 of the Public Health Act, 1875, can be recovered by him from his tenant under a covenant whereby the tenant covenants to pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises or the landlords or tenants in respect thereof by authority of Parliament or otherwise, except the landlord's property tax." The reported cases on similar covenants are very numerous, but it seemed to me on the argument, when the principal cases were quoted, that no case exactly covered the present one, and I still think so. In considering cases of this kind it is necessary, in the first place, to notice what the payment sought to be recovered is for, and next the exact words of the covenant. Expenses for abating nuisances and for drainage and other works on the premises are in some respects different from paving and works done in the street upon which the property abuts, and expenses of paving within the metropolis differ from similar expenses under the Public Health Act outside the metropolis in this respect, that under the Public Health Act such expenses are a charge upon the premises, whereas under the Metropolitan Management Acts they are not. In the present case the expenses in question were payable under the Public Health Act, and the sum is therefore both a charge on the premises, and it is also, I think, beyond doubt a charge on the landlord in respect of the premises. Several of the reported cases which have been decided in favour of the tenants have been so decided by reason of the absence from the covenants there in question either of words covering charges upon the premises or of words covering charges upon landlords in respect of the premises, as, for

instance, "Allan v. Dickinson" (9 Q.B.D., 632) and perhaps "Wilkinson v. Collyer" (13 Q.B.D., 1), when the words were absent; but it is not quite clear that this was the sole ground of the decision. Such cases are no authority in the present case, for here we have the words "imposed or assessed upon the premises or the landlords in respect thereof." In the present case therefore the only question is whether the payment in question comes within the words "rates, taxes, or assessments." Now there are many of the reported cases in which these words occur, but there are generally one or more other words. Thus, in "Hartley v. Hudson" (4 C.P.D., 367) the word "charges" occurred in the covenant. In "Budd v. Marshall" (5 C.P.D., 481) the word "duties" occurred. In "Aldridge v. Frae" (17 Q.B.D., 212) the word "outgoings." These cases do not, therefore, conclude the present. The nearest case to the present is, perhaps, "Wilkinson v. Collyer," where the words were as here "rates, taxes, or assessments" without further addition, but, as I have already remarked, the words "imposed on the landlord in respect of the premises," which we have here, were absent. Mr. Turner relied very much on a passage in "Hartley v. Hudson" (4 C.P.D., 367, at p. 368), where Mr. Justice Lindley says, "The expense of paving, &c., can hardly be said to be a rate, tax, or assessment; hence it only remains to consider whether it is a charge." But as he had got the word "charge," obviously a wider word and one which he held covered the paving expenses, it is clear that it was not really necessary for him to consider whether the words rate, tax, or assessment were sufficient, and that the passage is a dictum only. It seems to me necessary, therefore, for me to consider the question. I agree that these expenses cannot be considered either a rate or a tax, but I have had a good deal of doubt whether they are not "an assessment imposed on the landlord in respect of the premises." Mr. Turner contended that nothing could be an assessment which was not apportioned according to the value of the premises, and here the apportionment is according to frontage. I do not think that argument conclusive. Some sewer rates, for instance, are raised "per acre," and these would properly be described as assessments, and I think a sum to be paid out of or in respect of a particular property might be an assessment if the amount were arrived at in proportion to acreage or in proportion to frontage just as much as if it were in proportion to rateable value. On the whole, however, having regard to the opinion of Mr. Justice Manisty in "Wilkinson v. Collyer," that *prima facie* such covenants as this are confined to rates and assessments of a temporary and a necessary nature, and do not include a sum which is a charge on property giving it an increased permanent value, and also to the dictum of the present Master of the Rolls in "Hartley v. Hudson," which I have quoted, I come to the conclusion that I am justified in holding this payment not to be a rate, tax, or assessment within the meaning of the covenant. It is obvious that in leasing at a rack-rent and for a short term the tenant would not be likely to have intended to bear it, but that would be immaterial if the words were clear. I therefore give judgment for the defendant, and, of course, costs will follow.

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } June 28.
GROVES V. LORD WIMBORNE.*

Master and Servant—Neglect to fence dangerous
machinery—Personal injuries—Factory and
Workshop Act, 1878, sec. 82.

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.
No. 29.—VOL. XIV.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

The Factory and Workshop Act, 1878, does not take away the right of action for personal injuries caused by neglect to perform the statutory obligation of fencing dangerous machinery.

This was an appeal by the plaintiff from the judgment of Mr. Justice Grantham at the trial of an action heard before him and a jury at Cardiff Assizes. The action was brought to recover damages for injuries received by the plaintiff, a boy in the employment of the defendant at the Dowlais Ironworks, in consequence of certain machinery being unfenced. The action was brought against the defendant for breach of a statutory duty in not maintaining the fencing of the machinery; and, in the alternative, for negligently allowing the machinery to become dangerous. It was admitted that the machinery in question, a steam winch, was machinery which ought to have been fenced under section 5 of the Factory Act, 1878. That Act contains a section—viz., section 82—imposing a penalty by way of fine not exceeding £100 in case of a breach of any of its provisions, with regard to the fencing of machinery causing loss of life or bodily injury. At the trial the learned Judge held that an action did not lie, and directed that judgment should be entered for the defendant. The damages were assessed by the jury at £150 in case the Court of Appeal should take a contrary view.

MR. ABEL THOMAS, Q.C., and Mr. S. T. EVANS appeared for the plaintiff, and said that he complained of the judgment of the learned Judge and asked for a new trial. An action lay for injuries caused by a breach of a statutory obligation. A long series of cases beginning with "*Coe v. Platt*" (7 Exch., 460, 21 L.J., Ex., 146) showed that the Judges had assumed over and over again that an action might lie for a breach of the provisions of the Factory Acts, notwithstanding the fact that the Acts contained provisions for penalties.

MR. FRANCIS WILLIAMS, Q.C., and Mr. BAILHACHE, for the defendant, argued that, looking at the whole of the Factory Act, it was clear that the intention of the Legislature was that the penalty imposed by the Act should be the only remedy which a person injured by a breach of the Act should get from the factory owner. If they were wrong on that point the defendant was entitled to rely on the defence of common employment.

The COURT allowed the appeal, and entered judgment for the plaintiff for £150.

LORD JUSTICE A. L. SMITH said that Mr. Justice Grantham entered judgment for the defendant upon the ground that no action would lie for breach of the statutory duty, and that there was no evidence of negligence on the part of the defendant. The Factory Act, 1878, was passed by the Legislature in favour of the workmen in order to compel the master to do certain things for their protection. An obligation was imposed upon the master in favour of the workmen and that obligation was enforced by a penalty. Section 5 imposed an unqualified obligation to fence certain machinery and to maintain the fencing. It was conceded that the machinery here came within the section. The machinery was not fenced, and the breach of the statutory obligation caused damage to the plaintiff. It could not be doubted that, if section 5 stood alone, a cause of action would have accrued to the plaintiff. Unless they could find that upon the whole purview of the Act it was intended that the only remedy should be the imposition of a fine upon the master for the breach of his statutory duty, it was clear that the Act gave a right of action to the injured person upon proof of the breach of the statutory duty and the injury caused

thereby. Had the *prima facie* civil remedy been taken away by some other provision in the Act? That brought him to sections 81, 82, and 87. He asked himself whether, considering that the Act was enacted in favour of the workmen and in coercion of the master, the penalty could have been intended to be the only remedy, when not one penny might ever go to the injured workman, because, by section 82, the Home Secretary might, in his discretion, but was not bound to, apply the whole or any part thereof for the benefit of the injured person. Could that be so? Upon an information for a penalty, the magistrates would probably take into account the character of the failure to fence. If the failure to fence was of a venial character, but the injury caused thereby to a workman was of a serious character, what fine should the magistrates impose? Ought they to impose a fine such as they would impose in a flagrant case? It seemed to him that the fine was a punishment on the master for his breach of duty, and that the fine should be proportionate to the character of the offence, and not proportionate to the injury that might be inflicted upon the workman. However, whatever penalty was inflicted, it was not made necessarily to go into the pocket of the injured workman, and that seemed to him almost conclusive that the imposition of a fine did not take away the right of action. Another consideration made it still more clear, because it did not necessarily follow that the occupier was the person to be fined. By section 87 the occupier might be exempt from a penalty, and a workman who was the real offender might be fined instead, when he might not have a penny to pay the fine with, and yet the argument was that in such a case the injured workman must look to the fine as his sole possible compensation. He could not think that that was so. In his opinion section 5 gave a right of action upon the statute for breach of duty occasioning injury to a workman, and there was nothing in the Act to deprive the injured workman of this right of action. As to the authorities, no case showed that the defendant's contention was correct. There were cases which tended to show that that contention was unsound. One of those cases was "*Britton v. Great Western Cotton Company*" (L.R., 7 Ex., 130). It was said that in that case the breach of duty was in not providing a fence, whereas here the breach was in not maintaining the fence. He could see no difference between the two. For these reasons, in his opinion, the plaintiff had a cause of action. It was next said that the doctrine of common employment afforded a defence to the action. A master was liable to a third person for the negligent act of his servant acting within the scope of his authority. Then came "*Priestley v. Fowler*" (3 M. and W., 1), which imposed a limitation upon that doctrine in favour of the master. That case decided that if a servant was injured by the negligence of a fellow servant while acting within the scope of his employment the master was not liable, the ground being, as it seemed to him, that the servant, when entering the master's employment, undertook the risk of injury arising from the negligent act of a fellow servant. That was the doctrine of common employment. It was a defence to an action by a servant against his master, but it did not apply to any case except an action by a servant against his master for the negligence of a fellow servant. In this case there was no question of any negligence. The plaintiff had only to prove a breach of the statutory duty and injury to himself therefrom, and it would be no answer to say that the injury was caused by the negligence of a fellow servant. The defendant could not delegate his statutory duty to another. The appeal must therefore be allowed, and judgment must be entered for the plaintiff for the £150 damages awarded by the jury.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

[Solicitors—Riddell, Vaizey, and Smith, for J. H. Jones, Cardiff, for the plaintiff; W. Hurd and Son, for Gwilym C. James, Merthyr Tydfil, for the defendant.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } June 30.

THE MERSEY DOCKS AND HARBOUR BOARD V.
R. HUNTER, CRAIG, AND CO.*

Shipping—Port dues on goods—Upper Mersey Dues Act, 1860—Construction.

Decision of Mathew, J. (*ante*, p. 38), reversed.

This was an appeal from the judgment of Mr. Justice Mathew at the trial of the action, without a jury, reported *ante*, p. 38; 3 Com. Cas., 6. The action was brought to recover £1 5s., being town dues at the rate of 8d. per ton on 37½ tons of flour imported into the port of Liverpool and landed at the Duke's Dock in that port. The flour in question formed part of the cargo of the ship *Oliva*, and was brought from Fiume under a bill of lading in which the ship was described as "bound for Liverpool, *via* Manchester." The vessel proceeded to Manchester by the Manchester Ship Canal, and the whole cargo, including the flour, was discharged and landed at Manchester. The flour was subsequently carried in lighters by the Manchester Ship Canal and over a part of the River Mersey into the Duke's Dock, and there landed in accordance with the terms of the bill of lading. In accordance with the usual practice of the Customs authorities, when the *Oliva* arrived at Manchester the flour was entered with the Customs there, and when it was carried to Liverpool no entry was there made or required by the Customs. Before 1861 town dues were levied by the plaintiffs and their predecessors in respect of goods loaded or discharged within the port of Liverpool. No service was performed in return for these dues. By the Upper Mersey Dues Act, 1860, it was provided that an imaginary line was, for the purposes of the Act, to be drawn across the River Mersey from Eastham Ferry Slip to the north-westerly boundary of the present Garston Dock Quay, and that so much of the port as lay seaward of the line should be designated the Lower Mersey. The dues receivable in respect of goods imported into, and exported from, the port of Liverpool, except those specified in section 17, were to remain the property of the plaintiffs, but dues in respect of goods carried over any part of the Upper Mersey were to be transferred to and vested in trustees to be called the Upper Mersey Trustees. The consideration for the transfer was £105,000, and it was provided that, when this amount and certain other charges had been paid out of the dues receivable by the trustees, the dues should be abolished. When this action was brought, these conditions had been complied with, and no dues were payable to the trustees. The entrance to the Ship Canal is about a quarter of a mile above Eastham Ferry, and the Duke's Dock is in the Lower Mersey, so that the flour was in fact carried over a portion of the waters of the Upper Mersey, both on its way to Manchester in the *Oliva*, and on its way from Manchester to the Duke's Dock in lighters. The town dues transferred to the trustees by the Act of 1860 were thus described in section 17:—"All such and so many of the said town dues as shall be payable for or

in respect of any goods which shall be carried or conveyed upon, over, or along any part of the Upper Mersey." A separate issue was ordered to be tried to determine the question, apart from other questions in the action, whether, assuming that the plaintiffs would otherwise have been entitled to succeed on their claim, they were disentitled by reason of the provisions of the Act of 1860. The question in effect was whether the town dues claimed were "payable for or in respect of any goods which had been carried or conveyed upon, over, or along any part of the Upper Mersey." Mr. Justice Mathew gave judgment for the plaintiffs. The defendants appealed.

Mr. Cripps, Q.C., and Mr. Danckwerts appeared for the defendants; Mr. Joseph Walton, Q.C., and Mr. Carver, Q.C., for the plaintiffs.

The Court allowed the appeal.

LORD JUSTICE A. L. SMITH said that in this case he could not agree with the judgment of Mr. Justice Mathew. The point to be decided was—What was transferred from the Mersey Docks and Harbour Board to the Upper Mersey Trustees by section 17 of the Act of 1860? The facts of the case were that a general ship came from abroad into the Mersey and the port of Liverpool, and proceeded thence along the Manchester Ship Canal to Manchester. Some of the goods on board were destined for Liverpool, *via* Manchester. These goods having been discharged at Manchester were sent in lighters down the canal over a portion of the Upper Mersey into the Duke's Dock in the Lower Mersey. The question was whether the Docks and Harbour Board were entitled to town dues in respect of those goods. The defendants' case was that the Board were not entitled to town dues on those goods, because town dues payable in respect of such goods were transferred to the Upper Mersey Trustees by the Act of 1860, and therefore nobody could be entitled to them except the trustees, and, inasmuch as the dues had since then been abolished, neither the board nor the trustees could now claim them. Section 17 of the Act of 1860 made a division of the river into two parts. A line was drawn across the river separating the Upper Mersey from the Lower Mersey, and a transfer of town dues was made to the Upper Mersey Trustees. What were the town dues so transferred? "All such and so many of the said town dues as shall be payable for or in respect of any goods not liable under, or by virtue of, the Mersey Dock Acts Consolidation Act, 1858, to the payment of dock rates on goods specified in Schedule C to such Act annexed, or any of them, which shall be carried or conveyed upon, over, or along any part of the Upper Mersey." The argument on the part of the plaintiffs was that those goods were not carried over a part of the Upper Mersey within the meaning of the section. In his opinion, notwithstanding the judgment of Mr. Justice Mathew, that argument was untenable. The case was suggested in argument of a ship being carried across the line by a storm, or a sailing ship going across the line while tacking. But this was a case in which goods were carried over part of the Upper Mersey in the ordinary course of their transit. He therefore thought that the appeal must be allowed.

LORD JUSTICE RIGBY was of the same opinion. If the town dues, which would have been payable in respect of these goods in 1860, were then transferred to the trustees, the Harbour Board clearly no longer had the right to recover them. The argument on the part of the plaintiffs was that town dues in respect of goods landed below the imaginary line were not transferred but were still payable to them. If that had been the intention of the Legislature, it would have been simple to say so. Whatever difficulty there

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

might be in the section, it seemed to him clear that it did not mean that. The transfer was of all such town dues as complied with certain conditions, one of such conditions being that the goods should be carried over part of the waters of the Upper Mersey. These goods were carried over part of the Upper Mersey. He thought that the town dues payable in respect of such goods were transferred, and that the Board could not now claim them.

LORD JUSTICE VAUGHAN WILLIAMS said it was not denied that the goods in question were not liable to dock rates, but it was argued that the town dues claimed were not dues included in the transfer because the goods were not carried over any part of the Upper Mersey within the meaning of section 17. That conclusion seemed to have been arrived at from some consideration of the state of things existing at the date of the transfer. But he was inclined to give the words of the section their literal construction, and he certainly thought that, where goods were carried in the ordinary course of their voyage to Liverpool and thence on to Manchester, and were then carried back in lighters to the Duke's Dock, such goods were within the section.

Chan. Div. }
(Stirling, J.) }

1898.
June 30.

WALL V. THE LONDON AND NORTHERN ASSETS CORPORATION AND OTHERS.*

Company — Management — Interference of the Court—Majority and minority of shareholders — Injunction refused.

This was a motion by the plaintiff, suing on behalf of himself and all other shareholders in the defendant company except those who voted for a certain special resolution which had been passed by the shareholders, asking for an injunction to restrain the company and the directors from carrying that resolution into effect. The London and Northern Assets Corporation was incorporated in 1888, its principal object being to carry on a financial and investment business. In 1889 another company, called the London and Northern Debenture Corporation, was incorporated, its objects being practically the same as those of the Assets Company, and the two companies had for some years past been working a joint business, and the board of directors of each company was the same. The capital of the Assets Corporation consisted of 100 founders' shares and 50,204 ordinary shares, all of £2 each, of which £1 10s. per share was paid up. The issued capital of the Debenture Corporation was 99 founders' shares and 34,600 ordinary shares of £2 each, fully-paid, but in March, 1898, these had been subdivided into £1 shares. In February, 1898, as the plaintiff alleged, the annual report of the Debenture Corporation stated a deficiency of assets to the extent of £5,165, and that only £1 17s. per £2 share was represented by assets. The market value of the shares at that date was £1 5s. per £2 share. In that month a scheme and agreement for the amalgamation of the two corporations was proposed by the directors. The scheme provided for the purchase of the whole undertaking of the Assets Corporation by the Debenture Corporation in consideration of shares in the Debenture Corporation, and the agreement further provided that out of the proceeds of sale each holder of a founder's share in the Assets Corporation should receive 13 ordinary fully-paid £1 shares in the Debenture Corporation, while each ordinary shareholder in the

Assets Corporation was to receive 13 ordinary fully-paid £1 shares in the Debenture Corporation and 5s. in cash or shares for every ten ordinary shares held by him in the Assets Corporation. The plaintiff, who was the holder of three founders' shares and 1,800 ordinary shares in the Assets Corporation and of one founder's £2 share and four ordinary £2 shares in the Debenture Corporation, objected to the scheme on the ground (*inter alia*) that the Debenture Corporation were making a profit out of the Assets Corporation, because the scheme provided for paying for the assets of the Assets Corporation on a cash basis in shares in the Debenture Corporation on the basis of their nominal value, whereas the fact was that the Debenture Corporation shares were much depreciated in value. An extraordinary general meeting of the Assets Corporation was held on March 22, 1898, to consider the requisite resolutions to carry out the proposed scheme. The plaintiff complained that at this meeting, while he and other shareholders were desirous of addressing the meeting, the chairman put a resolution that the discussion should be terminated. That resolution was carried, and then a resolution approving of the scheme was also passed. A meeting to confirm that resolution was held on April 6. On that occasion, the resolution having been proposed and seconded, an amendment was proposed, but ruled out of order by the chairman. The plaintiff alleged that a shareholder then moved the adjournment of the meeting, and upon his rising to second that resolution the chairman refused to allow him to speak, but at once put to the meeting a resolution that the original resolution "be now put." That resolution was carried. The plaintiff thereupon demanded a poll upon the question that "the resolution be now put," but the chairman refused to grant a poll thereon. The special resolution was then put and carried. The plaintiff thereupon demanded a poll, which was granted by the chairman, and the holding of which resulted in 25,593 votes in favour of the resolution, and 10,866 against it. The plaintiff then commenced this action, and moved for an injunction upon the grounds—(1) that the company had no power to sell its undertaking; (2) that the proposed distribution of assets was not in accordance with the rights of the shareholders; (3) that the minority had been unfairly treated; and (4) that the proceedings at the meetings were irregular.

Mr. W. H. Cozens-Hardy was for the plaintiff; Mr. Jenkins, Q.C., and Mr. Hamilton for the defendants, the company; and Mr. Lailey for the directors.

MR. JUSTICE STIRLING, in giving judgment, said that four points were raised by the plaintiff. The first was that the company had no power to sell its assets. This was not a proceeding under section 161 of the Companies Act, 1862, but it turned upon the powers of the company as defined by its memorandum of association. His Lordship then considered the terms of the memorandum, and came to the conclusion that the scheme in question came within the powers of the company. Then it was said, in the second place, that the distribution of the assets contemplated by the scheme was not in accordance with the rights of the parties interested. Upon this point his Lordship came to the conclusion that, inasmuch as the scheme altered the relative rights of the holders of shares which were already in existence, that part of the scheme was not, in the absence of special words in the memorandum, within the powers of the company, and he did not think that the terms of the memorandum were sufficient to justify what was proposed to be done as regards distribution. On the whole, however, he thought that the justice of the case would be met by accepting from the defendants an undertaking similar to that which was given in the case of "Griffith v.

*Reported by W. W. KNOX, Esq., Barrister-at-Law.

Page 77 (L.R., 5 Ch. D., 894)—viz., an undertaking not to distribute the shares to be received under the agreement. There were, however, two further points. It was said that the minority had been unfairly treated, because, as alleged by the plaintiff, the shares of the Debenture Corporation were not worth their nominal value. No personal imputation was made against the directors, but it was said that their judgment had been biased by their having a larger interest in the Debenture Corporation than in the Assets Corporation; and the like was said of a certain number of shareholders in the latter company. The case relied upon was "Menier v. Hooper's Telegraph Works" (L.R., 9 Ch. App., 350), but here it was not a question of the majority keeping the consideration to themselves, but simply whether the consideration was adequate, and upon that the view of the majority must prevail. Moreover, in this case the majority included a large number of shareholders not alleged to have any adverse interest. Then the last point urged by the plaintiff was that the proceedings at the meetings were irregular, and, in particular, that the closure was applied on two occasions. It certainly was of importance that free and fair discussion in meetings of shareholders should be supported by the Courts. In his Lordship's opinion, however, it had never been held that any particular shareholder had a right to insist upon being heard at any time and at any length that he pleased. That was a matter which must be left to the control of the chairman, supported by the meeting itself. His Lordship was referred upon this point to some remarks of Lord Justice James and Lord Justice Melish in the case of "Macdougall v. Gardiner" (1 Ch. D., 21). In that case Lord Justice Melish said:—"I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in 'Mozley v. Alston,' 'Lord v. Copper Miners' Company,' and 'Foss v. Harbottle' should be always adhered to—that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent." In the present case there was nothing illegal or fraudulent in what the company proposed to do, and it seemed to his Lordship that the application of the closure on the two occasions complained of was not shown to be oppressive or an undue interference with the rights of the minority. It was not made out that the minority had not had a fair opportunity of placing their case before the shareholders. Another point was that at one of the meetings a poll had been refused by the chairman, but his Lordship thought that the chairman was justified, in the construction which he placed upon the articles, in refusing a poll. This was borne out by the decision in "Reg. v. Government Stock Investment Company" (L.R. 3, Q.B.D., 442). His Lordship then lastly dealt with the contention of the plaintiff that the chairman had at the confirmatory meeting refused to put an amendment which was proposed by the plaintiff. In his Lordship's view the amendment really amounted to a negative of the confirmation. The question before the meeting was, aye or no, should the resolution be confirmed? If the amendment had been carried the resolution would not have been confirmed. Consequently, by ruling the amendment out of order and putting the question directly as he did, the chairman withdrew nothing from the meeting. On the whole case, therefore, his Lordship considered that the motion failed, and, upon the defendants giving the undertaking referred to, there would be no order upon the motion, except that the costs be costs in the action.

[Solicitors—A. E. Greville; Baker, Blaker, and Hawes.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) July 1.

WARREN V. MOORE.*

Vendor and Purchaser—Deposit—Sale of public-house—Vendor's inability to complete—Action to recover deposit.

Decision of Hawkins, J. (*ante*, p. 138), affirmed.

This was an appeal from the judgment of Mr. Justice Hawkins in favour of the plaintiff at the trial of the action without a jury, reported *ante*, p. 138. The action was brought to recover £500 paid as a deposit upon a contract dated October 26, 1896, to purchase the lease of a publichouse called the Prince Albert, Albert-road, Peckham. The Wenlock Brewery Company (Limited) held a lease of the publichouse, of which about 65 years had still to run, which lease was a free lease. The defendant was tenant of the house to the brewery company under a sublease for 40 years, this being a tied lease. The defendant advertised the lease of the house for sale, and negotiations were carried on between the plaintiff and the defendant through Mr. Beard, and on October 26, 1896, the contract was signed. By the contract the defendant, the vendor, agreed in consideration of the sum of £500 paid to him by the plaintiff, the purchaser, by way of deposit, and the further sum of £9,000 to be paid on November 30 to assign to the plaintiff the lease of the publichouse for the remainder of the unexpired term of 65 years, the same not being a brewer's lease, possession to be delivered on November 30, and the purchaser to make no objection should the lease be an underlease. It was further agreed that if either party should refuse or neglect to perform his part of the agreement he should pay to the other £500 as agreed damages, and in case of default by the purchaser the deposit money was to be forfeited. The date for completion was extended to December 17. Before this date the defendant's solicitors, who were also solicitors for the Wenlock Brewery Company, wrote to the effect that the brewery company had agreed to free the lease, and would join in the assignment. Upon December 18 the plaintiff rescinded the contract upon the ground that at the date for the completion the defendant had no power to convey the lease as specified in the contract, nor was the brewery company, who were not parties to the agreement, under any legal obligation to join in the assignment. Mr. Justice Hawkins gave judgment for the plaintiff for £500, holding that, time being of the essence of the contract, "Cowles v. Gale" (L.R., 7 Ch., 12), the defendant was not on December 17 in a position to fulfil the obligation into which he had entered. The defendant appealed.

Mr. McCall, Q.C., and Mr. R. A. GERMAINE, for the defendant, said that the brewery company did not first convey their lease to the defendant so that he might then convey that lease to the plaintiff, because it was thought advisable to have only one deed instead of two, but that the company were to join in the deed of assignment for the purpose of conveying the term vested in them. This was the position of the parties at the date fixed for completion, which was the material date, and therefore at that date the defendant was ready and willing to carry out his contract. They referred to "In re Bryant and Barningham's Contract" (44 Ch.D., 221), "Forrer v. Nash" (35 Beav., 167), "Bellamy v. Debenham" (1891, 1 Ch., 412), "Paton v. Rogers" (6 Madd., 256).

Mr. BLAKE ODGERS, Q.C., and Mr. H. A. FORMAN, for the plaintiff, contended that up to the date fixed

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

for completion there was no contract binding the brewery company to concur in the assignment, and that therefore the defendant was not in a position to fulfil his contract.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the question was whether the defendant on December 17, the date for completion, was in a position to convey the lease to the plaintiff, which he had contracted to convey. The defendant, by the contract of October 26, 1896, agreed in his own name to convey the lease of the house as a free house for 65 years to the plaintiff. When the title of the defendant came to be inquired into, the solicitors who were acting for the defendant and who were also solicitors for the Wenlock Brewery Company, a limited company, wrote to say that the company had agreed to free the lease and would join in the assignment to the plaintiff. He (the Lord Justice) could not see how, without a resolution of the board of directors, or some document under the seal of the company, there was anything in law to bind the company, or how the defendant could say in tendering his title for acceptance that the company were bound in law to carry out the representation and to join in the assignment. For these reasons, in his opinion, the judgment must be affirmed.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgments agreeing with the above.

[Solicitors—Benwell and Norfolk, for the plaintiff ; Nash, Field, and Co., for the defendant.]

Chan. Div. }
(Byrne, J.) }

1898.
July 1.

TOUSEY V. SHEFFIELD.*

Practice—Costs—Evidence on affidavit—Attendance of country solicitor on hearing of summons—Discretion.

In this case his Lordship was sitting as the Judge of the Chancery Division to whom Chancery matters commenced in the Manchester and Liverpool District Registries of the High Court of Justice are assigned. In these cases a London agent is not usually employed by the country solicitor, and the latter often comes up to town to attend proceedings in Court or Chambers which come before the Judge personally. This was a summons to review taxation as between party and party in respect of allowances by the District Registrar for the attendance of Liverpool solicitors in London on the hearing of an originating summons, all the evidence having been by affidavit. The case, as his Lordship pointed out, was a peculiar one. Although initiated by summons under the Judicial Trustees Act, 1896, it was equivalent to a most hostile action to remove trustees on the ground of misconduct. What his Lordship described as "unjustifiable charges (including charges of gross personal misconduct, unsupported by evidence)" were made, and his Lordship dismissed the application with costs. On taxation the District Registrar allowed for the attendance in London of Liverpool solicitors at the hearing upon two occasions—viz., when the case was part heard and on the adjourned hearing.

Mr. Torrell was for the applicant, and Mr. Rotch and Mr. Preston were for the defendants.

MR. JUSTICE BYRNE, in delivering judgment, said,—In my opinion, so far as the Chancery Division is concerned, the rules and practice in respect of the taxation of party and party costs are the same in the London

Taxing Masters' offices and in the offices of the District Registrars of Liverpool and Manchester; and I consider that such rules and practice apply in respect of cases heard in London exactly as if proceedings had been initiated in any other district registry than those of Liverpool and Manchester and had been taxed in London. In other words, the District Registrars in Liverpool and Manchester ought to act upon the same principles as the London Taxing Masters act in taxing costs where the proceedings have been commenced in district registries in other parts of the country. I have given the matter careful consideration and have made inquiry of two of the London Taxing Masters. In the result I am satisfied that there is no such hard and fast rule as that suggested by the applicant's counsel—namely, that in no case where all the evidence is taken by affidavit ought the costs of the attendance of the country solicitor to be allowed. On the contrary, I believe it to be in accordance with the existing practice to allow such costs in certain rare and exceptional cases, in the exercise of the discretion of the taxing officer. This discretion ought to be, and is, exercised with the utmost care and caution. One of the London Taxing Masters informs me that he does not think he has allowed such costs on a party and party taxation in more than about half a dozen instances. I can well understand that cases do occur where personal fraud or misconduct has been charged and has failed, where all the preliminary proceedings have been taken in the district registry, and where all the facts are known in the offices of the country solicitor that the taxing officer may fairly consider the presence in London of the country solicitor to be reasonably necessary for the conduct of the defendant's case. At the same time, it affords no reason at all for exercising the discretion that no London agent has been employed. If the charges for attendance of the country solicitor are allowed in the rare and exceptional cases referred to, it is not in accordance with the practice, as I understand it, to allow charges also for the attendance of the London solicitor. I have confined my remarks to cases arising in the Chancery Division, and I do not consider that I am departing from the general rule laid down in the case of "The Soto" (L.R., 1893, P.D., 73). My view is that upon a party and party taxation the costs of an unsuccessful litigant are not to be increased simply by reason of the opponent client, or his local solicitor in Liverpool or Manchester, electing that such solicitor should attend in London instead of employing a London agent; that no different rule or practice ought to prevail upon taxation before a Liverpool or Manchester District Registrar than that prevailing upon taxation in London of the costs arising in any other of the numerous district registries throughout the country; and that the discretion of the taxing officer ought always to be exercised in such a matter (as I have no reason to doubt it is) with very great care and only in exceptional cases. The present case was a very exceptional one, and the discretion of the taxing officer having been exercised with care, and after consultation with a most experienced London Taxing Master, I am not prepared to interfere with such discretion or to go into the question of the amount of the allowances complained of. I may add that the items 173 and 174 in Appendix N. to the R.S.C., 1893 (Annual Practice, Vol. II., p. 202), cited by the respondent's counsel, have no bearing upon the present case, inasmuch as they do not apply to cases heard in London or Middlesex. The summons must be dismissed, with costs. Leave to appeal was granted.

[Solicitors—J. F. Harrison and Barton, Liverpool; Norris and Sons, Liverpool; Tyrer, Kenion, and Co., Liverpool.]

*Reported by F. EVANS, Esq., Barrister-at-Law.

Court of Appeal (A. L. Smith, Rigby, }
and Vaughan Williams, L.J.J.) } 1898.
July 2.

WOOLF V. HAMILTON.*

Gaming and Wagering—Bets upon horse races—
Cheque in payment—Illegal consideration.

An endorsee who takes a note or bill which he knows to have been given in payment of a bet on a horse race cannot recover upon it.

This was an appeal by the plaintiff from the judgment of Mr. Justice Darling at the trial of the action without a jury, reported in *The Times* of December 22. For the purposes of this report it is only necessary to state the following facts:—The action was brought by the endorsee of a cheque for £84 3s. 9d., which had been drawn by the defendant in favour of a bookmaker in payment of bets lost upon horse races, and which had been endorsed by the bookmaker to the plaintiff for value, the plaintiff having notice that the cheque was given in payment of bets. The plaintiff contended that the cheque was not given upon an illegal consideration, but merely upon a consideration that was void, and that, therefore, as he was a holder for value, he could recover. Mr. Justice Darling held that the plaintiff could not recover, and gave judgment for the defendant.

Mr. RITTER and Mr. F. W. SHERWOOD, for the plaintiff, contended that a bet on a horse race was not an illegal contract, but that the consideration for the contract was merely void. Therefore a holder for value of a cheque with notice that it was given in payment of a bet on a horse race could recover upon it. Horse racing did not come within the statute of 9 Anne, c. 14, s. 1, and therefore a cheque given in payment of a bet on a horse race was not given on an illegal consideration, and did not come within 5 and 6 Will. IV., c. 41. The cases of "Goodburn v. Marley" (2 Str., 1,159), "Lynall v. Longbottom" (2 Wils., 36), "Blaxton v. Pye" (2 Wils., 309), which decided that horse racing was a game within the statute of 9 Anne, c. 14, s. 1, were wrong, and ought not to be followed. They also referred to "Lilley v. Rankin" (56 L.J., Q.B., 248).

Mr. F. Shewell Cooper, for the defendant, was not called upon.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that it had been held on more than one occasion that horse racing came within the provisions of 9 Anne, c. 14, s. 1. Horse racing was specially mentioned in the statute 16 Car. II., c. 7, and the authorities had held that the same kinds of games were covered by the statute of Anne as were covered by the statute of Charles. They were not going to overrule those authorities, seeing that the Legislature had on many occasions legislated upon these matters, and had not in any way touched those cases. Being within the statute of Anne the case was clear. The statute 5 and 6 Will. IV., c. 41, had repealed those parts of the statutes of Charles and Anne, which said that any note, bill, or mortgage given as therein mentioned should be absolutely void, and enacted that any such note, bill, or mortgage, should "be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration." The meaning of that obviously was that a person who for value took a note or bill which he knew to have been given in payment of a bet on a horse race—that was, with notice that it was given for an illegal consideration, could not recover upon it. The action, therefore, was not maintainable.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Dade and Co., for the plaintiff; W. H. Curtis, for the defendant.]

Q.B. Div. (Wills and }
Kennedy, J.J.) } 1898.
July 2.

KENNAIRD V. WILLIAM CORY AND SON.*

Local Government—River Thames—By-law—
Validity—Watermen and Lightermen Act,
1859 (22 and 23 Vict., c. cxxxiii., sec. 2).

This was a special case stated by the police magistrate for West Ham on an information against the respondents, the owners of the steamboat *Rotifer*, for unlawfully towing a barge, such steamboat not having a licensed waterman on board, contrary to By-law 60.

Mr. Ashton appeared for the prosecution; Mr. C. A. Russell, Q.C., and Mr. Tudor Howell for the respondents; Mr. Scrutton appeared for the Watermen's Company with a watching brief.

The arguments took place on May 24. The question raised was as to the validity of the above by-law made by the company. The magistrate had refused to convict.

MR. JUSTICE WILLS delivered the judgment of the Court in a written judgment, upholding the decision of the magistrate. The by-law was one made by the Court of the Master Wardens and Commonalty of the Watermen and Lightermen of the River Thames under section 80 of their Act of 1859 (22 and 23 Vict., cap. cxxxiii., section 2). That section provided that they could make by-laws "for the government of the company and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of this Act, and the several powers and authorities hereby vested in the company." The by-law in question was the 60th. It provided that "every steamboat navigated in the river within the limits of this Act in the towing of barges, lighters, vessels, or craft shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof," and imposed a penalty for contravention of the by-law. The word "vessel" in this by-law must be read as vessel of the like kind with barge or lighter. The only craft which the Act of 1859 dealt with excepting passenger boats were lighters, barges, and kindred craft, and when vessel was introduced it referred to vessels of the like kind with lighters and barges and not to vessels of all sorts. It was fair, therefore, in favour of the by-law to give it the same meaning in the by-law, otherwise it would be preposterously beyond anything within the purview of the Act. Now, the by-law was clearly not one for the government of the company, nor for the governing and regulation of lightermen or watermen. It could only be supported, therefore, if it aided in carrying into effect the purposes of the Act or the powers and authorities vested in the company. Part of the preamble to the Act recited that it was expedient that proper regulations should be made for the navigation of barges, lighters, boats, or other like craft carrying goods and for the regulation of persons employed to navigate the same, and for the security of passengers, and for the orderly conduct of traffic on the river, and it was argued broadly that all these matters referred to in the recital were amongst the purposes of the Act. If that were sound, hardly any subject connected with the traffic on the river might

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

not be dealt with, from a cork boat to an ocean steamer, or the speed, manning, lights, and everything else which might be considered to bear upon the security of passengers or the orderly conduct of traffic. This argument, however, distorted the proper office of a preamble. It did not follow because large words were used in a preamble that everything to which they could be referred was within the scope of the Act. They did not extend the provisions of the Act beyond what the enacting parts of the Act contained. His Lordship then went carefully through the different sections of the Act. Section 2 defined a "passenger boat"; section 3 defined a lighterman as "any person working or navigating for hire a lighter, barge, boat, or other like craft," and "waterman" as "any person navigating, rowing, or working for hire a passenger boat." Section 66 enacted that "no barge, lighter, boat, or other like craft for the carrying of goods . . . shall be worked or navigated . . . unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned" or an apprentice duly qualified. A penalty was imposed unless the owner of the boat proved that he was unable for the usual compensation to obtain the services of a licensed waterman or apprentice. After referring to other sections his Lordship continued. It appeared to the Court that there was no single provision or purpose of the Act which was subserved by the requirement that a steamboat towing barges should have on board one licensed waterman to assist in the navigation and management thereof. The by-law did not even provide for compulsory pilotage, but merely for compulsory employment. A person who was to assist in such a way would necessarily be under the orders of the captain. He would have no right to give an order or to take the helm or do anything but obey the captain's orders, a position for which any able-bodied man accustomed to a tug was just as competent as the waterman. It was curious to observe that the person who under the by-law was to be taken on board the tug was not even to be a lighterman, but a waterman, who according to the Act was a person having to do especially with passenger boats. The Act gave no special privileges of employment to watermen or lightermen except to the extent provided for by section 66 as to lightermen, or 67 as to watermen. The by-law attempted to extend these privileges and to force upon the owners of tug boats members of the company to perform services for which the owners, so far as the Act was concerned, were at liberty to go into the open market. The tug was not a lighter or other craft for the carrying of goods. There was nothing in the Act giving the company power to interfere with the owner or master of the tug in managing his steamboat. The framers of the by-law had taken a very extravagant view of these powers of legislation. His Lordship then referred to by-law 98, the effect of which was that no one could use the waterway of the Thames for any purpose if the journey was begun or ended within the limits of the Act without putting a licensed waterman or lighterman in command. The learned Judge was not surprised to be told that no attempt had been made to enforce that by-law, but it afforded a key to a good deal that otherwise would be startling in the by-laws. The Court had no doubt that the by-law in question in this case was radically bad. Even if it were within the general scope of the by-laws, it would be in the highest degree unreasonable on another ground. There was no exemption from the penalty, whatever be the circumstances under which the failure to take a waterman on board the tug occurred. There might be none available, or the one available might demand an exorbitant sum. The penalty attached notwith-

standing, and the saving provision which in the Act was made applicable to a case under section 66 was wanting in the by-law. But the objection of the Court was far deeper, and could not be removed by any mere modification of the by-law. The learned Judge then commented on the cases of "*Elmoire v. Hunter*" (3 C.P.D., 116) and "*Rolles v. Newell*" (25 Q.B.D., 335), which had been cited for the prosecution, and was of opinion that they did not affect the present case. In conclusion, he said, by-law 60 would seem to subserve no purpose except to find work or at all events pay for watermen, and, except in the very general words of the preamble, nothing was to be found in the Act to support it.

[Solicitors—A. C. Kent, for the prosecution; Sewell, Edwards, and Nevill, for the respondent.]

House of Lords (Lord Halsbury, L.C.,
Lords Watson, Macnaghten, and
Morris) 1898.
July 4.

MAYOR, &C., OF PRESTON V. BIORNSTAD AND OTHERS—
THE RATATA.*

Ship—Harbour authority—Duty of—Damage by
stranding—Contract of towage.

Decision of the Court of Appeal ([1897] P.,
118) affirmed.

This was an appeal from the decision of the Court of Appeal, consisting of Lord Esher and Lords Justices Lopes and Chitty, dated March 3, 1897, which reversed the decree dated July 22, 1896, of Sir Francis Jeune. The case is reported below 1897, P., 118; 66 L.J., P., 39, and the facts sufficiently appear in the Lord Chancellor's judgment. The arguments were heard on March 24 and 29 last, when the House took time for consideration.

Mr. Joseph Walton, Q.C., and Mr. Frederick Laing appeared for the appellants; Mr. Robson, Q.C., and Mr. H. Stokes for the respondents.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said,—The plaintiffs in this case are the owners of a Norwegian barque called the *Ratata*, and they sue the mayor, aldermen, and burgesses of the Borough of Preston for damage caused to that vessel by the grounding of it in the river Ribble on July 24, 1895. The Corporation of Preston are the port and harbour authority, and, besides filling that character, they have the right to make contracts for towage of vessels using the port of Preston, and to licence other persons to exercise the same business. It is important to bear in mind the two capacities filled by the corporation. It appears that the port of Preston is a considerable distance from the sea, and the ordinary course of business is that the harbour-master, who appears to act in a double capacity, arranges the time when vessels shall be towed up the river during the time that the state of the tide allows them to reach their destination in safety. The width of the river is such that only one vessel can occupy its width at the same time; when, therefore, there are more vessels to be towed up in the same tide they must go in line one after the other. On the occasion on which the accident arose the directions as to the time of departure were given in ordinary course by the harbour-master. The *Ratata* was towed by a steam tug, and two other vessels started to accomplish the same end—namely, the arrival at Preston during the same tide, before the ebb should create any danger of grounding. The vessel now in question was placed last of the line of ships, and

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

according to the evidence there should have been no difficulty in arriving at the port before the tide should ebb. The Vixen was the name of the steamer which was towing the foremost vessel, and for some reason the Vixen was unable to proceed at the ordinary rate at which it was expected and intended to proceed. The result was that the Ratata grounded before arriving at her destination, and received considerable damage in so doing. The action was brought to recover the damage incident to this misfortune. The contract of towage was preceded by a correspondence, which in substance invited the owners of the Ratata to come to the port, but undertaking to lighten the ship, if it should be proved to be necessary, at the expense of the corporation. No written contract between the parties has been put in evidence, but your Lordships are invited to infer what the contract was from the ordinary course pursued between shipowners and contractors for towage. Looking at the facts, I should infer, that while on the one hand there is no warranty by the contracting towers that the vessel shall arrive in time to avoid grounding, on the other hand I think it is clear that they undertook to exercise reasonable care and skill in the performance of the obligation which they have taken upon themselves for hire and reward in conducting the business of the towage to its consummation. Looking at the nature of the thing to be done, I should say they were bound to have reasonable knowledge of the state of the tide, inasmuch as they are to give the signal for the starting of the operations; reasonable care and skill in conducting the operation itself, where, as in this case, a number of vessels have to be brought up during the same tide; and reasonable care in providing adequate steam power to accomplish the object in question. It appears to me that in this case it is made out that they failed in the contract obligation which they undertook, and I think the plaintiffs were entitled to complain that in the combined operations the defendants were conducting—either, first, they did not lighten the ship sufficiently; or, secondly, that they did not place the Ratata, considering her draught as lightened by them, as first in the line; or, thirdly—and on this matter most reliance was placed at the trial—that they supplied an inefficient steamer to the leading vessel, the necessary effect of which was to delay the Ratata, which could not pass or go abreast of the vessel thus made to proceed too slowly, and the catastrophe undoubtedly did arise from the unusual and abnormal slowness of the Vixen. It is said that the Vixen was not the property of the corporation, but was only hired by it for the occasion. It appears to me that that consideration is immaterial. The Vixen was engaged in what I have called the “combined operation,” an operation which is necessarily combined by reason of the circumstance that the river will not permit two vessels to go abreast. If the corporation put an inefficient tug at the head of the line it follows that the effect of that inefficiency of the leading tug will involve the consequences not only to the vessel that that tug itself is drawing, but to all the other vessels that follow it. Indeed, it was but faintly contended that, if the vessel had belonged as property to the corporation that the corporation would not have been liable for the inefficiency of the tug which they provided. It was said that the corporation were not liable for a chartered tug; but this chartered tug was under the general direction and control of the corporation. It was performing corporation work for which the corporation was to be paid, and it appears to me that the ownership of the tug in the sense of its ultimate ownership is immaterial. For the time during which this contract business was being performed it was the tug of the corporation, and its inefficiency was an

insufficiency for which the corporation, as contractors for towage with reasonable care and skill, were responsible. But it is then said that the plaintiffs should have given evidence to show that the Vixen on this occasion was inefficient, and should have proved the cause of its inefficiency, which might, peradventure, be some cause for which upon the contract in question the corporation would not have been responsible. My lords, I am of opinion that this is altogether erroneous. The fact that it was an inefficient tug on this occasion is proved by the defendants themselves, when they show how on other occasions it had properly and efficiently performed its functions. If it was suggested that it was some extraordinary and unusual event—and as this was not a contract of warranty the defendants would have been entitled to insist on that as a defence—it was for the defendants to prove it. Two causes only are suggested in the course of the trial—one, the badness of the coal, itself supplied by the corporation, the other the unskillfulness or neglect of the stokers. In either event, as it appears to me, the corporation cannot avail themselves as against the owners of the Ratata of the unskillfulness of their tug or the bad material, the use of which placed the obstruction in the way of the Ratata and was the cause of the calamity. Under these circumstances I am of opinion that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON, LORD MACNAGHTEN, and LORD MORRIS concurred, and the appeal was dismissed.

[Solicitors—Bird and Hamer, for the appellants; Stokes and Stokes, for the respondent.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } July 4.

PHILLIPS V. LONDON SCHOOL BOARD—COCKERTON V. THE SAME.*

Education Acts—School Board—Power to establish superannuation fund—Deductions from teacher's salary—Acquiescence—Action to recover deductions dismissed.
Decision of Divisional Court (*ante*, p. 4) affirmed.

This was an appeal from a judgment (reported *ante*, p. 4) of a Divisional Court (Mr. Justice Wright and Mr. Justice Kennedy) on the hearing of two appeals from the Westminster County Court. The actions were brought against the London School Board by two plaintiffs, Miss Phillips and Mrs. Cockerton, to recover the amounts of certain deductions which had been made from their salaries as teachers. The facts of Miss Phillips's case were as follows:—The plaintiff was, from 1888 to 1897, on the permanent staff of the School Board, first as assistant teacher and afterwards as head mistress at a certain salary. When she entered the service no superannuation fund existed, and it was admitted that no express statutory power enabling a school board to establish such a fund exists or ever existed. In 1888 the School Board decided to establish such a fund, and promulgated a scheme for forming it by means of deductions from the salaries of the teachers, the scheme to remain in force for two years, after which, if Parliamentary powers were not obtained, the deductions were to be repaid. The plaintiff agreed in writing to

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

come under the scheme. In 1889 the School Board determined to extend the period of two years to five years, and the plaintiff consented in writing to this extension. On March 24, 1893, the School Board gave the plaintiff the option of having the deductions from her salary with interest returned to her or of joining the superannuation fund. The plaintiff on April 13, 1893, in writing elected to join the superannuation fund. In Mrs. Cockerton's case the facts were similar, except that when the plaintiff entered the service of the School Board the scheme was in force, and she was required to come under it when she entered the service. The actions were brought to recover the amounts of the deductions which had been made from the plaintiffs' salaries under the above-mentioned scheme. The County Court Judge found that the deductions were made with the consent of the plaintiffs, and that they were in law not entitled to recover them, and gave judgment for the defendants. The Divisional Court, without calling on counsel for the defendants, affirmed the judgment of the County Court Judge, but they gave the plaintiffs leave to appeal.

The arguments on the appeal were heard on June 16, when the Court took time to consider their judgment, as reported in *The Times* of June 17.

Mr. Jeff, Q.C., and Mr. Orgran appeared for the plaintiffs in support of the appeal; Lord Coleridge, Q.C., and Mr. Ram for the defendants.

The Court delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—This is an action brought by a teacher who for many years was in the service of the London School Board to recover from that Board the sum of £32 6s. 8d., being the amount of contributions voluntarily subscribed by her towards a superannuation fund promoted and carried on by the School Board for the benefit and aid of the plaintiff and their other *employés* desirous of subscribing thereto. The plaintiff now seeks to get back the money which has been so paid by her to this fund, and which has been applied by the Board according to her directions, as being money had and received by the defendants to the use of the plaintiff, and in the alternative she claims arrears of salary, and she has brought her action in the County Court in that behalf. The learned County Court Judge—his Honour Judge Lumley Smith—gave judgment against the plaintiff, and the Divisional Court, consisting of Mr. Justice Wright and Mr. Justice Kennedy, have affirmed his judgment, and the plaintiff now appeals to us against the decision of the Divisional Court. The facts material and necessary to this case will be found in the judgment of the learned County Court Judge, but I may add that in the year 1886 the School Board for London started the scheme for superannuation allowances to their *employés* in case of their becoming disabled by permanent infirmity of mind or body, and took from those desirous of joining the scheme 2 per cent. upon the amount of their respective salaries for the formation of the necessary fund. It may also be stated that the Board has been desirous of obtaining from Parliament authority—(a) to defray the expenses of the management of the fund, (b) to guarantee the safe keeping of the same, but as yet has not obtained that authority. It cannot be doubted that, had the defendants been individuals and not the creation of statute, there could have been no pretext for saying that the plaintiff could recover back the subscriptions voluntarily paid by her for the purpose of this fund, which subscriptions had been applied to such fund in accordance with her directions and desires. Her contract with such a defendant would be a perfectly lawful contract, and if authority were needed, which it is not, Lord Watson's judgment in "*Hewlett v. Allen*" ([1894] A.C., at p. 394) has only

to be referred to as to this. But it is argued on behalf of the plaintiff that, although this may be so, as the School Board is the creation of statute and can therefore only exercise the powers conferred upon it by statute, and as nowhere in the statute creating the Board is to be found the power either to undertake to administer a trust, which it is said the School Board is doing, by collecting, holding, and administering the subscriptions upon the advice and recommendation of a committee on superannuation, composed of the Chairman of the Board, five representatives elected by the Board, and five representatives elected by the subscribers to the fund, or to pay ratepayers' money towards the expenses of carrying out the scheme, which it is said the School Board is also doing, therefore the Board is acting *ultra vires*, and consequently this action is maintainable, for there has been a total failure of the consideration as to the purposes for which the moneys have been subscribed by the plaintiff to the fund. By section 35 of the Elementary Education Act, 1870, which is the Act regulating the School Board, it is enacted that "A School Board may appoint a clerk and a treasurer and other necessary officers including teachers required for any school provided by the Board, to hold office during the pleasure of the Board, and may assign them such salaries or remuneration, if any, as they think fit." The point as to the Board having used ratepayers' money towards the expenses of the scheme, which was the point argued before the County Court and the Divisional Court, is in my judgment untenable, for the contract between the plaintiff and the Board makes no provision that the Board shall use any of the ratepayers' money in carrying out the scheme, and, if they do so, that in no way makes the contract between the plaintiff and the Board illegal, and the suggestion that the contract between the plaintiff and the Board is *ultra vires* fails, and I agree with the Divisional Court upon this point. But the other point, which came up during the argument in this Court, still remains to be dealt with, and for the purposes of this case I will assume that the School Board has contracted with the plaintiff to administer a trust by undertaking to administer the funds of the superannuation scheme in the manner above mentioned, and that no provision can be found in the Act authorizing the Board to do this. I say I will assume but not decide that this is so, for in my judgment, even if this be so, it will not entitle the plaintiff to maintain this action either for money had and received, as being money paid without consideration, or for arrears of salary. If an action for money had and received would lie, the case of "*Lamb v. Great Northern Railway Company*" ([1891] 2 Q.B., 281) approved of in this Court in "*Hewlett v. Allen*" ([1892] 2 Q.B., at p. 674) was wrongly decided, and I am not by any means prepared to hold that it was. But, assuming that what the Board is doing is not authorized by statute, either as regards expending ratepayers' money in the management of the scheme or without spending such money as regards the administration of a trust, can the plaintiff recover back the subscriptions she has heretofore voluntarily made to this fund, which have been applied to the purposes thereof in strict accordance with her mandate? This fund has been in existence from the year 1886 to the present time, and during the years 1889 to 1897 inclusive the plaintiff has been a voluntary subscriber of 2 per cent. of her salary to this fund, thus earning her right during all this time to come upon the fund, when, according to the scheme, upon her becoming disabled by permanent infirmity of mind or body, she would be entitled to do so. The other numerous subscribers to the fund, amounting, it is said, to 10,000 persons, were in like

position as the plaintiff, the subscriptions of all going in aid of those who became incapacitated. I find that during this period—i.e., from 1889 to 1897—£7,175 has been paid by way of superannuation allowances to teachers and officers of the School Board when disabled, and that such allowances are continuing to be paid, and that upon March 25, 1897, this fund had a balance in hand of £94,861. That the plaintiff has for years voluntarily contributed to this fund and acquiesced in its being managed and applied as it has been is beyond dispute. If the plaintiff was in a Court of equity, what right would she have after this acquiescence now to demand back her subscriptions, which have been and are being dealt with in the way she has always desired, to the prejudice of the other subscribers who desire to continue to subscribe thereto and thus be protected in case of becoming disabled? She could have no such right after her acquiescence, if she was in a Court of equity. If she goes into a Court of law, as she has done, and seeks to recover back her subscriptions as money had and received, which cause of action is applicable when the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which render the receipt a receipt by the defendant to the use of the plaintiff (see *per* Lord Mansfield in "Moses v. Macferlan," 2 Burr., 1,005), what must she prove? She must prove that she handed the money she seeks to recover back to the defendants for a purpose, and that they have not applied it to that purpose, and that there has therefore been a total failure of consideration at the time she brings her action. This she cannot prove, for it is not the truth, for during all the time she has been subscriber to the fund she has had the right to a grant according to the provisions of the scheme. Upon these grounds this action fails, as does also the action brought by Mrs. Cockerton. If the plaintiff can establish that the School Board by reason of being the creation of statute cannot in the circumstances of the case administer the fund, it may be that the plaintiff by pursuing the proper course might obtain the appointment of a fit person for the purpose of administering the fund, or it may be that she might obtain a distribution of the fund between the different contributors according to their respective interests therein, but, though I offer no opinion thereon, she cannot maintain an action for money had and received to get back the subscriptions she has voluntarily for years subscribed to the fund and which up to action brought have been and were being applied to the very purposes for which she made her subscriptions, and during all which time she has had the right of participation in the scheme according to its terms and conditions; nor can she bring an action for arrears of salary, for no arrears exist. In my judgment the appeals in both actions must be dismissed with costs.

LORD JUSTICE RIGBY read an elaborate judgment in which he arrived at the same conclusion.

LORD JUSTICE VAUGHAN WILLIAMS agreed. He did not feel at all satisfied that the School Board had done anything *ultra vires*. He saw nothing in the Act of 1870 which prevented the School Board, if they thought they would get better service thereby, from making it a condition of service that their teachers should take their remuneration partly in deferred salary, and that the part of the salary so deferred should be devoted to a superannuation fund. Assuming that view to be correct, he could not see that it was *ultra vires* in the Board to take upon themselves the duty of administering the superannuation fund. He also agreed that neither of the plaintiffs could recover from the Board, even assuming that the Board had done that which was *ultra vires*, moneys which with their consent had

been paid to a fund to which other persons had subscribed upon the basis of mutual subscription.

[Solicitors—Baker and Nairne, for the plaintiffs; C. E. Mortimer, for the defendants.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J. } July 4.

IN RE WHITE—FENNELL V. FRANKLIN.*

Executor—Solicitor—Profit costs—Insolvent estate.

No one can claim the bounty of a testator where the estate is insolvent.

This appeal against a decision of Mr. Justice Kekewich's raised a point of interest to solicitors—viz., whether a solicitor, the sole trustee and executor under a will, could claim profit costs as against the estate of the testator, the estate being insolvent. The testator by his will provided that S. Franklin, one of his three trustees and executors, who is a solicitor, should be the solicitor to his estate, and as such, notwithstanding his acceptance of the trusteeship and executorship of the will, should be allowed all professional and other charges for his time and trouble which, if employed as solicitor to the trustees and executors, not being himself a trustee and executor, he would be entitled to make. The will was proved by Franklin alone, the other executors and trustees having disclaimed. Franklin acted as solicitor on behalf of himself as executor and trustee in some legal proceedings. In the present action, which was brought by a creditor for the administration of the testator's estate, Franklin, who was the defendant, carried in a claim for profit costs due to him as solicitor to the estate. The estate was shown to be insufficient for the payment of the testator's debts in full. Mr. Justice Kekewich held that, in these circumstances, there must be a declaration that the defendant was not entitled to any profit costs under the above clause in the will. His Lordship was of opinion that the gift by the testator of profit charges was a matter of bounty, and therefore a legacy, and could not be claimed in competition with the creditors. His Lordship relied on the decision of the Court of Appeal in the case of "*In re Thorley*" [1891] 2 Ch., 613). The defendant appealed.

Mr. Cozens-Hardy, Q.C., and Mr. J. G. Wood were for the defendant; Mr. Farwell, Q.C., and Mr. Charles Church were for the plaintiff.

The COURT, without calling on the counsel for the plaintiff, dismissed the appeal.

The MASTER of the ROLLS said he did not see that it was possible to differ judicially from the decision of the learned Judge. The trustee and executor of the will happened to be a solicitor, and he was the only trustee and executor, the others having disclaimed. It was impossible to get over the previous decisions and the principle on which they were based. The estate was insolvent, and Mr. Justice Kekewich had decided that the defendant was not entitled to receive any profit costs out of the estate in competition with the creditors. It was not possible to differ from the declaration which he had made. It was hard upon the solicitor, but it could not be helped.

LORD JUSTICE CHITTY said that no one could claim the bounty of a testator until his creditors had been paid. The rule applied, not only to a solicitor trustee, but equally to a trustee who was an accountant, a surveyor, or an architect.

LORD JUSTICE COLLINS concurred.

[Solicitors—S. Franklin; Maitlands, Peckham, and Co.]

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

Court of Appeal (Lindley, M.R.,
Chitty and Collins, L.J.J.) }

1898.
July 5.

SAVILL BROTHERS (LIMITED) V. LANGMAN.*
Licence—Beerhouse—Application for—Agreement to support application—Legality.

This was an appeal from a decision of Mr. Justice Romer dated March 31, 1898. The action was brought by Messrs. Savill Brothers (Limited), brewers, of Essex, for an injunction to restrain the defendant from purchasing beer sold at his off-licensed beerhouse known as the Duke of Portland, East Ham, from any person other than the plaintiffs. In 1889 the defendant was building the beerhouse in question, and was desirous of obtaining a licence for it, and with this view on September 7, 1889, he entered into an agreement with the plaintiffs in the following terms:—"In consideration of your having agreed to pay all the costs of my application for a licence for the sale of beer for consumption off the premises, I agree to apply for such licence and use my best endeavours to obtain the same, and further, for such considerations as aforesaid, I agree to tie the beer trade of the premises when licensed to you and your successors in business for the term of 12 years, you undertaking to supply beers in cask and bottle at such price as you shall supply to your other customers." After this agreement was entered into the defendant, with the assistance of the plaintiffs, applied for a licence and obtained it. Then disputes arose between the parties as to the amount of percentage to be allowed to the defendant, and ultimately this action was brought. The defendant alleged that the true consideration for the agreement was that Mr. Philip Savill, who was the managing director of the plaintiff company, and was himself a magistrate, was to use his influence with his brother magistrates to obtain the licence, and that consequently the agreement was void as against public policy. In support of this allegation the defendant mainly relied upon an affidavit filed by Mr. Savill in which he explained the reasons which induced the plaintiffs to enter into the agreement. In paragraph 3 he said:—"The said firm of Savill Brothers and the plaintiff company have for many years made a speciality of the business of assisting in procuring new licences in new neighbourhoods in Essex as local brewers, and are always prepared to take up an application which has a reasonable prospect of success. The place in which the premises belonging to the said defendant were situate was then a new neighbourhood, and although the trade likely to be done at the time the licence was obtained was not large, it was thought by the firm of Savill Brothers that it would increase in proportion to the increase of population. In these circumstances the firm of Savill Brothers agreed to support the defendant's application for an off-licence on condition that they secured the trade of the house if the licence should be granted"; and in paragraph 6 he said:—"The said firm of Savill Brothers gave the support of their name and business reputation to the defendant's application. It is perfectly well-known in the trade that an application supported by brewers is more likely to be successful than an application not so supported." In cross-examination upon this affidavit Mr. Savill stated that the only assistance he gave the defendant was to place his application before the magistrates in the best form and pay the costs of it, that he did not appear before the magistrates in any way, and that the form of the application contained nothing to show that the plaintiffs had anything to do with it, though in point of fact when these applications were made it generally became known in Court whether they were brewers'

applications and where they came from. Mr. Justice Romer upon this evidence came to the conclusion that the agreement was not made for an illegal consideration, and he granted an injunction. The defendant appealed.

Mr. Neville, Q.C., and Mr. Micklem were for the defendant; and Mr. Farwell, Q.C., and Mr. Hugh Humphry for the plaintiffs.

The Court dismissed the appeal.

The MASTER of the ROLLS said that this case raised a question of great importance to persons interested in obtaining or opposing publichouse licences. The action was brought upon an agreement in writing dated September 7, 1889, and the defence was that this agreement was illegal. The alleged illegality was not disclosed on the face of the document itself, but that was not necessary. It was suggested that the plaintiff's own evidence showed that this was an illegal agreement because in substance the transaction amounted to the purchase by the defendant of the plaintiff's influence with his brother magistrates. If that were proved the defence of illegality would be made out, but in his Lordship's opinion that was not the true inference to be drawn from the facts. The true inference was that these agreements between brewers and publicans usually got known, and that when they became known they increased the chances of obtaining a licence. The magistrates meeting to consider the granting of licences were not a Court, but they had public duties to perform which involved investigation as to the requirements of the neighbourhood and as to the character of the applicant, and in the case of an old house as to the character of the premises. What was meant by Mr. Savill "supporting" the defendant's application? That did not mean that Mr. Savill was to use his influence with his brother magistrates to induce them to grant the licence. The truth was that brewers were trusted not because they were disinterested but rather the reverse, it being assumed as a matter of business that they would not recommend a man whom they could not have business dealings with, and who was not respectable. This agreement could not properly be said to be an agreement in substance and in fact for the sale and purchase of a recommendation so as to make it illegal within the meaning of the authorities. Then it was suggested that the agreement was void on the ground of champerty, but champerty was only an aggravated form of maintenance, and maintenance meant the fostering of litigation. But there was no semblance of litigation in this case. It would be straining the doctrine of champerty to an absurd extent to make it apply to licensing proceedings such as these. The appeal should be dismissed.

LORDS JUSTICES CHITTY and COLLINS delivered judgment to the same effect.

[Solicitors—Layton, Sons, and Lendon; Sandilands and Co.]

Court of Appeal (Lindley, M.R.,
Chitty and Collins, L.J.J.) }

1898.
July 6.

BIGGS V. HODDINOTT.*

Mortgage—Covenant—Enforcement—Covenant to deal exclusively with mortgagee—Injunction.

This was an appeal by the defendants against a decision of Mr. Justice Romer, reported in *The Times* of June 11. The question was whether a covenant contained in a mortgage of a publichouse by the publicans to a brewer ought to be enforced by injunction, the covenant being that during the continuance of the mort-

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

gage security the mortgagors (the defendants) would deal exclusively with the mortgagee (the plaintiff) for all beer and malt liquor sold upon the mortgaged premises. There was a corresponding covenant by the mortgagee that he would supply the mortgagors with beer, &c. The deed also provided that the mortgagors should not be entitled to redeem the security for five years. The defendants had ceased to purchase beer from the plaintiff, and the plaintiff applied for an interlocutory injunction to restrain the defendants from committing a breach of their covenant. Mr. Justice Romer was of opinion that there was nothing oppressive or unreasonable in the covenant and no "clogging" of the equity of redemption, and held that the covenant ought to be enforced by an injunction. The defendants appealed, and it was contended on their behalf that a Court of equity would not allow a mortgagee to stipulate by the mortgage for any collateral advantage not appurtenant to the mortgage, and it was said that the covenant in question was such an advantage.

Mr. Farwell, Q.C., and Mr. Ingpen were for the defendants; Mr. Levett, Q.C., and Mr. R. F. Norton for the plaintiff.

Without calling on counsel for the plaintiff, The COURT dismissed the appeal.

The MASTER of the ROLLS said that the Court had listened to a very ingenious and learned argument with the view of inducing them under pressure to lay down a proposition which would be very unfortunate for business men—a proposition which, in effect, came to this, that when two people were engaged in a mortgage transaction it was impossible for them to be at the same time engaged in any other. Such a proposition would be contrary to good sense, and Mr. Farwell, with all his courage, did not attempt to support it on any rational principle, but took refuge in authority. Of course the Court was bound by the authorities.

"Jennings v. Ward" (2 Vern., 520) was the first case relied upon. But there the stipulation which was actually in question did seriously interfere with the redemption of the mortgaged property. No doubt in that case the Master of the Rolls, Sir John Trevor (in December, 1705), said, "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." That had been understood as meaning exactly what it said—viz., that a mortgagee could not have both the interest for his money and also any collateral advantage. That proposition had constantly been departed from since—for instance, in the case of West Indian mortgages, in which it had been held that a mortgagee who was not in possession could bargain that he should act as consignee for the mortgagor. It was clear that the proposition as stated in "Jennings v. Ward" did not mean exactly what it said. As stated, the proposition was a great deal too wide, but what it really meant was that a mortgagee could always redeem on payment of principal, interest, and costs, and that unconscionable bargains would not be enforced. In no case had anything more than that been enforced. To say that such a covenant as that now in question was an unconscionable bargain would shock any business man. The Court would have to say that any stipulation contained in a mortgage deed in favour of the mortgagee was necessarily oppressive and unconscionable. That would be going a great deal too far. His Lordship thought that Mr. Justice Romer was quite right, and he was glad that the Court was not bound by any authority to uphold such a senseless and unbusinesslike doctrine as that which had been contended for.

LORD JUSTICE CHITTY said that the covenant in no way affected the equity of redemption, for it was not stipulated that damages for breach of the covenant

should be covered by the security. The principle that a mortgage was only a security for the mortgagee money was maintained. It was argued that a mortgagee could not stipulate for a collateral advantage for himself. In his Lordship's opinion that proposition was not made out. He thought the proper statement was that a mortgagee could not stipulate for that which was oppressive and unconscionable. It would be contrary to good sense if such a covenant as this, entered into between business men with their eyes open, should be set aside upon that which would be a fanciful doctrine of equity. His Lordship then referred to some of the authorities and came to the conclusion that there was no such rule of equity as had been supposed.

LORD JUSTICE COLLINS said that were it not for the authorities he did not think that any rational man looking at this covenant would say it was otherwise than a reasonable business transaction. His Lordship did not wonder that equity Judges in endeavouring to state the principles on which the interference of Courts of equity in mortgage contracts was based had sometimes laid down the principles too generally. This covenant was perfectly reasonable, and it did not in any way fetter the main purpose of the mortgage as a security for money. There was nothing oppressive or unconscionable in it, and the mere fact that it was contained in a mortgage deed did not make it so. There was no foundation for such a general proposition.

[Solicitors—Riddell, Vaizey, and Smith, agents for J. Henry Jones, Cardiff; Bower, Cotton, and Bower, agents for Stephens, David, and Co., Cardiff.]

Chan. Div. }
(Byrne, J.) }

1898.
July 7.

LORD HASTINGS V. NORTH-EASTERN RAILWAY COMPANY.*

Landlord and Tenant—Lease—Way-leave over land—Rent—Incorporeal hereditament capable of being inherited by the heir and of being assigned to a purchaser.

In this case the plaintiff, the Right Hon. George Manners, Baron Hastings, claimed payment from the company of 3s. per ton (i.e., 45 tons) for certain coal conveyed over a portion of a railway known as the Morpeth Branch Railway, and shipped at the port of Blyth, and for an account of the coal so conveyed and shipped. Assuming the sum alleged to be payable was a rent, the question of liability turned mainly on the construction of a number of documents, including a deed entered into with one of the plaintiff's predecessors in the title to the land. On this assumption his Lordship delivered judgment some days since in the plaintiff's favour, but reserved for argument, which has since taken place, the question whether the plaintiff, being the successor in title of the former lord in respect of the land, as distinguished from the personal estate, was entitled to the 3s. per ton, which, as the defendant company contended, was not a rent passing with the ownership of the land. His Lordship delivered judgment on the point reserved.

Mr. Eve, Q.C., and Mr. George Henderson were for the plaintiff; and Mr. Swinfen Eady, Q.C., Mr. Astbury, Q.C., and Mr. Mackarness for the company.

MR. JUSTICE BYRNE delivered judgment as follows:—The interest conferred upon the railway company—viz., a way-leave over land of the grantor, with the right to make a railway thereover, and with the other powers given to them, is, in my judgment, an incorporeal hereditament, a property, and an estate capable of

*Reported by F. EVANS, Esq., Barrister-at-Law.

being inherited by the heir (if granted to an individual) and of being assigned to a purchaser. It is a "tenement" within the definition of Lord Coke (1 Inst., 20a), being an inheritance concerning or annexed to or exercisable within a corporeal inheritance. I have nearly followed the judgment of the Court in the case of "*Martyn v. Williams*" (1 H. and N., 817, 827), and, following the further reasoning in the same case, I think that the plaintiff is the owner of the reversion within the statute of 32 Henry VIII. To quote from p. 830 of the report:—"There is in reality the relation of reversioner and owner of particular estate between them; there is exactly the same privity of estate as exists between reversioner and tenant properly so called, and upon the determination of the term the entire interest in the land would revert to the plaintiff as upon the expiration of an ordinary lease. In the ordinary case of owner in fee simple and tenant for years, in which the relationship of reversioner and tenant within the statute certainly exists, the owner of the fee, upon the determination of the term, has vested in him a larger and more extensive interest in the corpus of the land than the tenant for years had. His interest in the minerals and timber, and, indeed, in the soil itself, is very different from that of such tenant." In the case of "*Norval v. Pascoe*" (34 L.J., Ch., 83) the decision in "*Martyn v. Williams*" was followed by Vice-Chancellor Kindersley, who dealt with other authorities bearing on the matter. In both the cases I have referred to the subject-matter was a lease or licence for a term to dig china clay, with ancillary powers, and in the present case the subject-matter is a lease or licence for a term of a way-leave for a railway to be made and used for traffic over the grantor's land. In general structure it follows the form of what is called "Lease of a way-leave" given in Mr. Davidson's *Precedents*, 2nd ed., vol. v., part 1 (leases). I think that the subject-matter in the present case is such as to bring it within the principle of the decided cases, and I refer particularly to "*Buckeridge v. Ingram*" (2 Ves. Jun., 652) and "*The Earl of Portmore v. Bunn*" (1 B. and C., 694) for instances of analogous rights. In the latter of these an action was brought to recover rent against the assignee of the licence for a term to cut a channel to the river Wey, and, although the actual decision turned upon a variance between the declaration and the evidence, it was distinctly held that a mere easement upon the soil of others to make channels and towing-paths is a real hereditament. The covenant to pay rents or annual sums in the present case is in favour of the grantor, his heirs, and assigns, and although it is quite true that some of such rents or sums are, as I have held, payable, even although the traffic does not pass over any part of the plaintiff's lands, and that they are calculated in part on such traffic, nevertheless I consider that the rents are payable in respect of the hereditaments leased, and that the plaintiff is entitled to sue exactly as the original lessor might have done.

Execution was stayed in respect of payment of the amount to be found due on taking the account, pending an appeal.

[Solicitors—Horace Peel; Williamson, Hill, and Co., agents for A. Kaye Butterworth, York.]

Q.B. Div. }
(Bigham, J.) }

1898.
July 7.

NEALE AND WILKINSON V. ROSE AND OTHERS.*
Insurance—Marine—Policy on goods—Construction—Intention of the parties—Transshipment.

This was an action brought to recover for a total loss of certain goods under a marine policy of insurance, dated August 23, 1897, subscribed by the defendants. The policy, which was in the ordinary Lloyd's form, was, so far as material, in the following terms:—"At and from London to any ports and for places in Australia upon any kind of goods and merchandise in the good ship or vessel called the P. and O. and Orient steamers, beginning the adventure upon the said goods from the loading thereof aboard the said ship and shall so continue and endure . . . until the said goods and merchandise whatsoever shall be arrived at as above, and until the same be there discharged and safely landed." "It shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever necessary or otherwise in any order with all liberties and exceptions as per bill of lading and (or) charter-party especially including the risk of negligence, whether of the owner, master, or crew without prejudice to this insurance. Valued at £5,000 on goods and (or) merchandise to be hereafter declared and valued. Including all risks of transshipment." The policy contained certain marginal clauses, of which the following are important:—"To pay partial loss arising from transshipment including all risk of craft or otherwise to and from the vessel, each craft or lighter to be deemed a separate insurance," "including all risks in transit and (or) while waiting shipment and (or) of boats and craft to and from the ship, each craft or lighter to be deemed a separate insurance." The plaintiff's shipped goods to the value of £300 by the P. and O. steamer *Arcadia* consigned to Brisbane under a bill of lading, dated October 15, 1897. These goods were duly declared on the policy. The bill of lading for the goods, so far as material, contained the following clauses:—"To be delivered at the port of Brisbane, or as near thereunto as the local steamer can safely get. For transshipment into local steamer at Sydney." The company are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers or ships either belonging to the company or to other persons proceeding either directly or indirectly to such port. "The ships are to be at liberty to sail with or without pilots, and to tow and assist vessels in all situations." The goods in question arrived at Sydney and were transhipped on to a coasting steamer called the *Fitzroy* for Brisbane. The *Fitzroy* was not owned by the P. and O. or Orient Companies, and was a vessel of about 500 tons, and was unclassified by Lloyd's. On the voyage from Sydney to Brisbane the goods became a total loss.

Mr. Joseph Walton, Q.C., and Mr. Rufus Isaacs, Q.C., appeared for the plaintiffs; Mr. J. A. Hamilton, and Mr. Chaytor for the defendants.

It was proved in evidence that the P. and O. and Orient steamers never went to Brisbane, and that the course of business was to transship goods for Brisbane into local steamers. Witnesses were called for the plaintiffs who stated that these facts were commonly known to underwriters and insurance brokers. Witnesses for the defendants denied this. One of the defendants stated that he knew there were some places in Australia to which the P. and O. and Orient steamers did not go, and that underwriters had an idea that all large lines transhipped goods to other places under through bills of lading.

His LORDSHIP, in giving judgment, said:—"I think I ought to give judgment for the plaintiffs. I have to discover what the intention of the parties was, and I have to discover that from the policy by the light of the circumstances in which it was made. The plaintiffs are merchants, shipping goods to various ports in Australia, and they naturally desired to insure these goods

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

and to cover the risk from London, where they were shipped to the different ports where the risk was to terminate. They want a policy to cover the marine risk on their goods from London to any port or places in Australia. It seems to me that if I were driven to give my judgment in this case for the defendants I should take away from the plaintiffs the protection which they stipulated for, and which, in my opinion, the defendants intended to give them—namely, the protection of the risk of the goods being lost between London and any port to which the plaintiffs might desire to export them. There is no doubt in my mind what the plaintiffs intended. What did the defendants intend? The defendants, in my opinion, knew that the P. and O. and Orient steamers did not go to more than a few of the ports in Australia. They knew that they did go to some ports where the largest amount of trade was carried on. And they knew, I have no doubt, that in order that the goods carried by those steamers should reach the other ports in Australia transshipment from the P. and O. and Orient boats into local trading vessels was necessary, and I cannot help thinking that the defendants when they issued this policy knew perfectly well the risk they had undertaken was the whole risk of the transit of those goods from London to the port of destination. What they stipulated for was that the goods should be shipped in this country on board the steamers of the P. and O. and Orient lines; that is to say, that as far as the voyage could be performed in the ordinary course of business in boats of those lines the voyage should be so performed. These goods were reshipped within the meaning of the policy and carried to Sydney and transhipped within the meaning of the policy and carried to the port of destination, at which place the risk was to end. In my opinion, the risk was not to end until they reached that place. I do not think I should cut down the meaning of the policy. I have no doubt in point of business as to what the parties intended, my only doubt arises from the wording of the policy. The policy, I think, means that the risk shall be covered from London to the port in Australia for which the goods are intended, that part of the journey from London to the port of transshipment to be performed in P. and O. and Orient steamers.

Judgment for the plaintiffs for the amount claimed.

[Solicitors—Robert Greening, for plaintiffs; Hollams and Co., for defendants.]

Prob., Divorce, and Adm. Div. } 1898.
(Gorell Barnes, J.) } July 7.

THE FULHAM.*

Ship—Salvage—Arrest by Receiver of Wreck—
Legality—Merchant Shipping Act, 1894, sec.
552—Construction.

The operation of sec. 552 of the Merchant Shipping Act, 1894, is not confined to salvage made payable by secs. 544, 545, and 546, but is applicable to all claims for salvage which may become payable by the decree of any Court having jurisdiction to award salvage.

MR. JUSTICE GORELL BARNES, in giving judgment, said,—This action is brought by the owners of the steamship Fulham to recover damages from the defendant for an alleged illegal arrest and detention by him of the steamship Fulham at Plymouth. The defendant was the Receiver of Wreck and Collector of Customs at Plymouth. On December 14 last the Fulham, while on a voyage from Sulina to

Dunkerque, ran short of fuel, and when in the English Channel, about 20 miles from Plymouth, was taken in tow by the tug Flying Buzzard and brought to Plymouth. A claim for salvage was made against the Fulham by the Flying Buzzard, and at the request of the master of the Flying Buzzard the defendant directed and secured the arrest and detention of the Fulham. A writ was subsequently issued against the Fulham for salvage, and on security to the satisfaction of the defendant being given the Fulham was released. The question is raised as to whether or not the defendant was entitled to arrest and detain the Fulham under the powers conferred upon him by the 552nd section of the Merchant Shipping Act, 1894. There was a further point made at the hearing before me that the defendant at first improperly refused to accept bail or the undertaking of the plaintiffs' solicitors to put in bail. I think the defendant acted rightly. He was bound to satisfy himself that the security offered was adequate, and he was justified in not releasing the ship till he had the salvors' assent to the securities offered. The plaintiffs also contended that there was no salvage due to any person under the 552nd section, and that therefore the defendant had no right to detain the vessel, the argument being that "salvage due to any person under the Act" meant salvage made payable by sections 544, 545, and 546, and that the operation of the 552nd section is confined to such salvage, and that the salvage in question did not become payable under any of these sections. It was also argued that the Fulham was "not in distress at any place on or near the coasts of the United Kingdom," because she was picked up 20 miles from the coast. The broad contention for the defendant was that section 552 is applicable not only to causes of salvage made payable by sections 544, 545, and 546, but to all claims for salvage which may become payable by the decree of any Court having jurisdiction to award salvage. The point is not free from doubt. On the whole, I am of opinion that the defendant's contention is correct. The words in section 552 "where salvage is due to any person under this Act" can hardly be construed literally. The term "due under this Act" appears to have been used as a general expression to cover any salvage which the Act contemplates being awarded by the Court mentioned in it. It seems unreasonable to limit section 552 to one class of salvage and not to extend its provisions to salvage claims generally for which process may be issued. It was also contended that the defendant was entitled to detain the vessel because the services in question had been rendered partially in saving life. In the salvage action by the Flying Buzzard (reported in *The Times* of June 13 last), I was advised by the Elder Brethren that the Fulham was in risk of going ashore and being lost. Therefore there was some risk to life, and it cannot be said that the defendant had no jurisdiction whatever to detain the vessel. Another point on behalf of the defendant was that the Fulham was in distress on or near the coast of the United Kingdom within the meaning of section 546, because part of the assistance rendered to her was rendered within the three-mile limit. I cannot, however, read the words "near the coast" as covering a place 20 miles off the coast. Some limit must be placed on the term, and, as at present advised, I think the limit should be the territorial limits, though it is not necessary in this case to express a final opinion upon the point. Nor is it necessary to decide whether the 546th section could apply because part of the service was rendered within the territorial limits. It is, in my opinion, extremely doubtful whether this section could be made to apply on this ground to the facts of this case. I, however, uphold the defendant's main contention and give judgment for him with costs.

*Reported by H. STUART MOORE, ESQ., Barrister-at-Law

Mr. Robson, Q.C., and Mr. Hamilton appeared for the plaintiffs; the Solicitor-General and Mr. Sutton for the defendant.

[Solicitors—Holman, Birdwood, and Co.; Solicitor to the Board of Trade.]

Court of Appeal (Lindley, M.R.,) 1898.
Chitty and Collins, L.J.J.) July 8.

IN RE A DEBTOR, EX PARTE THE DEBTOR.*

Bankruptcy—Married woman—Bankruptcy notice—Bankruptcy Act, 1883, sec. 4, subs. 1 (g).

The hearing of a bankruptcy petition presented against a spinster debtor was adjourned. Before the hearing came on again the debtor married.

Held, that she could not be made bankrupt.

In this case a bankruptcy petition was presented by a judgment creditor against a debtor, who was then a spinster, the act of bankruptcy alleged being non-compliance with a bankruptcy notice within the time prescribed by section 4, subsection 1 (g), of the Bankruptcy Act, 1883. The petition was adjourned by consent and the debtor got married in the interval and then set up the plea of coverture in answer to the petition. It was admitted that she was not "carrying on a trade separately from her husband" so as to render her, in respect of her separate property, "subject to the bankruptcy laws in the same way as if she were a *feme sole*" as provided by section 1, subsection 5, of the Married Women's Property Act, 1882. Mr. Registrar Giffard made a receiving order against her notwithstanding her coverture. The debtor appealed.

Mr. F. Cooper-Willis appeared in support of the appeal; the creditor did not appear.

The Court allowed the appeal.

The MASTER of the ROLLS said that it appeared to their Lordships that upon the true construction of the Bankruptcy Act and the Married Women's Property Act this order could not be supported and ought to be discharged. It was one of the additional privileges which married women had acquired by the Married Women's Property Act and the Bankruptcy Act. The case was peculiar. At the time when judgment was recovered and the petition was presented the debtor was a spinster, so that all that was done was perfectly regular. Then she induced the Court to let the petition stand over, and during the interval she got married, and she now said that she was a married woman and not liable to be made a bankrupt. His Lordship thought that she was on the right side of the law. Looking at the Bankruptcy Act and the Married Women's Property Act and the decisions which had been pronounced upon them, "*ex parte Jones*" (12 Ch. D., 484), "*ex parte Holland*" (L.R. 3, Ch., 307), and "*ex parte Conson*" (20 Q.B.D., 249), it was clear that a married woman could only be made liable when she was trading separately from her husband. The order should be discharged but without costs.

LORDS JUSTICES CHITTY and COLLINS concurred.

[Solicitors—Colyer and Colyer.]

Chan. Div.) 1893.
(Kekewich, J.)) July 8.

THE SOUTHWARK AND VAUXHALL WATER COMPANY V.
THE WANDSWORTH DISTRICT BOARD OF WORKS.†

Metropolis—Streets—Water pipes and mains—Repair of streets—Disturbance of pipes—Injunction.

This was a motion by the plaintiffs for an interim injunction to restrain the defendants from lowering their streets and footways wherever the plaintiffs' pipes and mains were laid in any manner which would leave such pipes or mains without a sufficient covering of soil or other material to protect them from injury, whether by the passing of traffic, the effect of frost, or otherwise, unless the defendants should first alter the position of the said pipes and mains by placing them at a depth below the proposed new surface of such streets or footway, not being less than the depth at which the same then were below the present surface of such streets or footways. It appeared that the defendants contemplated lowering some of their footpaths to such an extent as to leave only a few inches of surface above the plaintiffs' mains. This the defendants maintained they were entitled to do, and they contended that if the mains, for their protection from frost or otherwise, had to be lowered to a proportionate depth this should be done by the plaintiffs at their own expense.

Mr. WARRINGTON, Q.C., and Mr. GORE BROWNE, for the plaintiffs, referred to section 98 of the Metropolitan Local Management Act, 1855, which empowers a district board to pave and repair streets "and to cause the ground or soil thereof to be raised or lowered . . . and to alter the position of any mains or pipes in or under any such street, such alteration to be made subject to the approval of the engineer of the company to which such mains or pipes belong." They contended that if the defendants exercised their power of altering the level of a street they must exercise their other power of altering the position of the mains, and that the defendants were not to exercise their powers in such a way as to be injurious to the plaintiffs—"*Geddis v. Proprietors of the Bann Reservoir*" (L.R., 3 App. Cas., 430). All the plaintiffs asked was that the mains should be made as safe as they had been—that is, laid at the same depth as before.

Mr. RENSCHAW, Q.C., and Mr. LYTTELTON CHUBB, for the defendants, contended that the motion was misconceived, that it sought to compel the defendants to do that which if they did not do would be negligence on their part and so give rise to a claim for damages. But it had been laid down in "*Bolton v. Crowther*" (2 Barn. and Cr., 703) and other cases that turnpike trustees and other public bodies exercising their Parliamentary powers were not liable for consequent injury arising therefrom.

MR. JUSTICE KEKEWICH said the Court had a large power in granting an injunction, and he thought this was the exact case in which that large power should be exercised, rather than that the Court should wait until the injury was done and leave the plaintiffs to damages. The plaintiffs were therefore entitled to an injunction, though the form of injunction asked was too wide. The proper form would be to restrain the defendants from altering the position of the plaintiffs' mains by placing them in a position in which they would be more liable to injury than they were at present.

[Solicitors—Lanfear, Tanner, and Lanfear; Young and Sons.]

Chan. Div.) 1893.
(Romer, J.)) July 8.

STRANGWAYS V. READ.*

Lunacy—Committee—Annual sum for maintenance—Death of lunatic—Repayment to estate of sums not expended.

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

†Reported by G. I. FOSTER COOKE, Esq., Barrister-at-Law.

*Reported by E. B. SCHOMBERG, Esq., Barrister-at-Law.

In this action it appeared that by an order made in lunacy on March 24, 1896, the custody of the person of a lady lunatic was committed to her sister and another lady, and the custody of her estate to the official solicitor, and there was directed an allowance for maintenance of £2,500 per annum from January 20, 1896. The committee of the estate paid the committees of the person the allowance by quarterly payments in advance. A quarterly payment was made on October 29, 1896, and the lunatic died on the following November 11. The executors of her will claimed to be repaid by the committees of her person the sum of £528, being the proportionate part for the period subsequent to her death of the £625 paid in advance as a quarterly allowance. In the alternative the executors claimed an inquiry and account. It appeared that the Master in Lunacy decided that the payment of the £625 by the committee of the estate was a proper payment, and that neither at law, nor in equity, nor in lunacy were the executors entitled to recover any portion thereof. By an order made by the Lords Justices sitting in Lunacy the Master's decision was discharged. The executors accordingly instituted the present action against the committees of the person to enforce their claim. The following authorities were cited:—"Jodrell v. Jodrell" (14 Bea., 411); "Re Ponsonby" (3 Dr. and W., 27); "Grosvenor v. Drax" (2 Knapp, 82); "Re Weld" (L.R., 20 Ch. D., 451); "Whincup v. Hughes" (L.R., 6 C.P., 78); "Re French" (L.R., 3 Ch., 317).

Mr. Neville, Q.C., and Mr. R. J. Parker appeared for the plaintiffs; and Mr. Farwell, Q.C., and Mr. Samuel Dickinson and Mr. E. F. Buckley for the defendants.

MR. JUSTICE ROMER held that the terms of the order were that £2,500 should be paid for a year's maintenance, and the sum must be treated as a whole, and not as made up of quarterly or *de die in diem* payments, and the quarterly payments actually made as merely made by arrangement between the committees of the estate and person. As an arrangement the mode of payment was reasonable, but there was nothing binding as against the executors. Having regard to the nature of the order the executors were entitled to recover such portion of the allowance, if any, as was not properly expended on the maintenance.

The order therefore which he made would be for an inquiry, with costs reserved.

Q.B.Div. (Ridley and } 1898.
Phillimore, JJ.) } July 8.

THE MAYOR, ETC., OF LIVERPOOL V. THE ASSESSMENT COMMITTEE OF THE LLANFYLLIN UNION AND OTHERS.*

Rating—Rateable value—Waterworks—Assessment.

This was a case stated by the justices of the county of Montgomery, sitting at quarter sessions, upon an appeal from the assessment committee of the Llanfyllin Union with regard to the rating of Lake Vyrnwy and other parts of the Liverpool waterworks situated within the parish of Llanwddyn.

Mr. Balfour Browne, Q.C., and Mr. Honoratus Lloyd appeared for the appellants (the Liverpool Corporation); and Mr. Marshall, Q.C., and Mr. Arnold Herbert for the respondents.

The property of the appellants within the parish of

Llanwddyn consisted of a reservoir called Lake Vyrnwy with banks, dam, and appurtenances, the greater part of which was within the parish and of part of the land occupied by the Hirnant tunnel and its appurtenances. The gross rental was £195,000 and the rateable value £15,322. The land was acquired and the works constructed under the provisions of the Liverpool Waterworks Act, 1880, and were by virtue of section 9 to form part of the system of works constructed by the appellants under their Waterworks Acts for the supply of water to the city of Liverpool as if they had been authorized by such Waterworks Acts. They were occupied solely for that purpose. On December 1, 1896, the appellants were rated and assessed by the assessment committee in respect of the reservoir and works upon a net assessment of £15,322 in the sum of £542 13s., being a rate of 8½d. in the pound. The appellants appealed to quarter sessions. The cost of constructing the reservoir and works was £646,932 and the cost of the land upon which they were constructed was £62,250, making £709,182 for the reservoir and site. In addition to this expenditure the appellants were bound by their Act to construct certain roads and bridges and a church, vicarage, and schools. The latter were in substitution of buildings which were submerged by the formation of the reservoir. They spent on roads £55,939, on bridges £8,337, and on the church, vicarage, and schools £13,952. None of these hereditaments were now in the occupation of the appellants. The reservoir was at present capable of delivering 52½ million gallons per day, but the catchment area which was at present connected with the reservoir was only sufficient to provide 41 million gallons. Catchment areas capable of providing the remaining 11½ million gallons could and would ultimately be connected with the reservoir. Of the 52½ million gallons 39 would be delivered by means of three pipes at Liverpool, and the remaining 13½ million gallons would be passed down the river Vyrnwy as compensation water in accordance with the provisions of the Act of 1880. At present only one of the lines of pipes, capable of carrying 13 million gallons a day, had been laid. The appellants were able to borrow money at £2 10s. 11d. to £2 11s. 10d. per cent., but the money for the Vyrnwy Waterworks had been raised, part at 3½ per cent., and the remainder at 2½ per cent. The appellants' estimate of the rateable value of property was as follows. They took the total cost of the reservoir and site to be £709,182 and the total cost of the portion within the parish of Llanwddyn as £617,450. As only 26½ million gallons were now being produced instead of the ultimate capacity of 52½ million gallons, they reduced that figure by half, making £308,725 as the total effective cost of the reservoir and site. The total cost of the Hirnant tunnel and appurtenances within the parish they took at £27,936. They divided that figure by three, as only one of the three pipes was being used, making the total effective cost £9,312. This made the present effective capital value of the works £318,037. They put the rateable value at £8,746, being 2½ per cent. of the effective capital value. The respondents in their estimate added to the value of the land the improved value due to the construction of the roads and bridges by the appellants, which amounted to £70,091, and they estimated the total capital value of the reservoir and works at £318,615. They multiplied this by the fraction 27-41 to obtain the present effective capital value, making £539,088, of which £474,574 was apportioned to the parish of Llanwddyn. The fraction 27-41 was used because, though 52½ million gallons was the capacity of the reservoir, yet the catchment areas which were now connected with it only produced 41 million gallons. The cost of the Hirnant tunnel

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

divided by three was estimated at £9,280, making the present capital value of the reservoir and tunnel in the parish of Llanwddyn £483,854. The total capital value of the whole of the Liverpool waterworks undertaking was estimated at £3,880,733 and the gross rental value at £184,163, which was equal to $4\frac{1}{2}$ per cent. on the total capital value. The gross rental value, calculated at $4\frac{1}{2}$ per cent. of £483,854, yielded £22,983, less rates at 2s. 2d. in the pound on a rateable value of £16,920, less 20 per cent. for maintenance and renewal, making the rateable value £16,920. The quarter sessions held that, in order to ascertain the effective capital value of the undertaking, the sums expended, not only on the roads and bridges, but also on the church, vicarage, and schools, ought to be included, making the total capital cost of reservoir and site £787,410; that the effective capital value of the reservoir and site ought to be taken at $26\frac{1}{2}$ -41 of the expenditure—namely, £508,935; and that £9,312 was to be added to that, being one-third of the cost of the Hiramant tunnel, making the total effective capital cost £518,247. They were further of opinion (paragraph 24) that in consequence of the greater demand at the present time for such sites and of the increased cost of labour and materials, the outlay would be greater than the actual cost of the site and works of the corporation, in consideration of which the rateable value should be taken at 3 per cent. on the outlay, rather than $2\frac{1}{2}$ per cent., the rate at which the appellants could borrow; and, finally, that if in law the reservoir and dam might be rated separately, and not as integral parts of the appellants' water undertaking, their annual value if let as a separate hereditament should be arrived at by an estimate based upon 3 per cent. of the capital expenditure properly attributable thereto.

MR. JUSTICE RIDLEY delivered the considered judgment of the Court. He referred to the facts set out in the case. The appellants and respondents had adopted in principle the same method of arriving at the rateable value of the property, but in carrying out the principle the differences arose which required the Court's decision. The quarter sessions had left five questions. The first question was whether the reservoir and works were to be treated as integral parts of the appellants' water undertaking or as severable from the rest of the undertaking. The Court thought that such part of the waterworks as lay within the parish was a separate rateable hereditament in it and should be rated accordingly upon an estimate of the rent which it would yield after making the statutory deductions. See "Reg. v. West Middlesex Water Works Company" (28 L.J., M.C., 135). But it must be taken that the reservoir and works were part of the whole undertaking for the purpose of distributing water as a source of profit and though they did not directly earn anything in the parish, yet they conducted to earnings elsewhere. The whole undertaking continued in operation and, therefore, the owner of the whole must be assumed to pay a contractor adequate remuneration for land and fixed capital vested in these parts of the undertaking and for the labour and skill required for the construction and maintenance. The contractor stood in the relation of occupying tenant in the words of the case cited:—"The part within the parish is the rateable subject and the local rateable value is such sum as will pay the rent of the land and the profit on fixed capital therein." The answer, therefore, was that the reservoir and works were integral portions of the undertaking, and although rateable separately were not to be valued apart from the rest of the undertaking. The second question was whether there ought to be taken into account the circumstances mentioned in paragraph 24 of the case, in addition to the rate of

interest at which the appellants could have borrowed money at the date of the making of the rate. The Court, in the absence of direct evidence, could not feel certain that the supposed greater demand for sites existed and that in this case the capital value should be arrived at from the cost of the works as a basis. The third question was whether, in order to ascertain the effective capital value of the undertaking, the amount expended upon roads, bridges, church, &c., ought to be included. The Court were clearly of opinion that none of them ought to be included. It had been argued that the amounts expended were part of the cost of the works. It was clear, however, that they were not; but that they were to be regarded as expenses to which the appellants had been put in carrying out the obligations put upon them by Parliament. If they enhanced the value of the lands, as to which there was not sufficient evidence, that must be taken into account in the rateable value of the lands enhanced. The fourth question was as to whether the value of the reservoir and site ought to be $26\frac{1}{2}$ -41 or $26\frac{1}{2}$ -52 of the total capital expenditure. At present the daily supply was only about one half of the complete or total possible supply. *Prima facie*, therefore, the effective capital value was also one-half of the total, but on behalf of the respondents it was said that, the total now received into the reservoir being only 41 million gallons a day and the total supply being $26\frac{1}{2}$ millions a day, the proper fraction to be used in the calculations was $26\frac{1}{2}$ -41. In other words, although the supply was only one-half of the intended amount, the rateable value of the effective capital was to be taken at more than one-half. It was also contended that the appellants should, in order to justify their contention, add to the capital value the cost of including the additional catchment area which is required to bring the daily supply into the reservoir to the amount of $52\frac{1}{2}$ million gallons. But it was the reservoir and works which were here rated, not the works which had not been carried out, and, although it was true that the proportion between the gallons supplied out of the reservoir and those actually received into it was at the time $26\frac{1}{2}$ to 41, that proportion did not represent the true relation between effective capital value and total cost of construction. The reservoir was large enough to receive $52\frac{1}{2}$ millions daily, and had been constructed and completed for those dimensions, but it did only supply one-half of that quantity. For the purpose of the rate the Court thought that the comparison supplied the true proportion. The case of "R. v. the South Staffordshire Water Works Company" (16 Q.B.D.) was relied on as showing that the cost of connecting the additional catchment area with the reservoir ought to be added to the capital value. But in that case the works had been completed and formed part of the undertaking. As to the last question, whether the rateable value ought to be taken at 3 per cent. or $2\frac{1}{2}$ per cent. on the effective value of the undertaking, that was largely a question of fact as to which the Court would not interfere with the decision of quarter sessions. The principle on which the capital value was to be calculated had been stated. The Court thought that the percentage upon it ought not to be higher than the necessary rate of interest at which the money could be borrowed. At the same time, when all the circumstances were considered, the Court could not say that the percentage had been wrongly fixed at 3 per cent., although it was higher than the rate at which the money could now be raised. The order of quarter sessions ought to be quashed and the rate reduced in accordance with the opinion of the Court.

[Solicitors—F. Venn and Co. for Clare, Liverpool, for the appellant; Robbins, Billing, and Co., for Pugh and Jones, Llanfyllin.]

Court of Appeal (A. L. Smith, Chitty, } 1898.
and Vaughan Williams, L.J.) } July 9.
THE BRITISH EMPIRE TYPESETTING MACHINE COMPANY (LIMITED) AND OTHERS V. THE LINOTYPE COMPANY (LIMITED).*

Defamation—Libel—Trade libel—Disparagement of goods—Libel on plaintiffs in the way of their business.

Appeal from judgment of Lord Russell of Killowen, C.J. (*ante*, p. 253), dismissed (Vaughan Williams, L.J., dissenting).

This was an application by the defendants for judgment or for a new trial of an action tried before the Lord Chief Justice and a special jury, reported *ante*, p. 253. The action was brought by the British Empire Typesetting Machine Company and the Empire Typesetting Machine Company of New York against the Linotype Company to recover damages for libel. The alleged libel referred to five machines of the Empire Typesetting Machine Company which had been sent to be used in the office of a newspaper in New York called the *Evening Sun*. It was contained in an article which was sent to the editor of the *St. James's Gazette* and the editor of the *Printer's Register*, but it was not published in either of those papers. The article was as follows:—"The Empire Typesetter in America.—The *Union Printer and American Craftsman*, the most wide-awake and sprited of American trade journals, has recently contained several references to the Empire composing machines, which were installed in the office of the New York *Evening Sun* with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in the month of February last, and the other four commencing operations on March 9 last. So short-lived, however, does this installation appear to have been that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Company is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine." It appeared that in consequence of certain trade union rules the presence of the machines in the office of the *Evening Sun* made it necessary for the owners of that paper to pay the workmen in their employment higher wages than they had been paying before, and that, as they did not think it worth while to do this, the machines were removed. The innuendo alleged in the statement of claim was that the words complained of meant that the plaintiffs the Empire Typesetting Machine Company were unskilful, incompetent, and negligent in the manufacture of typesetting machinery, and that they induced the proprietors of the New York *Evening Sun* to purchase and install certain of such machines in their office by falsely and fraudulently representing the same to be machines of skilful, careful, and superior workmanship and design, and efficient for the purpose for which they were sold, well knowing that this was not the case, and that the said plaintiffs were dishonest and unskilful in the conduct and management of their business, and that the said plaintiffs, and the plaintiffs the British Empire Typesetting Machine Company, were unskilful and negligent in the management of their business in that all machines sold by them were of an inferior and worthless description. The jury, in answer to questions put to them by the Lord Chief Justice, found that the words complained of were a libel, and that they were directed against the business of the company as vendors of these machines generally, and were not merely a disparagement of the

particular machines, and that the defendants published the words maliciously intending to attack the plaintiffs in the conduct of their business; and they assessed the damages at £500. The Lord Chief Justice accordingly gave judgment for the plaintiffs for that amount.

SIR EDWARD CLARKE, Q.C., and Mr. J. ELDON BANKES (Mr. Lewis Thomas with them) appeared for the defendants in support of the application for judgment or a new trial, and argued that there was no evidence on which judgment could be rightly entered for the plaintiffs, or that, in the alternative, the verdict was against the weight of evidence. They contended that the words complained of contained nothing defamatory of the plaintiffs, and that, at the utmost, they amounted to mere disparagement of the plaintiffs' goods; and an action for libel on goods would not lie unless special damage were alleged and proved, which was not done here. They cited "*Capital and Counties Bank v. Henty*" (7 App. Cas., 741), "*Nevill v. Fine Art and General Insurance Company*" ([1897] A.C., 68), and "*Evans v. Harlow*" (5 Q.B., 624). They also contended that the damages were excessive, inasmuch as there had been no publication of the alleged libel except to the editors of the two newspapers.

SIR ROBERT REID, Q.C., and Mr. GREGSON ELLIS, for the plaintiffs, argued that the words complained of were open to the construction that they bore a meaning defamatory of the plaintiffs, and that it was for the jury to say whether they bore that meaning or not. They relied on the judgment of Lord Esher in "*South Hetton Coal Company v. North-Eastern News Association*" ([1894] 1 Q.B., 133).

The COURT, having taken time to consider, delivered judgment to-day, dismissing the appeal, Lord Justice Vaughan Williams dissenting.

LORD JUSTICE A. L. SMITH read the following judgment:—"This is an action brought by the plaintiffs, the British Empire Typesetting Machine Company, against a rival trader, the defendants in this action, for having libelled them in the way of their business. The case came to trial before the Lord Chief Justice of England and a special jury, when the latter found—(1) that what the defendants had written and published of the plaintiffs was a libel; (2) that it was defamatory of the business of the plaintiff company; (3) that the defendants published the libel maliciously intending to attack and injure the plaintiffs in their business; and (4) they assessed the damages at £500. There was no suggestion in this case, as was the fact in "*The Capital and Counties Bank v. Henty*" (7 App. Cas., 741), and also in "*Nevill v. Fine Art and General Insurance Company*," ([1897] A.C., 68), that the occasion upon which the libel was published was a privileged occasion, and I have not to discuss the law applicable to such a case. No complaint is made by the defendants of the third finding of the jury as to their actual malice, and it is not argued by them that there was not good evidence to support it; but it is said that judgment should nevertheless be entered for the defendants, because what they published was only defamatory of the plaintiffs' goods, and was not capable of being defamatory of the plaintiffs in their business, and, as no special damage was proved, this action is not maintainable. If it were true that the libel in question was only a disparagement of the plaintiffs' goods, I agree that the case of "*Evans v. Harlow*" (5 Q.B., 624) and the case in the House of Lords of "*White v. Mellin*" ([1895] A.C., 154), approving of the former case, are conclusive to show that the action would not be maintainable without proof of special damage. The defendants also ask for a new trial upon the ground that the damages are excessive. The Lord Chief Justice was of opinion that the inference which might properly be

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

drawn from the words published was that they conveyed a libellous imputation upon the plaintiffs in their business, and he therefore left the case to the jury, and, as it seems to me, clearly pointed out to them what they had to decide—viz., the difference between a libellous imputation upon the plaintiffs' goods and upon the plaintiffs themselves in the way of their business—and he told them that when considering what the libel meant they must consider what its language would convey to the mind of a person reading it with ordinary intelligence, which is quite correct. I do not dispute that, when a verdict has passed against a defendant in a case of libel and judgment has been given against him, if he asserts that there was no libel, and that both the jury and the Court of first instance have gone wrong, he is not called upon to say that the words are incapable of conveying a libellous imputation—it is enough if he can make out to the satisfaction of the Court above that the onus of showing that they do convey such an imputation is not satisfied by the plaintiffs (see per Lord Blackburn, 7 App. Cas., at p. 776). The question is whether in this case the plaintiffs have satisfied this onus. In my opinion it is the law that, if a publication be such that a person of ordinary intelligence reading it might naturally come to the conclusion that the publication imputed to a trader either misconduct or want of care or of qualification or of skill in his business, and the statement is proved to be untrue, the occasion not being privileged, then the case must be left to the jury, and it is not competent for the Judge to withdraw it from them, for they are the tribunal, if there be ground for assuming that the imputation may be libellous upon the plaintiff, to say whether the document published does in fact make any such imputation upon him. Now, what is it that the libel complained of, which was sent by the defendants to the editor of the *St. James's Gazette* and also to another newspaper, contains upon its face? I will read the whole of the document as sent by the defendants to the editor of the *St. James's Gazette*, who refused to publish it in his paper. (His Lordship read the document.) The Empire Company named in this document are the plaintiffs, and the Empire composing machines are the machines the plaintiffs vended and installed in the way of their trade or business. It cannot be disputed that this document contains the allegation that the plaintiffs had installed five type-setting machines at the office of the *Evening Star*, and so short-lived had been these installations that the plaintiffs had received notice to remove the machines altogether in the course of a few days, and that this would be a very serious blow for this machine. Now, what do these words naturally convey to a reader? What in their ordinary sense do they mean? In my judgment their *prima facie* and natural meaning is that the five machines which the plaintiff company had installed were worthless or unworkable. What is the meaning of the passage about the installation being so short-lived? Why had the plaintiffs' notice to remove them altogether in the course of a few days? To me the natural meaning of the words is this, that the notice was given because the machines would not work or were worthless; and in my opinion any other meaning is a strained and non-natural meaning of the words. If the meaning of the publication was, as the defendants now assert, merely an imputation upon the machines, what is the meaning of inserting the plaintiffs' name as being the persons who had installed these disparaged machines? The sting of the libel to me is obvious, and so is the meaning of the words, and this has been the opinion of every one who has hitherto had to do with the words—I mean the Lord Chief Justice and the special jury. It is my own opinion and I agree

with them. It appears to me unnecessary to inquire how the plaintiff's pleader has set out his innuendo, for that is not what we have to determine in this case. It has been proved to be wholly untrue that the machines or any of them were worthless or unworkable, for on the contrary it was proved that they were excellent machines and worked with perfect efficiency, and there was no pretence for saying that they did not; and it was also proved to be untrue that the plaintiffs had received notice to remove them altogether in the course of a few days. To falsely write of a trader that he sells or sets up worthless or unworkable wares is a libel upon the trader in the way of his trade, for it imputes either carelessness or incapacity therein, and this in my opinion is what the defendants have written and published of and concerning the plaintiffs. A libel may well contain a disparagement of goods and at the same time a disparagement of the trader who in his business sells them or sets them up. Lord Esher, in "*South Hetton Coal Company v. North-Eastern News Association*" ([1894] 1 Q.B., 133, at page 139), pointed out that, if the libel complained of, although in disparagement of a trader's goods, is stated in such a way as might reflect upon the conduct of the trader's business, it was for the jury to say which sense the libel really bore; and in this I entirely agree. I have no doubt that the libel in this case disparages the plaintiffs' goods, but it does a great deal more, for it also contains a disparagement of the plaintiffs in the way of their business. It is immaterial to consider whether the alleged libel carries the imputation that what the trader did was done knowingly or not, for if knowingly it was an *a fortiori* disparagement of the trader in the way of his business, for it imputes to him misconduct therein. It was argued for the defendants that, as the Court of Queen's Bench in the case of "*Evans v. Harlow*" held upon demurrer that the alleged libel in that case was only upon the goods and not upon the plaintiffs in the way of their business, we should in this case do the same. I do not agree with that argument, which comes to this, that, because a Court has held that one particular libel was only a libel upon goods, we should therefore hold that the libel in the present case, a wholly different libel, was also only a libel upon goods. It might just as well be argued that, because the majority of the Court of Queen's Bench held in the "*Bag of Bags*" case, "*Jenner v. A'Beckett*" (L.R., 7 Q.B., 11), that the libel in that case was capable of being a libel upon the trader in the way of his trade (as to the correctness of this decision I give no opinion), we should hold that the present publication constituted a libel upon the plaintiffs in the way of their trade. It was further argued by the defendants' counsel that it was unreasonable, as was pointed out by Lord Justice Brett in "*Capital and Counties Bank v. Henty*," cited with approval by Lord Halsbury, Lord Chancellor, in "*Nevill v. Fine Art and General Insurance Company*," at p. 73, that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document; but, in my opinion, the natural meaning of the words used in this case is defamatory of the trader in the way of his trade, and mean what the jury have found, and were perfectly entitled to find, they did mean. Indeed, what is the good interpretation which the words naturally convey? I can see none. The defendants' admitted case is that the document published by them is a libel upon the plaintiffs' goods, false and malicious; where, then, is the good interpretation to be found? As before stated, there is no pretence for suggesting the occasion to have been privileged. For the reasons above, I think the plaintiffs have satisfied the onus upon them, and that we should

clearly be wrong if we entered judgment for the defendants. As to damages, if a trader falsely and with actual malice publishes a libel intending to attack and injure a rival in trade, as has been proved to have been done by the defendants in this case, I cannot say, nor do I think, that £500 damages are in such circumstances excessive. In my judgment, the appeal should be dismissed with costs.

LORD JUSTICE CHITTY read a judgment in which he arrived at the same conclusion.

LORD JUSTICE VAUGHAN WILLIAMS read a long and elaborate judgment, arriving at a contrary conclusion. He was of opinion that judgment ought to be entered for the defendants—first, because the words of the alleged libel in their natural meaning were not in themselves libellous; secondly, because they were not capable of the meaning imputed in the innuendo, and there was no evidence of any extrinsic facts calculated to give the words an extended meaning; lastly, because, even assuming the words to be capable of a defamatory meaning, they were also capable of a meaning innocent of defamation of the plaintiffs as distinguished from their machines, and there was no evidence to satisfy the Court that the words had a libellous tendency.

House of Lords (Lord Halsbury, L.C., 1 1898.
Lords Watson, Herschell, and Shand) } July 11.
THE SAILING SHIP BLAIRMORE COMPANY (LIMITED) AND
OTHERS V. MACREDIE.*

Insurance—Marine—Constructive total loss—Expenses of raising vessel—Notice of abandonment.

When a vessel capsizes and sinks owing to perils insured against, underwriters cannot, by spending money in raising her, turn what would otherwise be a constructive total loss into a partial loss.

An important question of maritime law was involved in this appeal against two interlocutors, one pronounced by the Second Division of the Court of Session in Scotland on June 4, 1897, and the other by the Lord Ordinary (Lord Kyllachy) dated February 18, 1897. The question was whether the liability of insurers as for a constructive total loss of the insured vessel is determined according to the state of matters as they existed when notice of abandonment was given by the insured, or at the time when the action was instituted. The appellants, who were pursuers in the action, sued the respondent as one of the underwriters of the Blairmore for his share of the liability for the insured value of the vessel. The ship was insured for the period from April 3 to June 3, 1896, under five time-valued policies amounting in all to £15,000. Of this £100 was underwritten by the respondent, and this was a test action by the result of which the other underwriters agreed to be bound. On April 9, 1896, the Blairmore, whilst moored in the Bay of San Francisco, capsized and sank in a squall. Immediately afterwards the appellants, on the instructions of the underwriters, obtained an offer to raise her for £5,760 on the condition "No cure, no pay." This offer was not accepted, and on April 15, 1896, the appellants gave to the underwriters notice of abandonment as of a constructive total loss. The underwriters declined to accept this notice, and proceeded to raise the vessel. The cost of doing so amounted to £7,600 or more, and the underwriters calculated that when the cost of repairs was added to this sum the total outlay would be about £12,000, and the value of the vessel when repaired

would be about £9,600. The appellants did not dispute that, if the cost of raising the vessel was excluded, she was not a constructive total loss; but they contended that the sum so expended had to be taken into consideration in determining that question. The appellants claimed the valued sum in the policies, but payment was refused, and on December 1, 1896, the appellants raised the present action. Lord Kyllachy dismissed the action, without prejudice to the pursuers' bringing another action for a partial loss. This decision was affirmed by Lords Trayner, Young, and Moncreiff in the Second Division. It was matter of discussion in the Courts below whether in such a case the law of Scotland is the same as that of England. On this question Lord Young said:—

"We must decide this question according to the law of Scotland. . . . We are glad to be informed that the law of England is the same as the law of Scotland on any question. Indeed, we are glad to know that the law of America or France is the same as ours in any case. . . . We do not know what may have been decided in England yesterday or last week. It is reported of Lord Eldon that on one occasion he declined to express any opinion on a question of law which was put to him, excusing himself because he had been out of town for a fortnight, and had only just returned."

The case was argued on February 15 and 17 by Mr. Robson, Q.C., Mr. Salvesen (of the Scotch Bar), and the Hon. M. Macnaghten for the appellants; and Mr. Joseph Walton, Q.C., and Mr. Henry Aitken (of the Scotch Bar) for the respondent.

Judgment was delivered reversing the decision of the Court below.

The LORD CHANCELLOR.—In "*Miles v. Fletcher*" (1 Doug. 231a) Lord Mansfield said that the great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be certainly known. In this case a controversy has been raised which I had thought had long since been laid to rest. During the existence of a time policy, a ship covered by it has been struck by a squall and sunk, and it is contended that if the underwriters can raise her up again by an expenditure of their own, and that then when she is raised she can be repaired by the expenditure of less money than her total value, when thus raised they are only to be liable as for a partial loss. It seems to me that such a proposition would unsettle the law as between insurers and insured as it has been understood and acted upon for something like a century. I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again; and I think, in construing a contract now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk. It is, I think, a total misapplication of what has been found to be a convenient test to distinguish a total from a partial loss to apply it to a case where the vessel insured has gone to the bottom. The question is, What did the contract between the parties mean? No such case has arisen before, inasmuch as I think so bold a contention has never been made. The cases of capture and re-capture have sometimes given rise to somewhat difficult questions of fact rather than law, and I think their application to cases of loss by perils of the sea has occasionally given rise to confusion, but even in such cases it has always been held that the principle that the existence of the thing *in esse* is not conclusive against the loss being a total loss; and I think that now after all the discussion that these questions have received both insurer and insured must be taken to have understood the words

"total loss" in the business sense of those words. I am disposed here to adopt the language of Chief Justice Erle in "*Adams v. Mackenzie*" (13 C.B. N.S.), where a ship was insured in the peculiar form of "against total loss only." The learned Judge says:—"It has been urged on the part of the underwriters that they only intended to become answerable for one of two descriptions of total loss—namely, the actual total destruction of the subject matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, if they so intended they have failed to express their intention." And Mr. Justice Willes, with whom Mr. Justice Willes concurred, says:—"If the parties intended only to insure against the total and absolute physical destruction of the ship, they should have expressed themselves in different language." My view is that in the contemplation of both parties to this contract a total loss is incurred when the ship goes to the bottom. (See "*Irving v. Manning*," 1 H.L. Cases, 287.) In this particular case, for the reasons I have given, the familiar test which brings a constructive total loss into a partial loss I think is not applicable at all, but if it were the formula would have to be altered. It would no longer be, What would a prudent uninsured owner do? but, How much would an astute underwriter expend to turn a total into a partial loss? The change of circumstances which in our jurisprudence has been held to turn a total into a partial loss has arisen, certainly originally if not altogether, in respect of insurances against capture, where to my mind totally different considerations arise. A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and re-taken before any one knows of the loss, and as the contract of insurance is mainly a contract of indemnity one can see how the Courts would struggle against a large profit being made out of such a contract. But where the laws of other countries differ from ours in this respect I think it will be found that the difference arose from positive enactments and regulations apparently directed to avoid the solution of difficult and complicated questions of fact. The Scotch Judges have held, apparently, that the law of Scotland is the same as the law of England, and, as in mercantile and maritime law, unlike in this respect to some other parts of Scottish jurisprudence, the sources of the laws of both England and Scotland are the same. I am glad to think, in this respect, the learned Judges are right. It would be very inconvenient if, in such questions as arise in this case, the law were different. I think the judgment should be reversed with the usual consequences as to costs.

LORD WATSON, after stating the facts and discussing authorities, said,—It appears to have been held by the learned Judges in both Courts below that, there being no firmly established rule upon the point in Scotland, the decision of it ought to be in conformity with the law of England. One of the learned Judges observed:—"It has been stated recently, on high authority, that the law upon maritime questions is the same in Scotland as in England, and if this view, so broadly stated, is adopted, then we have nothing to do in this case beyond applying to it the rule which, I have said, is now settled in England. As matter of individual opinion I do not concur in that view." I do not think I am mistaken in supposing that the preceding passage refers to the recent decision of this House in "*Currie v. McKnight*" (13 *The Times Law Reports*, 53; 1897, A.C., 97; 66 *L.J.*, P.C., 19). All that was determined in that case was that, in maritime causes which exclusively belonged to the jurisdiction of the Admiralty Courts in both countries, the law applicable

was neither English nor Scotch, but British law, and, therefore, one and the same code. But the jurisdiction exercised by these Courts in the two countries has never, so far as I am aware, been precisely co-extensive. In Scotland the Admiral's jurisdiction, although cumulative with that of the Court of Session, extended to all questions arising in regard to policies of maritime insurance, and had also been extended, "by long possession," to the right of cognizance in bills of exchange and other mercantile questions which were in no sense maritime (*Ersk. Inst.*, B. I., Tit. III., sections 33 and 34). In England, on the other hand, policies of marine insurance were regarded simply as matters of mercantile contract, and actions brought upon them belonged to the jurisdiction, not of the Admiralty, but of the common law Courts. Accordingly, I do not think that "*Currie v. McKnight*" has any application to the first point raised by the appellants in answer to the respondent's plea of irrelevancy; and I see no reason to differ from the observations made by Lord Blackburn in the Scotch case of "*Shepherd v. Henderson*" (7 App. Cas., 71), to which Lord Trayner refers with approval. I may observe, however, that the findings of fact contained in the interlocutor appealed from, which in that case were binding upon the House, were not calculated to raise the question discussed in those observations by the noble and learned Lord, one of them being to the effect that, on the day the vessel was driven ashore, there was, and continued thereafter to be, a reasonable prospect of her being got off without greater expense than a prudent, uninsured owner would reasonably incur. In either view of the law that finding was sufficient to negative the claim made for a constructive total loss. I should have been unwilling to decide the first point without hearing an argument going beyond Scotch and English cases, and embracing the *rationes* which have governed the practice and decisions of other countries which have not adopted the English rule; but I am relieved from the necessity of considering and deciding it, having come to the conclusion that the second point advanced by the appellants is well founded in law. In considering the second I shall assume that the first point was rightly decided by the Courts below; and also that, if the Blaimore had been raised, after notice of abandonment and before the date of the action, by the operation of natural causes or by the action of neutral persons, without expense to the insured, the appellants would, according to English law, have been disabled from claiming under their policy for a total constructive loss, if it were shown that the value of the ship, when repaired, would have substantially exceeded the cost of repairing her. But the question still remains whether the gratuitous act of the underwriters, in raising the vessel at their own expense, leaving nothing but the cost of repairs to be borne by the insured, will, according to English law, have the effect of reducing a total to a partial loss and of relieving the underwriters from their contract liability. It might be that, in every case where the ship has been raised by causes or persons which entail no liability upon himself, a prudent uninsured owner would repair the vessel; but I have been unable to arrive at the conclusion that, in the circumstances which occur in this case, the consideration of what would be the action of a prudent owner, uninsured, affords the true test of the liability of the underwriters as for a total constructive loss. In my opinion that test is excluded by the contractual relations which exist between the insured and his insurers. Not one of the English authorities, so far as I understand them, goes near to the length of deciding that the insurers can avoid their liability as for a total constructive loss by their intervening gratuitously and

taking upon themselves part of the expenses which *prima facie* fall upon the assured and would otherwise have been taken into account in estimating whether there has been such a total loss. To admit an exception of that kind would be contrary to general law, and it is not, in my opinion, recommended by any principle of equity. The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil. The result of admitting the exception in this case would be that the underwriters, who would otherwise be bound to pay to the appellants the sum of £15,000, would escape from that obligation by making an expenditure of £8,000, which the contract did not oblige them to make or contemplate that they should make. It was strongly argued for the respondent that if the exception were admitted the appellants would be indemnified, and that, the contract being one of indemnity, their claims under it would be fully satisfied. The conclusive answer to that argument is, in my opinion, to be found in the circumstance that the indemnity which he proposes to give to the appellants is not that which they contracted to get. The underwriters had no larger right, and were under no greater obligation to raise the ship, than to pay for her repairs; and, on principle, if the exception were admitted, I do not see why they should not also have been permitted to avoid their responsibility for total loss by paying the repairing shipwrights' bill or by sending the assured a cheque for its amount. For these reasons I am of opinion that the interlocutors appealed from ought to be revised and the respondent's plea against the relevancy of the action repelled. I do not think that in the present shape of the record your Lordships are in a position to dispose of the action upon its merits. There must be a remit to the Second Division to give final judgment, after the disputed facts have been ascertained, either by proof or by mutual admission. I think the appellants ought to have their expenses in the Court of Session after the date of closing the record and their costs of this appeal.

LORD HERSHELL.—In this case the Lord Ordinary held that the pursuers' statements were irrelevant as founding a claim under the policy for a total loss, and therefore dismissed the action. To this interlocutor the second division adhered. The averments in the first three articles of the condescendence disclose the following facts:—The *Blairmore* was insured by time policies for the period from April 3 to June 3, 1896, for £15,000. During this period she was struck by a squall and sunk. The pursuers, having ascertained that the ship could not be raised and repaired except at a cost greatly exceeding her value when raised and repaired, gave notice of abandonment, which, however, the underwriters did not accept. Then follows this averment:—"The cost of raising and repairing said ship would be about £15,000, and her value after being raised and repaired would be about £9,600. The pursuers believe and aver that the underwriters actually expended a sum of £8,000 thereby in raising the vessel and bringing her into a place of safety." It is contended that these averments show that, although the notice of abandonment was properly given, there being at that time a constructive total loss, yet they also show that at the time the action was brought the loss was not total, because, if the cost of repairing the vessel, which was all that then had to be done by the assured, be alone regarded, it would be less than the value of the vessel when repaired. According to the laws of some foreign countries, whenever a notice of abandonment has been properly given the rights of the parties to the contract of insurance are regarded as fixed, and are unaffected by anything which may happen between that date and the time when legal proceedings

are commenced. In England a long course of decisions has established a different rule, notwithstanding the unfavourable criticism by Lord Eldon of some of the earlier ones. The decisions referred to have been nearly all pronounced in cases of loss by capture, where, the ship having been recaptured and being in good safety at the time when the action was brought, it was held that the loss was not total. After referring to authorities, the noble and learned Lord proceeded:—"I take it, then, that the general rule applicable is, according to the law of this country, that if in the interval between the notice of abandonment and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss. The question is whether a constructive total loss can be reduced to a partial loss by the expenditure on the part of the underwriters of so much of the cost necessary to enable the vessel again to take the sea as to leave what still needs to be expended for the purpose of putting the vessel into that condition less in amount than the value of the vessel when so repaired. In the present case the assurance is against partial as well as total loss; but the question must, I think, be answered in the same way, whether the policy covers total loss only or partial loss also. Could the underwriter of a policy against total loss escape liability, although there had been a constructive total loss, by doing part of the repairs? I cannot think so. A constructive total loss is as much a total loss within the meaning of a policy of insurance as an actual total loss. And in the case of a total loss by perils insured against, whether constructive or actual, the underwriter has agreed to pay the sum insured. Where such a liability has accrued the underwriter cannot, in my opinion, incur part of the expenditure required to make the ship fit to take the sea, and then insist that the loss has become a partial one only. The rule adopted in this country with reference to a change of circumstances between the time of notice of abandonment and the time when the action is brought has never been applied to a change, such as I have referred to, brought about by the underwriter; and I am not disposed to extend it to a case of this description. I think it would be unreasonable and would not give due effect to the contract between the parties. Although the Lord Ordinary dealt with the point I have been considering, it seems to have passed unnoticed in the Inner House, where it was apparently assumed that, if the law of Scotland was the same as that of England, the judgment must be adverse to the pursuers. The agreement appears mainly to have turned on the question whether the rule established in this country is the law of Scotland also. I think it right to say that, in my opinion, this question is quite open to discussion. It is certainly not concluded in a sense adverse to the pursuers' contention by any authority in the Scotch Courts, and in view of the fact that the English rule does not prevail generally in maritime countries, the reasons on which it is founded, and its reasonableness, will have to be considered if the question, what is the law of Scotland, should ever arise for decision. In the present case it is unnecessary to decide it, because, in my opinion, even if the law of Scotland be identical with that of England, the argument of the appellants must prevail. For the reasons I have given I agree in thinking that the judgment should be reversed.

LORD SHAND read a judgment concurring with the motion.

[Solicitors—Learoyd, James, and Mellor, for the appellants; William A. Crump and Son, for the respondent.]

House of Lords (Lord Halsbury, L.C., } 1898.
 Lords Watson, Herschell, and Shand) } July 11.
 GLASGOW CORPORATION V. GLASGOW TRAMWAY AND
 OMNIBUS COMPANY.*

Contract—Agreement—Construction—Lease of
 tramway from corporation—Agreement to keep
 corporation free from all “expenses”—Liabi-
 lity for rates and taxes.

This was an appeal from an interlocutor of the First Division of the Court of Session dated March 14, 1897, in two conjoint actions—the one instituted by the tramway company against the corporation and the other by the corporation against the tramway company. The arguments were heard on February 28 and March 1 last. The question was whether the appellants were bound to relieve the respondents of the landlords’ or owners’ assessments, rates and taxes, local or Imperial, paid by the respondents in respect of the tramways leased by the appellants to the respondents during the period from July 1, 1871, to July, 1894, to the extent and in the manner described by Lord Watson in his judgment. The facts are fully stated by Lord Watson.

Mr. Haldane, Q.C., Mr. Cripps, Q.C., and Mr. Renton were for the appellants; Mr. J. B. Balfour, Q.C. (of the Scotch Bar), and Mr. W. Campbell for the respondents.

Judgment was given allowing the appeal.

THE LORD CHANCELLOR.—In this case the whole question turns upon the true construction of the contract between the appellant corporation and the Glasgow Tramway Company. The corporation agreed to construct certain tramways, and leased the undertaking to the respondent company. It is clear that but for the stipulation in the agreement the respondent company would have had a right to claim indemnity against the corporation in respect of owners’ assessment, rates and taxes, whether local or Imperial. But the answer to that claim is that the respondents had undertaken to bear those burdens themselves, and the sole question is, as I have said, the construction of the particular stipulation which has thus been made. Now, that stipulation is in these terms:—“And the company shall pay to the corporation the expenses of borrowing, management, &c.” and it proceeds thus:—“This provision shall be so construed as to keep the corporation free from all expenses whatever in connexion with the said tramways.” That the rates and taxes levied upon the tramways as such and the expenses involved in making payment in respect of them are expenses within the strictest meaning of those words appear to me to be beyond doubt, and the words “free from all expenses whatever in connexion with the said tramways” appear to me to be so wide in their application that I should have thought it impossible to qualify or cut them down by their being associated with other words, on the principle of their being *ejusdem generis* with the previous words enumerated. “Expense,” I presume, is itself a very general word, but the construction which limits that word would be strange indeed which should strike out the word “all” and the word “whatever” from the sentence. Neither does it appear to me very intelligible why where the assessment is upon the tramway itself it is not an expense in connexion with the tramway. For these reasons I am of opinion that the judgment of the Court of Session was erroneous, and I think it ought to be reversed, and I move your Lordships accordingly.

LORD WATSON.—The appellant corporation, having obtained statutory authority to construct tramways upon the streets of the city of Glasgow, entered in

May, 1871, into an agreement with the promoters of the respondent company, which was then in course of formation, by which the corporation undertook, upon the terms and conditions therein specified, to construct certain tramways and thereafter to grant a lease of the said tramways to the company for the period of 23 years. The corporation proceeded to construct the tramways, and effect was given to an agreement by embodying its stipulations in a contract of lease between the parties, which was duly executed by the corporation and by the company upon the 16th and 17th days of November in the year 1871. By the lease the corporation demised to the company “the sole right to use, for the sole purposes of the Glasgow Street Tramways Act, 1870, carriages with flange wheels or other wheels specially adapted to run on a grooved rail on the whole tramways authorized to be formed by the said Act, and that for the space of 23 years from and after the 1st day of July, 1871.” The tenure of the respondent company being for a period exceeding 21 years the assessor, following the provisions of section 6 of the Valuation Act, 1854, entered their names in the current valuation rolls as “proprietors,” with the result that the company became primarily liable to pay, and regularly paid, the assessments yearly levied in respect of the tramways, whether for Imperial or for local purposes, during the whole term of the lease, which expired in July, 1894. Section 6 provides that a tenant whose name has been so entered “shall be entitled to relief from the actual proprietor thereof and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid upon the valuation of such lands and heritages made under this Act and payable by such lessee as proprietor in the sense of this Act as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation.” During the currency of their lease the company, although they intimated a claim against the corporation, did not make any deduction from the rents which they paid to the corporation in compliance with the conditions of the lease. This action was brought in January, 1896, and the first and the only conclusion of the summons to which the present appeal relates is for payment by the corporation to the company of the sum of £14,246 5s. 0½d. sterling, or of such other sum as may be ascertained to be the amount of owners’ assessment, rates, and taxes, whether local or Imperial, paid by the company for the period between July 1, 1871, and July 1, 1894, in respect of the tramways leased to them or the proportion of such payments of which the corporation were bound to relieve them. In defence to that conclusion the corporation pleaded—(1) that by the conditions of the lease the respondent company were bound to free and relieve them of those assessments; (2) that upon a sound construction of section 6 of the Valuation Act the only right of recovery given to the company as tenants was by deducting the amount of such assessment from the rent payable by them to the corporation under the lease, a remedy which the company had failed to pursue and had therefore lost; and (3) that, assuming the company to have had, under section 6 of the Act of 1854, the alternative remedy of recovering these assessments by legal process, their claim was, in the circumstances of the case, barred by *taciturnity* and *mora*. If any one of these three pleas in defence be sustained the claims for relief made by the company must necessarily fail. After a proof had been led the Lord Ordinary (Kyllachy) on December 2, 1896, found that the corporation were bound to relieve the company of the owners’ assessments, rates, and taxes, whether local or Imperial, paid by them in respect of the tramways during the period from July 1, 1871, to July 1, 1894.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

He made various subordinate findings bearing upon the proportion of assessments chargeable to the corporation, and, seeing that further inquiry was necessary upon one point, he directed the cause to be enrolled for further procedure. His interlocutor was on March 1, 1897, affirmed *simpliciter* by the First Division of the Court. The first plea urged in defence by the corporation depends upon the just construction of a single sentence in the second article of the lease of November, 1871. That clause enumerates various payments which are to be made by the lessees to the lessors, and then proceeds thus:—"And the company shall also pay to the corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connexion with the said tramways." The question, therefore, comes to be whether the proportion of assessments payable by the corporation as owners of the tramways under section 6 of the Valuation Act are expenses of the corporation "in connexion with the said tramways" within the meaning of the second article, and are therefore within the respondent company's obligation of indemnity. In my opinion, the conditions of the second article which I have just quoted ought to be construed in connexion with the whole stipulations of the lease in so far as these relate to the considerations passing between the corporation and the company. Viewed in that light, the general scheme of the lease is that the obligation of constructing the tramways was to rest upon the corporation, it being in the contemplation of both parties that the corporation was to raise money for that purpose by borrowing upon its own credit. On the other hand, the company (article 6) undertook the whole cost of maintenance and repair during the period of their tenure; they (article 3) agreed to pay half-yearly 3 per cent. per annum on the gross sum from time to time expended by the corporation on capital account, which percentages were to form a sinking fund to be applied "ultimately" by the corporation towards reduction or extinction of the cost of constructing the tramways; by the first part of article 2 the company agreed to pay half-yearly during the term of their lease the whole interest falling due upon the money from time to time borrowed by the corporation on capital account; by the second part of the same article, they agreed to pay interest on the expenses incurred by the corporation and by the board of police in obtaining statutory power of construction in the year 1870, or incident to the execution of the lease, it being declared that the obligation of the company for the payment of such interest was not to be affected by any payment made to the corporation through the medium of the sinking fund. The substance of the scheme, as embodied in these stipulations, appears to me to have been that no pecuniary obligation was to attach to the corporation beyond that of borrowing funds in order to pay for the construction of the tramways; and that the company, during the currency of their right, were to relieve the corporation of all other outlays connected with or incident to the performance of the obligation to construct, or incident to their position as proprietors of that which they had constructed. I have had no difficulty in coming to the conclusion that payment of assessments, whether Imperial or local, levied from the owner in respect of a tramway or other erection *in solo*, is an expense connected with such tramway or erection. But for the construction of the tramway no such liability would have arisen. I am, for these reasons, of opinion that the first plea is well founded, and that the company are suing for a sum of which they were bound by their lease to relieve the corporation. In that view, it is neither expedient nor necessary to express any opinion with regard to the other pleas maintained in defence

by the corporation. I think that, in so far as they relate to the first conclusion of the summons, the interlocutors of December 2, 1896, and March 14, 1897, ought to be reversed, and the corporation assailed from that conclusion. I also think that the interlocutors of March 14 and March 20, 1897, in so far as they relate to expenses of process, ought to be reversed; and that the appellant corporation ought to have the expenses incurred by them before the Court of Session and their costs of this appeal.

LORD HERSCHELL and LORD SHAND concurred.

[Solicitors—Martin and Leslie, for the appellants; Grahames, Currey, and Spens, for the respondents.]

House of Lords (Lord Halsbury, L.C.,
Lords Watson, Herschell, Macnaghten,
and Morris) } 1898.
July 11.

INGLIS V. ROBERTSON AND BAXTER.*

Factors Act, 1890—Pledge of documents of title
—"Mercantile agent."

Held, on the facts, that there had been no pledge of documents of title to goods by a "mercantile agent" so as to amount to a pledge of the goods themselves within the meaning of the Factors Act, 1890, sec. 3.

This was an appeal from the Second Division of the Court of Session in Scotland, and was of a remarkable if not of a unique character, inasmuch as the whole strength of the Scottish Bench met for the decision of the question involved. It was also in controversy whether on the important points at issue the laws of Scotland and England were identical, and, if different, which should prevail. Twelve out of 13 of the Scotch Judges were in favour of the respondents, but Lord Young dissented, and held that the law in dispute was that of England. The arguments were heard on March 15 and 17. The facts are fully stated in the judgments.

Mr. Pyke, Q.C., Mr. E. Morten, and Mr. Wootton were for the appellant; Mr. Upjohn, Q.C., Mr. Younger (of the Scotch Bar), and Mr. T. T. Robertson, for the respondents, were not heard.

The LORD CHANCELLOR.—In this case the question to be determined is whether a certain parcel of whisky, or rather the sum of £1,000 10s. 6d., representing its value, belongs to the respondents in this appeal, and it cannot be doubted that unless the Factors Act, 1890 (53 and 54 Vict., c. 40), extending the English Factors Act, 1889 (52 and 53 Vict., c. 45), is in the way of the respondents, who arrested the whisky in the hands of the Clyde Bonding Company, the creditors (that is to say, the respondents, who have arrested the whisky) are entitled to the sum in question. The section in respect of which the question arises is the third section, which enacts that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." It can hardly be denied that if the section is applicable to this case the pledging of the documents of title would be for all purposes as valid to constitute an actual right in the goods themselves as if the goods themselves had been physically handed over to the pledgee. But the only point in this case seems to me to depend upon whether that section is applicable to the facts in this case, and that in turn depends upon whether the person pledging comes within that part of the statute which the Legislature has separated from the other parts of the statute as applicable to "dispositions by mercantile agents." The Act, which is a Consolidation Act and also an amending Act, is separated into parts. Section 1 is "preliminary,"

and the definition of a mercantile agent is "a mercantile agent shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." From the second section to the seventh inclusive the Legislature has enacted what shall be the law in respect of "dispositions by mercantile agents." From the eighth to the tenth "dispositions by sellers and buyers of goods," and the 11th to the 17th are described as "supplementary." I cannot doubt that each of the sections included in this separate portion of the statute must be read as only applicable to the case of persons indicated by that separate part of the statute, and, if so, it seems to me that the case is free from doubt, since, under the circumstances of this case, there was no disposition by a mercantile agent. This seems to me to dispose of the case, though, indeed, it was suggested that under the ninth section (which comes within the part of the statute applicable to sellers and buyers of goods) it might be contended here that these goods were obtained with the consent of the seller and under the conditions prescribed by that section. But it appears to me the facts raise no such question. I have referred to the English Act exclusively in what I have said, simply because the Act has been extended in its operation to Scotland subject to certain provisions not relevant to any question raised in this case. If the general law of Scotland be different from that of England in respect of pledges—though I do not say it is—the Act certainly did not purport, nor do I think it did in fact alter in any other respect than that specially enacted the law of Scotland as it stood at the passing of the Act. I am, therefore, of opinion that this appeal should be dismissed, with costs, and I move your Lordships accordingly.

LORD WATSON, in the course of his judgment, said,—Walter C. Goldsmith, a wine merchant in London, purchased, in December, 1893, from the respondents, Robertson and Baxter, who are wine and spirit merchants in Glasgow, a quantity equal to 600 hogsheads of blended Scotch whisky deliverable during the year 1894. The whisky was stored in a bonded warehouse at Glasgow. From the productions made by the appellant in this process, it appears that Goldsmith, after his purchase, had the whisky transferred to his name in the books of the Clyde Bonding Company, and obtained from them delivery orders in these or similar terms:—"Warrant for ten hogsheads whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon." In December, 1894, Goldsmith obtained a loan of £3,000 from the appellant, an English merchant, to whom he delivered a letter purporting to hypothecate 180 hogsheads and 101 quarter casks of Scotch whisky, as per schedule annexed, in security for the loan, with interest at £7 per cent. per annum, and containing a power of sale. The whisky thus hypothecated was part of the quantity which had been purchased from the respondents by Goldsmith, and was still lying in his name in the bonded warehouse at Glasgow. Along with the letter Goldsmith endorsed and handed to the appellant the warrants which he held for delivery of the whisky. The appellant did not intimate the right and interest which he had thus acquired in the whisky to the keepers of the bonded warehouse. Goldsmith having failed to make payment to the respondents, Robertson and Baxter, of the sum of £1,060 10s. 6d., being the balance of price then remaining due to them, they, on February 11, 1895, arrested the whisky in the hands of the Clyde Bonding Company, in order to found jurisdiction against their debtor; and then raised an action against him before the Court of Session, upon the

dependence of which they again arrested the whisky, on February 18, 1895. Under an arrangement made between the respondents and Alfred Cotton Harper, chartered accountant in London, as trustee administering the estate and affairs of Walter C. Goldsmith, the whisky was sold in April, 1895, upon consignment of the sum of £1,000 in the British Linen Company's Bank, Edinburgh, as a *surrogatum* for the goods sold, subject to the arrestments and claims of all parties who had an interest in the whisky. The present action of multiplepoinding was thereafter brought by the holders of the consigned fund, and two competing claims were lodged, which have been keenly contested and have led to this appeal. The respondents claim the fund in *medio* not as having a right of retention or other interest as unpaid sellers of the goods, but as personal creditors of Goldsmith, in whose name as owner the goods were at the dates of their arrestments held in Scotland by the actual custodiers, the Clyde Bonding Company. The appellant, on the other hand, claims an interest in the fund in *medio* preferable to that of the respondents, upon the ground that, prior to the date of their arrestments, he had become pledgee and endorsee of the delivery orders which constituted the documents of title to the goods, within the meaning of the Factors Act, 1889. He maintains that the legal effect of such a pledge, both according to the law of England, and according to the law of Scotland as altered by the provisions of the Factors (Scotland) Act, 1890, was to vest the property of the goods in him. I can see no reason to doubt that, by Scotch law as well as English, the endorsement and handing over of delivery orders in security of a loan, along with a letter professing to hypothecate the goods themselves, is sufficient in law, and according to mercantile practice, to constitute a pledge of the documents of title, whatever may be the value and effect of the right so constituted. In my opinion, the right so created, whether in England or in Scotland, will give the pledgee a right to retain the *ipsa corpora* of the documents of title until his advance is repaid. The crucial question in this case is whether the right goes further, and vests in the pledgee of the documents, not a *jus ad rem* merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodian for Goldsmith as the true owner. The state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scotch law, the effect of vesting the property of the whisky, or, in other words, a *jus in re*, in the pledgee. It was not disputed by the appellant's counsel, and it is hardly necessary to repeat that, by the common law of Scotland, the indorsement and hypothecation of delivery orders, although it may give the pledgee a right to retain the documents, does not give him any real right in the goods which they represent. He can only attain to that right by presenting the delivery orders to the custodian by whom they were granted, and obtaining delivery of the goods from him, or by making such intimation of his right to the custodian as will make it the legal duty of the latter to hold the goods for him. His right, which, in so far as it relates to the goods, is in the nature of a *jus ad rem*, will be defeated if, before he has either obtained delivery or given such intimation, the goods are validly attached in the hands of the custodian by a creditor of the person for whom the custodian holds them. It was argued, however, that the common law of Scotland has been materially altered by the provisions of the Factors Act, 1889, their effect being that a pledge of

the documents of title is by itself sufficient to carry a real right to the goods; and that the pledgee of the documents, from the moment when his right is completed by indorsation and delivery, is in the same position as if he had been pledgee of the goods and had obtained possession of them. The statute of 1889 is an English Act, which consolidates and repeals the previous Factors Acts, from 4 Geo. IV., cap. 83 to 40, and 41 Vict., cap. 39. But, by the Factors (Scotland) Act, 1890, the whole provisions of the English statute of 1889 are extended to Scotland, and must, therefore, be construed as if they had originally been made applicable to that country. Two clauses of the Act of 1889 were founded on by the appellant. The first of these is section 3, which enacts that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." So far as it applies the language of that clause is unambiguous. It provides that, to that extent, a pledge of the documents of title shall, although in point of fact it is not so, be nevertheless regarded in law as equivalent to a pledge of the goods." If the enactment had been embodied in a statute, which contemplated an alteration of the general law with regard to contracts of pledge in Scotland, I should have had little difficulty in holding that its effect would have been to make a pledge of the documents of title, in all cases, equivalent to a completed pledge of the goods themselves. But I am unable to come to the conclusion that the clause was meant to be, or is, of general application. It is one of a group of clauses which are collected under the statutory heading "Dispositions by Mercantile Agents"; and an examination of the context of these clauses shows, conclusively in my opinion, that the enactments of section 3 were merely intended to define the full effect of a pledge of the documents of title, made by a mercantile agent, under and by virtue of one or other of the subsections of the preceding clause (section 2). Accordingly, section 3 has, in my apprehension, no application to the case of a pledge of documents of title by one who was in the position of Goldsmith, or by any other person who is not a mercantile agent within the meaning of the Act of 1889. The other clause founded upon by the appellant was section 9, one of a group of clauses which occur under the statutory heading "Dispositions by Sellers or Buyers of Goods." The main, if not, the sole object of these clauses appears to be this—to protect the purchaser or pledgee of documents of title deriving right from one who is lawfully in possession of them against a claim of retention for unpaid price, or a right of stoppage in transitu, by the original seller, in cases where the purchaser or pledgee has had no notice of such claim or right. Goldsmith, from whom the appellant derived his right as pledgee to the documents of title representing the whisky in question, was not a pledgor within the meaning of section 9, who must be a person who has obtained the documents of title either from his seller or with consent of his seller. Goldsmith did not obtain the documents of title which he pledged to the appellant from the respondents, who were his sellers, or with their consent. He got the documents in his own right, and in his own name, as owner of the whisky directly from the warehousemen, after the goods had been transferred to his name in the warehouse books. I am therefore of opinion that the interlocutor appealed from ought to be affirmed, with costs.

LORD HERSCHELL, after stating the facts, said,—I think that in the present case there was a pledge of documents of title to goods. They were endorsed and handed to the appellant as security for an advance, and he was clearly entitled to hold them until the advance had been repaid. This appears to me to have constituted a pledge of the documents, and I fail to see how

it was any the less a pledge because the agreement of December 18 was at the same time executed by Goldsmith. But it is not necessary in the view I take to express an opinion upon the point so much discussed in the judgments in the Court of Session, whether the effect of the enactment is to put the pledgee of the documents of title in the same position as if he had received possession of the goods to which the documents relate. I think the enactment has no application to the present case, inasmuch as the pledge was not a disposition by a mercantile agent, and in my opinion it is to such dispositions only that the section applies. It is true that it is general in its terms, but it is one of a group of sections headed, "Dispositions by mercantile agents." The Act is divided into parts. The first, headed "Preliminary," consists of a definition clause. The last part, headed "Supplemental," contains provisions as to the mode of transfer "for the purposes of this Act," and certain savings. The other two parts are headed respectively "Dispositions by mercantile agents" and "Dispositions by buyers and sellers of goods." These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connexion with them and interpreted by the light of them. It appears to me that the Legislature has clearly indicated the intention that the provisions of section 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents. The only other section relied on by the appellant is the ninth. I think this section also is inapplicable to the case before your Lordships. I am not satisfied, as at present advised, that the section applies in any case where no right to the goods or the documents of title remains in the seller who has parted with possession of them. But I do not decide this point. The possession of the documents of title which were pledged was obtained from the warehouse-keeper by the appellant by virtue of his ownership of the goods. They had already been transferred into his name by the warehouse-keeper, and were held for him before the warrants were delivered. I think in these circumstances it cannot properly be said that he obtained possession of them "with the consent of the seller." For these reasons I think the judgment appealed from should be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN and LORD MORRIS concurred.
[Solicitors—Irvine and Borrowman, for the appellant;
F. W. Reynolds, for the respondents.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Herschell, Macnaghten, Morris, } July 12.
and Shand)

LORD WOLVERTON V. ATTORNEY-GENERAL.*

Revenue—Succession Duty—Annuity—Interest created by family settlement—"Succession," what is—Succession Duty Act, 1853 (16 and 17 Vict., c. 51), secs. 2, 15, 17, 18.

Decision of the Court of Appeal (13 *The Times* L.R., 86, and [1897] 1 Q.B., 231) reversed.

Their Lordships gave judgment in this important revenue appeal under the Succession Duty Act, 1853, on which the arguments were heard on November 18, 22, 23, and 25 last. The case is reported below, 13 *The Times* Law Reports, 86; [1897] 1 Q.B., 231; 66 L.J., Q.B., 202. The facts are fully stated in their Lordships' judgments, which reverse the decision of the Court of Appeal (Lord Esher, Lord Justice Lopes, and Lord Justice Rigby).

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Mr. Cozens-Hardy, Q.C., Mr. Swinfen Eady, Q.C., and Mr. Danckwerts were for the appellant; the Attorney-General, the Solicitor-General, and Mr. Vaughan Hawkins for the respondent.

The LORD CHANCELLOR.—George Grenfell, second Baron Wolverton, died on November 6, 1887. Under the provisions of his will, and in the events which happened, five nieces (described as the "co-heiresses") became entitled to his residuary estate upon the death of Lady Wolverton. That lady died on January 4, 1894, and upon her death legacy duty at the rate of 3 per cent. per annum was paid upon the whole residue of the testator's estate. On December 31, 1888, a deed was executed by, among others, the five nieces, the late Lady Wolverton, and the present Lord Wolverton. By that deed the present Lord Wolverton, the appellant here, became entitled to an annuity of £15,000, and the question here is whether he is liable to pay succession duty upon this annuity. The claim of the Crown is based upon the annuity being liable as upon a succession coming to the appellant from the late Lady Wolverton, or the five nieces, or from both, and the sum of money in question is said to come within the express language of section 2 of the Succession Duty Act, 1853. The words of the section are as follows:—
 "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Before dealing with the particular question now before your Lordships it will not be inappropriate to say a word or two upon the apparent scope and object of the section I have quoted. What it points to is the disposition of property by reason whereof a person becomes beneficially entitled upon the death of any person. The disposition may be past or future; it may take effect immediately or after an interval; it may be either certainly or contingently; it may be either originally or by way of substitutive limitation; but with all these safeguards against evasion it must be a disposition by reason whereof a person has become beneficially entitled upon the death of some person. If a person were to confer by a deed of gift *inter vivos* his own existing property it would seem impossible to contend that this is a new succession. It is simply a transfer *inter vivos* of one person's property to another, and is not within the scope of the Act at all. Whether the succession be operated by disposition or devolution it must be a succession upon death. Now, I am unable to understand how the annuity created under the deed to which I have referred is a succession at all. If it is a gift *inter vivos* deriving no force from the death of any one I do not find any words in the section which make it chargeable with duty. If so, a voluntary gift by him, or any part of it during his own life, would equally make such gift chargeable with duty, and the whole nature of the legislation aimed at—succession upon death—would be altered into taxation upon transfer of any property by gifts *inter vivos*, and

this to any extent of remoteness, so that each donee, though *inter vivos*, would become in turn the predecessor within the meaning of the section to each subsequent donee of the same property, although no new death had intervened at all, but simply a change of proprietorship. It is obvious to ask in this case whence it is that Lord Wolverton's interest in the annuity is derived. The Crown contends that it is derived from the nieces, or from Lady Wolverton, or from both. Let us take them separately. Suppose these ladies had waited to make the deed in question till the death of Lady Wolverton and had thus become entitled in possession to the whole of the late Lord Wolverton's residuary estate, would they then have been entitled to hand over all or a part of what had become absolutely their own? The element of succession upon death would be entirely wanting, and though the word "succession" has a technical definition in the Act the whole scope and meaning of the Act points to a distinction between alienation between living persons and a succession which death has opened to a successor. It seems to me that if this case can be maintained then if A inherits and pays his succession duty every donee from A. down to Z. must pay it also. Such a tax would be both unreasonable in itself and impossible of collection. The succession to property upon a death is one thing; the free gift *inter vivos* is a totally different thing. I am aware that the Crown repudiates this view, but it is not permissible to repudiate the logical conclusion of a contention by saying that the Crown would not insist upon such a right. It will not do to throw over consequences which may reduce the argument to an absurdity. The question here is the true construction of the Act. I am unable to deal with it because I am afraid I do not understand the suggestion of one succession being substituted for another, or how in this case it would arise. The present Lord Wolverton got nothing upon the death either of the second Lord Wolverton or by the death of Lady Wolverton. The utmost that can be said is that upon the occurrence of the death of Lady Wolverton the present Lord Wolverton's donors obtained the power to render effectual a gift which they had *inter vivos* agreed to give him before the death took place. "Succession" in the Act means not the act of succeeding, but property chargeable with duty under the Act, and, as Baron Bramwell pointed out in "*Re Peyton*" (7 H. and N., 296), property may escape the tax for all time by always passing *inter vivos*. I am of opinion that the annuity given by the deed of December 31, 1888, is not within section 2 of the Act at all. Lord Wolverton certainly obtained nothing by Lady Wolverton's death. She dealt with her own life interest in the property during her life. I am not, of course, suggesting that the transfer *inter vivos* of property the right to which arises upon the death can escape the duty by its being transferred to a person other than the original successor. The succession once created the duty must be paid for it, but I can find no warrant in the statute for a new succession duty being leviable upon the same property or money where no new death has created the right to such succession. I have hitherto dealt, and only dealt, with the second section itself. It is that section which imposes the tax. But the 15th section, which is supplementary to it, to my mind places the matter beyond all possibility of doubt. The framers of the Act contemplated the case of the original person intended to succeed under the disposition or devolution spoken of in section 2 transferring the interest to some other person, and I think the short effect of that part of section 15 with which we are dealing is that the person to whom such an interest has been transferred shall stand in the shoes of the person originally entitled and shall be chargeable with duty at the same time and at the same rate as the person originally

entitled would have been chargeable if the interest had not been so transferred. The succession to the sum of money which created the annuity of £15,000 was a succession rendering the successor liable to the tax, but the "successor" were the five nieces, and undoubtedly they would be liable to the tax if they had not already paid it in a different form. But they had paid it in the form of legacy duty, and the Succession Duty Act enacts that any one who is charged with the duties on legacies shall not also be charged in respect of the same acquisition of property under the Succession Duty Act. I do not think it would be proper to rely upon the fact that the legacy duty was charged if it were charged erroneously—that could not estop the Crown in arguing what was the true construction of the Act. But I think it was charged—properly—rightly. Looking at the scheme of the Act and the application of the second, 15th, and 18th sections as applied to the facts in the present case, I confess I am unable to appreciate the difficulties which have been supposed to surround it. It is not very intelligible to me what is intended by the argument relied on, apparently, so much in the Court below as to whether the annuity granted to Lord Wolverton was one annuity or two annuities. If (what is the only intelligible meaning that I can attribute to these phrases) it is meant that the sources from which the annuity given to Lord Wolverton are two different sources that is quite true, but what relevancy has it to the question under debate? Lady Wolverton could and did only affect her own life estate. On her death nothing was left to succeed to. The co-heiresses by the annuity to Lord Wolverton gave nothing to which a title accrued by any one's death, and I am unable to see, therefore, what other source from which the annuity is derived has to do with this question. Nor do I see what relation the mode in which people dispose *inter vivos* of what they have got already can affect the question of what is only payable upon a succession—which by the hypothesis is not a new succession, but a disposition of property obtained under an old succession upon which duty has been paid already. It seems to be assumed without explanation—at least so far as I can understand—that there is a new succession, and, if there were a new succession, no doubt the consequence would follow. But the only point being whether there is a new succession or not that appears in the argument to be assumed, and then an elaborate explanation is given of the consequences that must follow from that succession. For the reasons, however, I have given I think there is no new succession; and, if there is not, it is to my mind perfectly immaterial what, in fact, is done with the property to which a donee had already succeeded. As to the point upon the 17th section, I quite concur with the Court of Appeal that the argument founded upon that section is untenable. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed with the usual result as to costs, and I move your Lordships accordingly.

LORD HERSCHELL, after stating the facts, said in the course of his judgment:—I am unable to find in the Act any warrant for the view that a succession once created can by the act of the successor cease to exist, and another succession be substituted for it. The words of section 10 are precise, "There shall be levied and paid to her Majesty in respect of every such succession as aforesaid" the following duties; and these are made dependent on the relationship of the predecessor and successor. This provision operates, in my opinion, as soon as the disposition is made by which a "succession" is conferred. Moreover, "succession" denotes by Clause 1 any property chargeable with duty under the Act. No doubt the time of payment is fixed by section 20, but this is quite a different thing from the obliga-

tion to pay. The time of payment is to be when the successor "or any person in his right or on his behalf" shall become entitled in possession to his succession. This contemplates that at the time the succession falls in some person in right of the successor, and not the successor himself, may be entitled to the possession. The original successor is none the less called the successor. I have not forgotten the argument of the Solicitor-General that an alienee for value does not become a new successor although a gratuitous alienee does, and that the language I have alluded to is thus sufficiently satisfied. I shall deal with this argument when I come to consider the 15th section of the Act. It does not touch the point I am now concerned with, that section 20, to say the least, affords no support to the argument that one on whom a succession has been conferred can destroy it and the obligation to pay the duty which was attached to it by alienating it. And when we come to section 44, which provides who are to be "personally accountable" to her Majesty "besides the successor," amongst those named are "every person in whom" any property subject to such duty "shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession." Here again there is nothing to suggest that a person who has once been a successor has ceased to be so if prior to the time of the succession becoming an interest in possession he has alienated it. It was argued that the provisions of section 21, relating to the mode of assessment of the duty, in the case of real estate, would hardly be workable if in those provisions the word "successor" were held to refer to the original successor and not to his alienee. I think the application of this section may give rise to difficulty in certain cases. But it is to be observed that it does not determine either what is to be charged with the duty, when it attaches or becomes payable, or what is to be its rate. It is merely a rule for ascertaining the amount. And the difficulty is not got rid of by adopting the argument of the Crown, for it is just as great in the case of an alienation for a money consideration, which it is admitted does not make the alienee a new successor, as in the case of a gratuitous alienation. I am not surprised that the notion that the gratuitous alienation of a succession before the time for payment of the duty arrives creates a new succession ousting the original one and becoming substituted for it finds no countenance in the provisions of the Act. In the present case the contention of the Crown operates in favour of the revenue and increases the amount of the tax, but in many, and perhaps the majority of cases, it would have precisely the contrary effect. It would be strange if a person in whom a succession had been created by a stranger in blood, and in respect of which therefore a duty of 10 per cent. would be payable, should be able by a gratuitous alienation to his son before the death occurred to reduce the duty payable to 1 per cent. It seems to me inconsistent with the entire scheme of the Act that, when once a succession has been created and the liability to duty has attached, a mere voluntary assignment of the right vested in the successor by the disposition, or any part of it, should alter the succession duty and make another, and it may be a lower, duty payable at the time when the succession falls into possession. Having arrived then at the conclusion that duty was payable at the same rate and time as if the co-heiresses had made no alienation, the only question which remains is whether the payment of legacy duty at 3 per cent. on the entire residuary estate of the testator renders the duty of 3 per cent., which would otherwise have been payable on the succession in question, no longer payable. This depends on the concluding provision of section 18. It enacts that "no person charged with

the duties on legacies and shares of personal estate under the Legacy Duty Acts shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property." It is clear that the co-heiresses could not have been called on to pay any further duty on the property which they assigned to the appellant. Having paid the legacy duty, no succession duty would have been payable by them at the time of Lady Wolverton's death or any other time. If I am right in the view which I have expressed that the alienation did not create a new succession, it seems to me to follow that the Crown cannot be entitled both to legacy and succession duty in respect of the acquisition of the same property, on the same death, whether by the successor or his assignee. I think any other conclusion would be unreasonable, and contrary to the manifest intention of the enactment. For the reasons I have given I think the judgment ought to be reversed and judgment entered for the defendants, with costs.

LORD MACNAGHTEN.—"The Act," it has been observed, "is a difficult Act, and the *dicta* are not less difficult to consider than the Act itself." So said a distinguished Judge speaking of the Succession Duty Act, 1853. I cannot help thinking that there is a good deal of truth in that saying and just a touch of warning, which the author of the observation himself might sometimes perhaps, if I may venture to say so, have kept in view without impropriety. Happily the provisions of the Act bearing upon the question now before the House do not present any very great difficulty, and even the *dicta* are less embarrassing than usual. His Lordship then stated the facts, and proceeded:—"The question depends simply on the effect of two sections of the Succession Duty Act, the 15th and the 18th. Section 15 enacts that 'where . . . any succession shall before the successor shall have become entitled thereto, or to the income thereof in possession have become vested by alienation or by any title not conferring a new succession in any other person then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created.' It seems to me that the case which your Lordships have before you is precisely the case contemplated in the 15th section of the Act. I do not think that the transaction in respect of which the Commissioners are now claiming succession duty could be described more accurately than in the very words of that section. The succession of the co-heiresses, that is to say, the residuary estate of the testator to which, at the date of the deed of arrangement, the co-heiresses were contingently entitled, and which was chargeable with duty on the death of the widow, became to the extent of £15,000 per annum vested by alienation in the appellant as the holder of the barony before the co-heiresses became entitled thereto in possession; and, therefore, if the 15th section had stood alone, the duty payable in respect thereof to the extent of the annuity would have had to be paid at the same rate and time as the same would have been payable if the deed of arrangement had not been executed, and no such alienation had been made. But then the provision at the end of the 15th section comes in, which enacts that no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by the Succession Duty Act in respect of the same acquisition of the same property. Now, if the alienation in question had not been made, and if the whole of the testator's residuary estate had come to the co-heiresses, they could not have been charged with succession duty on any part of their succession. The charge for succession duty would have been cleared by

the payment of legacy duty. It follows, therefore, from the combined operation of the 15th and 18th sections, that no succession duty can now be claimed in respect of the annuity of £15,000 payable to the appellant as from the widow's death out of the income of the testator's residuary estate. Speaking for myself, I hardly think it necessary to say anything more. And, indeed, I should not have supposed the question open to argument if it had not been argued so strenuously on the part of the Crown. However, as the claim for duty has been made, and made with success in both the Courts below, it would scarcely be respectful to omit all reference to the judgments under review. In the Queen's Bench the ground of decision, which I believe commends itself to your Lordships, though argued, was not even noticed in the judgment of the Court. It was supposed by the Court, I do not know why, that the defence rested on two grounds, and two grounds only. One was that the annuity, which became payable after the widow's death out of the succession of the co-heiresses, was the same annuity which was payable during her lifetime out of the income of the bank shares, and that in fact there was only one annuity. The other was that the annuity payable after the widow's death was payable under a contract for valuable consideration in money, or money's worth, within the meaning of section 17. Both those grounds were plainly untenable, and both were properly rejected by the Court of Queen's Bench. In the Court of Appeal the same arguments were repeated. They met with much the same fate. And the real ground of defence fared little better there than it did in the Queen's Bench. It suffered I think from being found in bad company. All the learned Judges of the Court of Appeal say that Lord Wolverton's annuity was "a new succession," because it was not a continuation of the old annuity, but came into existence for the first time at the widow's death. That, however, was not the point. The point was that the annuity to which Lord Wolverton became entitled after the widow's death was carved out of the succession of the co-heiresses, and was merely an alienation of part of their succession. I think the appeal should be allowed with costs both here and below.

LORD MORRIS and LORD SHAND concurred.

[Solicitors—Waterhouse, Winterbotham, and Co., for the appellant; F. C. Gore, for the respondent.]

House of Lords (Lords Herschell, Mac- } 1898.
naghten, Morris, and Shand) } July 12.

THE OWNERS OF THE STEAMSHIP GLENGYLE V. NEPTUNE
SALVAGE COMPANY AND OTHERS.
THE GLENGYLE.*

Ship—Salvage—Award—Vessels specially built and equipped for salvage services—Award confirmed.

Decision of the Court of Appeal (*ante*, p. 231 and [1898] P. 97) affirmed.

The question in this case was as to the amount of salvage award decreed to the respondents, which the appellants contended was largely in excess of adequate remuneration for the services rendered. The case is reported *ante*, p. 231; 67 L.J., P. D., and A., 48; 1898, P., 37. The facts were briefly as follows:—The *Hermes* is a screw steamer of 394 tons register, fitted with engines of 84-horse power nominal, working up to 750 indicated, with a pumping capacity of 2,750 tons per hour, and manned by a crew of 23 hands all told. Her value was £22,000. The *Newa* is a screw

*Reported by J. BYRN THOMPSON, Esq., Barrister-at-Law.

steamer of 459 tons register, fitted with engines of 144-horse power nominal, working up to 750 indicated, with a pumping capacity of 5,000 tons per hour, and manned by a crew of 21 hands all told. Her value was £20,000. Both the said steamships were specially built for and solely employed in rendering salvage services, and are equipped with divers and diving apparatus and powerful engines and pumps and other salving appliances. They are kept at Gibraltar with steam up day and night. The *Hercules* is a steam tug of 145 tons register, fitted with engines of 80-horse power nominal, and manned by a crew of ten hands all told. Her value was £5,000. The *Nellie* was a steam tug of 21 tons register, fitted with engines of 40-horse power nominal, and manned by a crew of six hands all told. Her value was £1,500. The *Glengyle*, it was admitted or proved, was a steamship of 3,455 tons gross register, and at the time of the said salvage services she was manned by a crew of 56 hands all told, and was on a voyage from London to China and Japan with passengers and cargo. The value of the *Glengyle*, her cargo, and freight was £76,596. Services were rendered by these vessels to the *Glengyle* which required great skill and promptitude and considerable risk, both to the salving vessels and their crews, and but for their assistance the *Glengyle* must have become a total wreck. Mr. Justice Barnes, who was assisted by Trinity Masters, awarded £19,000 to the respondents the owners of the *Hermes* and *Newa*, and £500 to the respondents the owners of the *Hercules* and *Nellie*.

Sir R. T. Reid, Q.C., Mr. Aspinall, Q.C., and Mr. Butler Aspinall appeared for the appellants; Mr. Joseph Walton, Q.C., Mr. F. W. Raikes, Q.C., and Mr. Dawson Miller for the respondents.

LORD HERSCHELL, in moving that the appeal be dismissed with costs, said there was no contest in this case with regard to the facts, and it was admitted that the services rendered were meritorious. The Court of Appeal had come to the conclusion that the award of the learned Judge of the Admiralty Court was not so exorbitant or so manifestly excessive that it would be just to disturb it. In these circumstances it would certainly need an exceptional and extraordinary case to induce their Lordships' House to interfere with the award made by the Admiralty Judge and affirmed by the Court of Appeal. The appellants in such a case would have to prove that some elements had been overlooked which ought to be taken into account, or that exaggerated importance had been given to some considerations in the matter, or that principles had not been satisfactorily or properly applied. No case of the kind had been made out by the appellants. All that could be done with respect to claims for salvage was to proceed upon a more or less rough estimate. It might be that the amount awarded was larger than their Lordships individually would have given. But it was not so exorbitant as to justify their interference. It was clear that the vessel would have gone to the bottom but for the help rendered by the respondents. She was in fact saved at great risk to the salving steamers, and lives might have been lost if these steamers had not been ready at hand with steam up to assist ships in distress. It was impossible to exaggerate the importance at such a place as Gibraltar of having vessels always ready for such purposes. The crews were not ordinary crews, but men of exceptional skill, including divers. All these were elements which were properly taken into account in estimating the reward to be assigned.

LORD MACNAGHTEN and LORD MORRIS concurred.

LORD SHAND also agreed that the appeal should be dismissed. He attached great importance to the circumstance that the captains and crews of the salving vessels possessed unusual qualifications, and had always

ready special appliances for saving vessels in distress. The only profits which they made by their skill was the return for services such as were rendered to the *Glengyle*. The Judges in the Court of Appeal gave indications that they might not themselves have awarded so much as had been allowed by the Admiralty Judge, and he might not himself, if he had been the Judge of first instance, have granted so large a sum. But the amount was not so exorbitant as to justify their Lordships' interference.

[Solicitors—Hollams, Sons, Coward, and Hawksley, for the appellants; W. A. Crump and Son, for the respondents.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } July 12.

THE SALT UNION (LIMITED) V. THE NORTH
STAFFORDSHIRE RAILWAY COMPANY.*

Railway—Carriage of goods—Rates—Rebates—
Railway and Canal Traffic Act, 1894, sec. 4—
Construction—Onus of proof.

This was an appeal by the Salt Union from a judgment of the Railway and Canal Commission (Mr. Justice Wright, Sir Frederick Peel, and Viscount Cobham). The Salt Union claimed an allowance or rebate under section 4 of the Railway and Canal Traffic Act, 1894, from the rates charged to them by the North Staffordshire Railway Company, and they applied to the Railway and Canal Commission to determine what would be a reasonable and just allowance or rebate. Section 4 is as follows:—"Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate." The applicants delivered their goods to the railway company at their own siding, and the goods were there placed upon the company's trucks by the 'applicants' servants, so that the company did not provide the applicants with any station accommodation or perform any terminal services for them. Mr. Justice Wright, in delivering the judgment of the Commissioners, held that the applicants had not given sufficient evidence to show that they came within the terms of the section.

Mr. C. A. CRIPPS, Q.C. (Mr. Balfour Browne, Q.C., and Mr. R. Whitehead with him), appeared for the Salt Union in support of the appeal, and contended that the learned Judge had practically nonsuited them, although they had clearly brought themselves within the section. The applicants had to show that the company carried their goods and charged them rates, but did not provide station accommodation or perform terminal services. It was not necessary for them to go further, and show that the charges which were made included charges for station accommodation and terminal services. The applicants had made out a *prima facie* case, and the railway company ought to have been called upon to answer it.

Mr. Littler, Q.C., and Mr. Ernest Moon appeared for the railway company.

The COURT dismissed the appeal.

LORD JUSTICE A. L. SMITH said that, in his opinion, what was contemplated by section 4 of the Railway and

*Reported by F. G. RUCKER, Esq., Barrister-at-Law

Canal Traffic Act, 1894, was this—an application by a trader to the Commissioners asking them to allow him a rebate from rates charged to him by a railway company by reason of his being overcharged for station accommodation which had never been provided and terminal services which had never been rendered, in consequence of his not requiring such accommodation or services, inasmuch as he delivered his goods to the company at his own private siding. The applicants sought to construe this section as meaning that, though the trader did not show that he had been charged one penny for station accommodation or terminal services, yet he was entitled to carry in his case and prove the fact that no station accommodation had been provided and no terminal services had been rendered, and on proof of that only he was entitled to call on the railway company to prove that he had not been charged anything for station accommodation or terminal services. The contention was that the company was bound to prove a negative where no affirmative allegation had been made by the applicants. He could not agree with that argument. In his judgment it was necessary for the applicants to give some presumptive proof that they had been wrongfully overcharged. He was prepared to decide the case against the applicants on the question of the true construction of the section. He quite agreed with what was said by Mr. Justice Collins in the case of "Corporation of Birmingham v. Midland Railway Company" (9 Railway and Canal Traffic Cases, 165)—viz., that the onus was on the applicants to prove every part of their case.

LORD JUSTICE RIGBY said that the applicants, in his opinion, were bound to make out a *prima-facie* case somehow; they must raise a presumption that they had been overcharged. In this case they failed to give any evidence that they had been charged for accommodation not provided or for services not rendered. He quite agreed with what had been said by Mr. Justice Collins in the case which had been cited.

LORD JUSTICE VAUGHAN WILLIAMS agreed in thinking that the appeal should be dismissed. He could not, however, take the same view of the section in question as had been taken by Mr. Justice Wright, though, inasmuch as that view was shared by his brother Collins and had now been approved by Lord Justice A. L. Smith, he felt great diffidence in differing. He thought that, looking at the facts of the case and the documents which had been produced, it was clear that the rates which had been charged by the company did not include any charges for station accommodation or terminal services, and the judgment appealed against ought to be affirmed on that ground. But he was not prepared to say that in his judgment it was necessary under this section for the applicant to prove more than that his merchandise had been delivered to the railway company at a siding not belonging to the railway company, and that a dispute had arisen as to what was a reasonable and just allowance or rebate. There seemed to him to be nothing which threw on the applicants the duty of showing more than that the amount of the charge made seemed to be unreasonable as a total charge.

[Solicitors—Neish, Howell, and Macfarlane, for the applicants; Burchell and Co., for the Railway Company.]

insurance policies—Moneys becoming payable under policies.

Decision of Bigham, J. (*ante*, p. 94), affirmed.

This was an appeal by the plaintiffs from the judgment of Mr. Justice Bigham at the trial of the action without a jury (reported *ante*, p. 94). The action was brought for a declaration that the plaintiffs were entitled, as against the defendant bank, which carried on business at Amsterdam, to £3 2s. 6d. of each £10 payable by the underwriters in respect of each donkey lost under policies of insurance on donkeys shipped by the steamships Maori and Mount Sirion, and for an injunction to restrain the defendants from receiving the insurance moneys under the policies. Two persons named Vorster and Maltzam had entered into a contract with the Transvaal Government to supply 4,000 draught donkeys at the price of £12 per head delivered at Pretoria. In order to obtain donkeys Vorster and Maltzam entered into negotiations with the plaintiffs, who carried on business in London and Antwerp, and the plaintiffs agreed to supply the donkeys, part at £10 and part at £10 10s. a head, delivered at Durban. This arrangement was made by the plaintiffs on condition (as appeared by a letter of May 29, 1897, from the plaintiffs to the defendant bank) that Vorster and Maltzam should obtain an advance from the defendant bank. Accordingly on May 29, 1897, an agreement was entered into by Koehorst, the representative of Vorster and Maltzam, and the bank, which recited the agreements with the Transvaal Government and with the plaintiffs; and provided that the bank should lend to Vorster and Maltzam £25,000 upon certain conditions—namely, that, after the donkeys had been shipped, the bills of lading were to be handed over to the bank, together with the policies of insurance and the contract with the Transvaal Government; that against delivery and upon the security of these documents the bank should lend the sum of £6 5s. per animal shipped, this sum to be paid by the bank to the plaintiffs. If the whole of the 4,000 animals were shipped the £6 5s. per donkey would amount to £25,000. In addition to the £25,000, a commission of 10 per cent., making together £6 17s. 6d. per donkey, or £27,500 in all, was payable to the bank. The policies were effected by the plaintiffs on the 4,000 donkeys, valued at £10 each. The donkeys were purchased and shipped in Ireland, and on the voyage a loss of 1,208 out of the 4,000 donkeys occurred within the meaning of the policies. The plaintiffs claimed that, out of the £12,080 payable under the policies, they were entitled to £3 2s. 6d. per donkey, amounting to £3,775, and contended that the bank's interest in the policies only amounted to £6 17s. 6d. per donkey shipped, being the sum advanced per donkey and commission. The plaintiffs alleged that the donkeys were insured at £10 a head in order to cover the amount of their interest, and that the policies must be looked upon as two sets of policies, one set insuring the plaintiffs' interest for £3 2s. 6d. per donkey, and the other set insuring the bank's interest for £6 17s. 6d. per donkey. The bank contended that they held all the documents, including the policies, as a security for the repayment of their advance of £25,000 and commission, and that they were entitled to retain the £3,775 in order to secure the total advance which they had made. This contention was put forward by the bank because it appeared that the Transvaal Government had rejected a large number of the donkeys. The question as to the terms upon which the policies had been delivered to and received by the defendant bank turned upon the construction of the agreement and a voluminous corre-

Court of Appeal (A. L. Smith, Rigby, }
and Vaughan Williams, L.J.J.) }

1898.
July 13.

SCHENKER, WOLFORD, and CO. v. THE NEDERLANDSCHE
BANK EN CREDIT VEREENIGING VOOR ZUID AFRIKA.*
Contract—Agreement—Construction—Advances
by bank—Security for advances—Deposit of in-

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

spondence between the parties. Mr. Justice Bigham held that the bank's contention was correct, and gave judgment for them.

Mr. Joseph Walton, Q.C., and Mr. D. C. Leck appeared for the plaintiffs; Sir R. T. Reid, Q.C., and Mr. R. M. Bray, Q.C., appeared for the defendants.

The COURT, having taken time to consider, delivered judgment, dismissing the appeal.

LORD JUSTICE A. L. SMITH read a judgment in the course of which he said that the question was whether the defendant bank were entitled to collect and retain the insurance moneys payable by the underwriters until the sum of £25,000 advanced by the bank had been repaid together with a commission of £2,500. What was the meaning of a person making an advance against bills of lading and policies of insurance upon a shipment of goods? There could be no doubt that, apart from special circumstances, such an advance would be made upon the terms that the person making the advance was to hold as security, until his advance was repaid, the bills of lading and the policies in order that he might be secure as to placing himself in funds to satisfy his advance. It was said that the defendants were only entitled to hold the policies effected upon the donkeys to the amount of £6 5s. per donkey *plus* a commission of 12s. 6d. per donkey, and that therefore the £40,000 worth of policies effected by the plaintiffs were only endorsed to the defendants as security for £6 5s. per donkey *plus* the commission. There was this answer to that contention—if the policies taken out and endorsed by the plaintiffs to the defendants were only to cover £6 5s. per donkey, as far as the defendants were concerned, why did they cover the commission of £2,500 payable to them? And, again, as the defendants had an insurable interest in what the donkeys would fetch on their safe arrival at Durban, if not at Pretoria, how could it be said that the policies were not effected by the plaintiffs to cover the interest which the defendants had at risk? His Lordship could find neither in the business of the matter nor in the arrangement of May 29, 1897, any ground for saying that when the plaintiffs undertook to and did cover by insurance the 4,000 donkeys, or as many as might be shipped, at £10 per head, they only insured for and on behalf of the defendants up to the amount of £6 5s. per donkey *plus* 12s. 6d. commission, and that the £2 2s. 6d. was effected in their own behalf. He could find no such limitation in the agreement and letter of May 29, 1897, and in his opinion the plaintiffs' contention was wholly untenable, because they endorsed the policies for £40,000 to the defendants as additional security to that of the bills of lading by way of securing to them their advance and commission. But it was argued that there was that in the letters subsequent to the tripartite arrangement of May 29, 1897, which showed that the above was not the true view of the arrangement. Assuming that the letters were admissible in evidence by reason of the plaintiffs not having signed the agreement of May 29, 1897, in his opinion, if the whole correspondence was read, it did not bear out the plaintiffs' contention. Nor did the letters form any new contract. The letters did not show that the defendants ever said, much less agreed with the plaintiffs, that they would give up the policies without being paid the full sum of £27,500. The appeal must therefore be dismissed.

LORD JUSTICE RIGBY read a judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS agreed in the result arrived at by the other members of the Court.

[Solicitors—Lowless and Co., for the plaintiffs; Freshfields and Williams, for the defendants.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Macnaghten, Morris, and Shand.) } July 14.

LORD REVELSTOKE V. COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—Bond, whether issued in United Kingdom—Stamp Act, 1891, sec. 82 (1) (b) (i.).

Decision of the Court of Appeal (*ante*, p. 19) affirmed.

This was an appeal from an order of the Court of Appeal of November 4 last affirming an order of the Queen's Bench Division of May 27, 1897. The question was whether a bond for \$1,000 of which the appellant was the holder, and which bound the Atchison, Topeka, and Santa Fé Railway Company, a company incorporated under the laws of Kansas, United States, to pay that sum to the bearer, or, if the bond were registered, to the registered holder, was liable to stamp duty under section 82 (1) (b) and first schedule of the Stamp Act, 1891, as a marketable security of a foreign company made or issued in the United Kingdom. These bonds of the company were expressed on the face of them not to be valid for any purpose unless authenticated by the certificate thereon endorsed of the trustee or trustee company under a certain mortgage or deed of trust. According to the original plan these bonds should have been countersigned by the trustee company before being sent to the persons entitled, but as the expense of insurance would have amounted to a large sum it was arranged that the vice-president of the trust company should bring to London the bonds destined for English bondholders and countersign them there. The arrangement was carried out, and the Commissioners of Inland Revenue were of opinion that the bonds were liable to the statutory stamp duty applicable to marketable securities transferable by delivery of 1s. for every £10 or fraction of £10 thereby secured. This view was sustained by the Divisional Court and the Court of Appeal. The case is reported below; *ante*, p. 19; [1898] 1 Q.B., 78; 67 L.J., Q.B., 44.

Mr. Cohen, Q.C., Mr. Bray, Q.C., and Mr. Willes Chitty were heard for the appellant.

The Solicitor-General and Mr. Danckwerts, for the respondents, were not called upon.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said,—I confess that it appears to me there is not much difficulty in determining this case. In my opinion this marketable security was both made and issued in London. It is to my mind immaterial to consider the origin of this document, or the place in which it was written, or where the process of its manufacture originally commenced. The document is a document which when completed became undoubtedly, within the meaning of the statute, a marketable security, and the marketable security, when thus completed, is for the first time delivered to a person who is entitled to receive it in London. I think that was an issue of that marketable security to that person in London. It was therefore, I think, issued in London. It was also, however, in my opinion, made in London. The earlier history of the transaction is immaterial. We are dealing now with a Taxing Act which imposes the necessity of placing a stamp upon particular instruments of the character designated and described by the statute itself. The statute has given a test of what is a marketable security, and any document which has that character and is issued in London or made in London is liable to that tax. I think this document

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

was issued in London. Was it made in London? Its commencement was in another country, but it cannot be denied that at the time it first reached this country it did not fill the character of an instrument to which the Act has affixed the necessity of a stamp's being applied. It is admitted that when it got to London it for the first time fell into the category to which the statute applies. It required a particular signature; and be it observed that we are here not dealing with those wider questions of the contractual relations between the parties. I am wholly unable to understand why, when for the first time it assumes that character and falls into the definition which the Act of Parliament gives, and which renders it liable to stamp duty, one should do more than look into the instrument itself and see whether it has first assumed that character of a marketable security in this country. For my own part I think the case is extremely plain, and that the instrument was both made and issued in this country, and I decline to go into the earlier history of the transaction. Though I cannot agree with all the reasons given by the Judges below, I think the judgment of the Court of Appeal was substantially right and that this appeal ought to be dismissed with costs.

LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred.

[Solicitors—Bompas, Bischoff, Dodgson, Coxe, and Bompas, for the appellant.]

Court of Appeal (Lindley, M.R.,) 1898.
Chitty and Collins, L.J.J.) July 14.

IN RE THE NEW ENGLISH BANK OF THE RIVER PLATE (LIMITED).*

Company—Winding up—Scheme of arrangement—Construction—Postponement of certain payments—Interest accruing subsequent to the winding up.

In 1892, the then existing English Bank of the River Plate being in liquidation, the above company was formed to take over the business, assets, and liabilities of the old company, in accordance with a scheme of arrangement sanctioned by order of the High Court. The scheme provided that the new company should issue, for the benefit of the creditors of the old company who should come in, promissory notes for the amounts of their claims as at the commencement of the winding up, payable as to one quarter at six months' date, another quarter at 15 months', and as to the remaining half at ten years' date from March 31, 1892, the notes to bear interest at 4 per cent. per annum. It was provided that, "if upon the winding up of the company the assets and uncalled capital thereof shall be insufficient for payment of all creditors in full, then all claims for principal or interest upon promissory notes issued under the said scheme, or any renewals thereof, shall be postponed to all other claims proved in the winding up of the said company." The new company was now in course of winding up, and the assets were not sufficient to discharge in full all the liabilities of the company. A question consequently arose, on the construction of the above proviso, between the depositors in the new company and the holders of promissory notes issued under the scheme as to the extent to which the latter were postponed; whether the preferred creditors were entitled not only to be paid in full the amount of their debts with such interest as they carried down to the commencement of the winding up only, or whether they were also entitled to subsequent interest in preference to the claims of

the holders of the promissory notes. The matter came before Mr. Justice Wright on summons for directions, and he decided on April 21 that the holders of promissory notes were not postponed as to interest subsequent to the date of the winding up. From this decision an appeal was lodged by a representative ordinary creditor, which was now heard.

Mr. Buckley, Q.C., and Mr. Martelli were for the appellant; Mr. Swinfen Eady, Q.C., and Mr. Whinney, for a representative holder of promissory notes, were not called on; Mr. Kirby appeared for the liquidator.

The LORDS JUSTICES were unanimously of opinion that the bargain the parties entered into by the scheme of arrangement, expressed in language very similar to a well-known provision of bankruptcy law, was that the postponement of the promissory notes did not extend to interest subsequent to the commencement of the winding up; that the expression "claims proved" in the winding up had the same meaning as in the Bankruptcy Acts, and did not include interest subsequent to the commencement of a winding up.

The appeal was dismissed.

[Solicitors—Armitage and Chapple, for all parties.]

Q.B. Div. (Wright and)
Darling, J.J.)

1898.
July 14.

REG. V. JUDGE OF THE NORTHALLERTON COUNTY COURT.*

County Court—Jurisdiction—Proceedings in bankruptcy—Warrant of arrest—*Certiorari* refused.

This was the argument on a rule for a *certiorari* to the Northallerton County Court Judge to quash a warrant of arrest issued by the County Court Judge under section 25 of the Bankruptcy Act, 1883.

Mr. Muir Mackenzie appeared to show cause against the rule; Mr. Horridge and Mr. W. R. D. Adkins appeared to support it.

The question raised was whether a *certiorari* would go to quash an order of a County Court Judge sitting in bankruptcy. The facts and dates were these. On April 25 a petition alleging an act of bankruptcy in departing from his dwelling house to avoid an examination was presented against Frederick Herbert Skinner, solicitor at Howgrave, near Ripon; on May 9 a receiving order was made against him in the County Court of Northallerton; on May 10 one of the officers from the office of the receiving officer attended at the debtor's residence, and found that he had gone; on May 11 the debtor failed to attend the meeting of creditors; on May 17 application was made under section 24 for a warrant of arrest; on May 19 the order for the issue of a warrant was made. The warrant recited that, "Whereas by evidence taken upon oath it hath been made to appear to the satisfaction of the Court that there is probable reason to suspect and believe that the said Frederick Herbert Skinner is avoiding examination in respect of his affairs and is otherwise delaying or embarrassing the proceedings in bankruptcy against him," and directed his arrest. On May 20 the statutory meeting of creditors was held. At this the debtor did not attend. On May 23 the debtor wrote to the Official Receiver to say that he had returned. On May 31 the debtor was arrested. He was in custody three days. On June 3 an application for the release of the debtor was made and an affidavit of apology from him was put in. In it the debtor

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

undertook to give all information required. Debtor was thereupon released. Application for the rule nisi for a *certiorari* to quash the warrant was subsequently made and granted. The warrant did not state that the debtor had absconded. Section 25 of the Bankruptcy Act, 1883, provides for the grant of a warrant of arrest of a debtor if after presentation of a bankruptcy petition against a debtor it appears to the Court that there is probable reason for believing that "he is about to abscond," with a view of avoiding examination in respect of his affairs.

Mr. MUIR MACKENZIE, showing cause against the rule, referred to sections 25, 92, and 102 (2) of the Bankruptcy Act, 1883. By section 100 the County Court in its bankruptcy jurisdiction was to have the powers of the High Court. A *certiorari* could not therefore go. He cited "Reg. v. Surrey Justices" (13 Q.B.D., 963), "Colonial Bank of Australasia v. Whelan" (5 L.R., P.C., 417), and "New Par Consols (Limited) (No. 2)" ([1898] 1 Q.B., 669). The matter was one for application to review under section 104 and not for *certiorari* to quash the warrant.

Mr. HORRIDGE contended that the County Court Judge had made an order quite outside his jurisdiction, as the words about the debtor absconding were not contained in the warrant. The County Court was an inferior Court, except in actions within the Bankruptcy Act. Directly it went beyond the powers there given, it ceased to be equal to a superior Court. If the order showed that the Court had exceeded its authority then it was an inferior Court and subject to *certiorari*. "James v. South-Western Railway (L.R. 7, Ex., 187)," "Reg. v. Justices of Surrey" (L.R. 5, Q.B.), "Ex parte Austin" (50 L.J., M.C., 8).

Mr. JUSTICE WRIGHT said he only knew one case in which a *certiorari* had gone to the Central Criminal Court.

Mr. HORRIDGE submitted that the Court could not inquire into the evidence on which the warrant issued. "Reg. v. Liston" (5 T.R., 133).

Mr. ADKINS, on the same side, said the order was not made within the powers of that Act.

Mr. JUSTICE WRIGHT said the 100th section of the Bankruptcy Act, 1883 (46 and 47 Vic., c. 52), provided that a County Court should for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court. There was no statute passed to take away the *certiorari* in regard to those powers. The case of the "New Par Consols (Limited) (No. 2)" ([1898] 1 Q.B., 669) showed that a prohibition would not be granted against a County Court Judge invested with the powers of the High Court if he was acting within his jurisdiction. The contention in support of the rule was that here the County Court Judge was not acting within his bankruptcy powers and was, therefore, only an inferior Court. The fact of his so acting was to be gathered from the warrant, which disclosed no offence. The learned Judge agreed that the warrant disclosed no offence within the Act, but he declined to give any opinion as to whether a *certiorari* would or would not issue if there had been actually no facts on which to found jurisdiction of the County Court Judge. In this case, however, the affidavits showed that there was ample evidence of facts which would have given jurisdiction to the Court to make an order of committal. That being so, the County Court had jurisdiction to make such an order and it had all the powers of a High Court. If so, the case came back to this—Did the fact that the order was wrongly drawn up, the Court having jurisdiction to make a proper order, justify the grant of a *certiorari*? He thought not. The order was within the powers given in section 100. The error ought to have been set right by application to the

County Court Judge or on appeal. Further, a *certiorari* should not go unless it would serve some useful purpose. It would not be of any service in such a case as this, when the debtor had been released.

Mr. JUSTICE DARLING concurred.

[Solicitors—Simsy and Simsy, for Skinner, Son, and Church, Sunderland, in support of rule; The Solicitor for the Board of Trade to show cause.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Herschell, Macnaghten, Morris, } July 15.
and Shand)

EASTMAN PHOTOGRAPHIC MATERIALS COMPANY V. COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS.*

Trade Mark—Registration—Capacity for—Invented word—"Solio"—Patents, Designs, and Trade Marks Act, 1883, sec. 10.

Decision of the Court of Appeal (13 *The Times* L.R., 373) reversed.

This was an appeal from an order of the Court of Appeal dated April 29, 1897, affirming an order of Mr. Justice Kekewich of November 6, 1896. The decision of the Court of Appeal is reported in 13 *The Times* Law Reports, 373, and 14 Patent Cases, 487, and the only question—one of great commercial importance and likely, from the principles laid down in the judgments, to influence the practice of the Board of Trade which had been used by the appellants since March, 1892—was whether the word "Solio" was a trade mark capable of registration. The Courts below held that the word ought not to be registered, inasmuch as it suggested the Latin word "sol," and was therefore descriptive and had reference to the processes of photography. From the evidence it appeared that the word originally chosen was "Soho," as the company had formerly done business in Soho-square. It happened, however, to be printed so as to look like "Solio," and Mr. George Eastman said he chose the latter word in preference as being purely arbitrary. The arguments were heard on June 24 and 28, and their Lordships on the 28th intimated their intention of reversing the decision below, but took time to consider the form in which their judgments should be expressed. The illustrations given in the course of the discussion of the choice by traders of their distinctive marks were in some cases rather amusing. Some names chosen are so incorrectly formed or barbarous as to suggest the desirability of appointing a literary adviser or committee to the Board of Trade to protect in this respect the purity of the English tongue.

Mr. Moulton, Q.C., and Mr. Kerly were counsel for the appellants; the Attorney-General, the Solicitor-General, and Mr. Ingle Joyce for the Comptroller-General.

The LORD CHANCELLOR, in moving that the appeal be allowed, said:—This is an appeal from the Comptroller-General of Patents, Designs, and Trade Marks, who has refused to the appellants to permit the word "Solio" to be registered as applicable to their photographic paper. Before dealing with the decision itself, I think it desirable, from what occurred in the course of the argument, to say something of the sources of construction to which we are entitled to appeal in order to construe a statute. Among the things which have passed into canons of construction recorded in Heydon's case we are to see what was the law before the Act was passed and what was the mischief

*Reported by J. EYRE THOMSON, Esq., Barrister-at-Law.

or defect for which the law had not provided; what remedy Parliament appointed and the reason of the remedy. Now the law before the Act now in question was passed was one which had given rise to considerable litigation, and is contained in section 64 of the Act of 1883, which provided that a trade mark must consist of or contain at least one of the following essential particulars:—Subsection (c) “A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.” That was the law passed in 1883, and on February 24, 1887, a Commission was appointed to inquire into the duties, organization, and arrangement under the Trade Marks Act so far as related to trade marks and designs. It appeared by the report of the Commission that complaints had been made as to the working of the Act of 1883, and in that part of the report relevant to the present controversy it is stated that “The most difficult question which has arisen upon the enactment under consideration is to determine what may be properly regarded as ‘fancy-words.’ Words are undoubtedly a most popular form of trade mark, but some limit must obviously be put upon the words which an individual may be permitted to register and claim the exclusive use of. The expression ‘fancy word’ is certainly not a happy one, and has naturally given rise to considerable differences of opinion as to its meaning. It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolize them and exclude others from their use. Again, geographical words which can be regarded as descriptive of the place of manufacture or sale of the goods are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade mark. But there are objections to giving a monopoly even in that case, and to attempt to draw any such distinction would be likely to lead to difficulty and litigation. We think, therefore, that geographical names ought only to be permitted when they clearly could not be regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that, where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning, should be registered. The question in such a case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it was, it ought, of course, to be rejected.” I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under consideration was intended to remedy could be imagined than the report of that Commission. Lord Justice Turner, in “*Hawkins v. Gathercole*” (6 De G.M. and G., 1), after enforcing the proposition that the intention of the Legislature must be regarded, says:—“We have, therefore, to consider, not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject.” After quoting a passage from Lord Black-

burn’s judgment in “*River Wear Commissioners v. Adamson*” (2 A.C., 743), his Lordship continued. It appears to me that to construe the statute now in question it is not only legitimate, but highly convenient, to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act, which provided the remedy. These three things being compared, I cannot doubt the conclusion. Now the objection pointed out by the Commissioners was that a particular individual could not be permitted to take exclusive possession of any part of our language, and this objection appears to have been in the mind of the framers of the earlier statute when they made the phrase “fancy word” part of the definition of what might be registered as a trade mark. It was the use of that phrase and its accompanying qualification which gave rise to much litigation; and I am certainly not disposed to hold that cases decided under that Act can have any bearing upon the construction of that part of the Act now under consideration, which was obviously intended as an alteration and amendment of the former Act. The present Act provided, among other things, by section 10 that a trade mark must consist of or contain at least certain particulars, the first of which is “an invented word or invented words.” This word “*Solio*” is claimed to be an invented word, and it has been adjudged not to be an invented word, and apparently (though I think the association of the two things involves an incorrect construction of the statute) because it is a word which has reference to the character or quality of the goods. I think it is an invented word within the meaning of this statute. I know of no such word as “*Solio*” in any sense which would make it intelligible here, although it is an Italian word meaning a throne, and although it is a Latin word in the ablative case with the same meaning. Not much reliance, however, is placed upon the word having some meaning in a foreign tongue; but what is put is that it may have extracted from it some meaning in relation to the character or quality of the goods, because the letters *s-o-l* may be understood to mean the sun. And it is true that Shakespeare in *Troilus and Cressida* speaks of our planet “*Sol*,” and that, inasmuch as the goods in question are photographic papers and sunlight is operative in producing impressions on photographic paper, it comes within the prohibition against using words which are distinctive of the character and quality of the goods in respect of which the word is sought to be registered. My answer is that “*Solio*” is not “*sol*” and “*sol*” is not “*Solio*.” It certainly is a very strange thing that you should take three letters out of a word, and by the somewhat circuitous process that has been adopted here arrive at the conclusion that it is not an invented word, and that it does describe the character and quality of the goods. I desire to give my opinion with reference to the particular word and not to go behind it. I can quite understand suggesting other words—compound words, or foreign words, as to which it would be impossible to say that they were invented words—although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word “*cheap-and-good*,” or even without taking so gross an example, using a word so slightly differing from an ordinary and recognized word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating character or quality. The line must be sometimes difficult to draw, but to my mind the substance of the enactment is intelligible enough, and the Comptroller has to make up his mind whether in substance there has been an infringement of

the rule. Of course, also, words which are merely misspelt, but which are nevertheless in sound ordinary English words, and the use of which may tend to deceive, ought not to be permitted. I am satisfied in this case to say that the word "Solio" is an invented word, that it does not indicate the character or quality of the goods, and that the decision of the Court of Appeal ought to be reversed.

LORD HERSCHELL.—The Comptroller-General of Patents, Designs, and Trade Marks having refused to register "Solio" as a trade mark in respect of photographic paper, the applicants, who are the appellants at your Lordships' bar, appealed to the Board of Trade, who referred the appeal to the Court. Mr. Justice Kekewich held that the application had been rightly refused, and his judgment was upheld by the Court of Appeal. The ground upon which the Courts proceeded was that the word "Solio" had reference to the character or quality of the goods, and was therefore incapable of registration. The Court of Appeal held itself bound by a previous decision of the same Court in the case of "*In re Farbenfabriken* application" (1 Ch., [1894] 645; 63 L.J. Ch., 257) to hold that an invented word could not be registered if it had any reference to the character or quality of the goods. The question turns upon the construction of the section which by section 10 of the Act of 1888 is substituted for section 64 of the Patents, Designs, and Trade Marks Act of 1883. The section to be construed provides that a trade mark "must consist of or contain at least one of the following essential particulars." Then follow seven particulars distinguished by the letters (a) to (e). The last two of these are as follows:—"(d) An invented word or invented words; or (e) a word or words having no reference to the character or quality of the goods and not being a geographical name." Before considering the effect of this legislation, I think it well to refer to the fact that these two particulars of which a trade mark may consist were not to be found in the Act of 1883. On the other hand, "fancy word or words not in common use," which were amongst the essential particulars in section 64 of the Act of 1883, are not to be found in the substituted section. It had been held that they did not cover words that were descriptive, and the section had given rise to much litigation and some divergence of judicial opinion. I cannot doubt that this was the origin of the legislation by which the words appearing in the principal Act were omitted, and the provision found in the later Act substituted. In the *Farbenfabriken* case, Mr. Justice North said that he did not see how he could hold "Somatose" to be an invented word within subsection (d), having regard to the decisions with respect to such words as "Herbalin," "Washerine," and "Valvoline." All these decisions had reference to the provisions of section 64 of the Act of 1883 with regard to fancy words. In my opinion none of the decisions upon that part of the original section have any bearing on the new provisions to be found in the substituted section, the purpose of which was, I think, to get rid of expressions which had occasioned much embarrassment, and of all the distinctions and decisions which had been founded upon them. Those decisions, so far from affording any guide to the true interpretation of the particulars designated (d) and (e), are likely to lead to error if applied to these new provisions. Addressing myself, then, to the terms of the substituted section, I am unable to find any justification for qualifying the provision "(d) an invented word, or words," by the condition that they shall have no reference to the character or quality of the goods. By the words which introduce the section the particulars designated under the

headings (a) to (e) are treated as separate and distinct. "A trade mark must consist of at least one of the following essential particulars." What warrant is there, then, for transferring words found in any one of these particulars to any other of them? With all deference to the learned Judges who have thought otherwise, I can see none. It seems to me to involve an interpretation of the language used which is not its natural grammatical construction. In the *Farbenfabriken* case Lord Justice A. L. Smith said:—"It is impossible, I think, to hold that the Legislature intended that an invented word might be a word having reference to the character or quality of the goods, whereas a non-invented word might not. There would be no sense in so holding." I am unable to agree with this view. There seems to me to be the broadest distinction between the two cases. Under (e) any word in the English language may serve as a trade mark, the commonest word in the language might be employed. In these circumstances it would obviously have been out of the question to permit a person by registering a trade mark in respect of a particular class of goods to obtain a monopoly of the use of a word having reference to the character or quality of those goods. The vocabulary of the English language is common property; it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of goods. If, then, the use of every word in the language was to be permitted as a trade mark, it was surely essential to prevent its use as a trade mark where such use would deprive the rest of the community of the right which they possessed to employ that word for the purpose of describing the character or quality of goods. But with regard to words which are truly invented words, words newly coined, which have never therefore been used, the case is, as it seems to me, altogether different; and the reasons which required the insertion of the condition are altogether wanting. If a man has really invented a word to serve as his trade mark, what harm is done, what wrong is inflicted, if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor? So far, then, from seeing no reason for a distinction between the particular designated in (d) and (e) there seems to me abundant reason for not interpolating in (d) words which the Legislature has used only in relation to (e). In a later part of the judgment to which I have already referred, Lord Justice A. L. Smith says that to constitute an invented word, within the meaning of the section, it must be a word coined for the first time. "Such a word," he says, "is of necessity incapable of having reference to the character or quality of goods, because, *ex hypothesi*, it is an entirely new unknown word incapable of conveying anything." With this—subject to a qualification to which I will refer in a moment—I entirely agree. An invented word has of itself no meaning until one has been attached to it. But this circumstance does not seem to me to be any ground for qualifying with a condition not applied to them the terms "an invented word or words." In considering the case of an application to register a trade mark under (d) the only question which, in my opinion, has to be determined is whether the word sought to be registered is an invented word. In one of the cases on this subject Lord Justice Kay said:—"There is extremely little invention in the matter." It may be that the word "satine," which was there in question, was objectionable on other grounds, but if the word be an "invented" one I do not think the quantum of invention is at all material. An invented word is allowed to be registered

as a trade mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases. It may no doubt sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form. Again, I do not think that a foreign word is an invented word simply because it has not been current in our language. At the same time, I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning except to a few scholars might not be regarded as an invented word. It is in this respect that I desire to qualify my assent to Lord Justice A. L. Smith's proposition, that an invented word can never have a meaning. Coming now to the particular case under discussion, I cannot doubt that the word "*Solio*" is an invented word, unless it is to be regarded as the Italian word *solio*, which means a throne, in which case it has certainly no reference to the character or quality of photographic paper. If it is not to be so regarded, it has of itself no meaning. As I have said, I think it unimportant if it be an invented word, whether it has reference to the character or quality of the goods or not; but if this were the test of the validity of the word as a trade mark I must say that I think there is no such reference. I daresay that it might occur to some minds given to etymology that *sol*, the Latin for sun, was a component part of it when they found it connected with photographic paper, but the same minds would equally find other root bases for the word if they found it connected with boots or agricultural implements. It seems to me to have no reference to the character or quality of the goods in the sense in which those words must have been used by the Legislature. I think the judgment appealed from ought to be reversed.

LORD MACNAGHTEN.—I am of the same opinion. In 1883 the Legislature for the first time allowed persons to register as trade marks words not used as trade marks before August, 1875. The privilege was conferred by adding to the words "a distinctive device, mark, brand, heading, label, or ticket," which were substantially taken from the Act of 1875, the words "or fancy word, or words not in common use." To be capable of registration as a new trade mark it was therefore required by the Act of 1883 that the word proposed to be registered should be a "fancy word," "distinctive," and "not in common use." Everybody knows the trouble which that enactment gave. In trying to construe it the Courts were almost driven to despair, until at last in the Court of Appeal the learned Judges declared that to be a fancy word a word must be "obviously meaningless," though one of those two learned Judges seems to have retracted or qualified his opinion before the next case was called on. For these very troublesome words in the Act of 1883 the Act of 1888 substituted the expression "an invented word or words." It made the substituted expression a separate, independent, and sufficient condition of registration. And now if a proposed trade mark consists of or contains an invented word, or invented words, it is capable of registration. But the word must be really an invented word. Nothing short of invention will do. On the other hand, nothing more seems to be required. If it is an invented word, if it is "new

and freshly coined," to adapt an old and familiar quotation, it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods. I do not think that it is necessary that it should be wholly meaningless. To give an illustration. Everybody will remember that in a book of striking humour and fancy which was in everybody's hands when it was first published there is a collection of strange words where there are (to use the language of the author) "two meanings packed up into one word." No one would say that those were not invented words. Still, they contain a meaning—a meaning is wrapped up in them if you can only find it out. The object of putting a restriction on words capable of being registered as trade marks was of course to prevent persons appropriating to themselves that which ought to be open to all. There is a "perpetual struggle" going on, as Lord Justice Fry has observed, "to enclose and appropriate as private property certain little strips of the great open common of the English language." "That," he added, "is a kind of trespass against which, I think, the Courts ought to set their faces." And I think the Legislature has set its face against it both in the Act of 1883 and in the Act of 1888. There is little danger of the apprehended mischief if invention is required as a condition of registration. After all, invention is not so very common. Turning to the present case, I think the word "*Solio*" may pass for an invented word, and not the less so because it was hit upon by a lucky accident. I should think so even if I thought that it contained in itself an obscure reference to the great source of light, and the goods were intended to be used for photographic purposes. But, speaking for myself, I must confess that without explanation from others, better scholars it may be or worse, it never would have occurred to me to connect "*Solio*" with the Latin word for the sun. I therefore agree in the motion proposed.

LORD MORRIS and LORD SHAND concurred.

[Solicitors—Bird, Moore, and Strode, for the appellants; The Solicitor to the Board of Trade, for the respondents.]

Q.B. Div.
(Channell, J.) }

1898.
July 15.

HANNAFORD V. SYMS.*

Principal and Agent—Sub-agent—Liability—
Privilege of contract—Money had and received.

This was an action to recover £55 0s. 8d., money received by the defendant for and on behalf of the plaintiff. The plaintiff is an auctioneer and the defendant is a London solicitor. In 1894 a Mr. Robert Cuddeford, as mortgagee, obtained an order for the sale of an estate called Kelland Barton. Cuddeford was given the conduct of the sale on condition of his paying £250, which he did. Messrs. Dun and Baker were the country solicitors of Mr. Cuddeford, and they proposed the plaintiff to act as auctioneer. The sale took place in August, 1895, and in January, 1896, the purchaser paid the balance of his purchase-money into Court. The defendant acted as Dun and Baker's London agent, and took in the bill of costs to be taxed. The bill of costs included an item of £55 0s. 8d. auctioneer's fee, for which the defendant held no receipt. He accordingly wrote Messrs. Dun and Baker to procure from the plaintiff a receipt for his fees in order to

*Reported by R. BARBER, Esq., Barrister-at-Law.

get the amount allowed upon taxation. The plaintiff signed the receipt without having received the money. thinking, as he said, that it was the usual thing to do. Two sums of £183 3s. 9d. and £56 9s. 9d. were paid out for costs to the defendant, which he retained in his hands to satisfy the costs due to him from Messrs. Dun and Baker. The plaintiff not having received his fees sued the defendant, the London agent, alleging that he had received £55 0s. 8d. out of Court on his account. The defendant admitted that before he received the money out of Court he knew the plaintiff's fees had not been paid.

Mr. SCARLETT, for the plaintiff, contended under the whole circumstances of the case there was an employment of defendant by the plaintiff to receive the money for him. An action would lie at the suit of a country client against a London agent for money improperly had and received, although there was no privity of contract ("Robbins v. Heath," 11 Q.B., at p. 257). A privity of contract was created between principal and sub-agent where the exigencies of the business required it ("De Bussche v. Alt," 8 Ch.D., 286). In this case it was necessary that a London solicitor should get the plaintiff's money out of Court, and that brought the case within the authority of "De Bussche v. Alt" (*supra*).

Mr. CRUMP, Q.C. (Mr. J. Samuel Green with him), for the defendant, argued there must be privity of contract between the plaintiff and defendant to render the defendant liable. There was no contract between the parties in this case. The London agent had a lien upon any sum received by him for his costs against the country solicitor, and was entitled to retain the money to satisfy those costs ("Lawrence v. Fletcher," 12 Ch.D., 858).

MR. JUSTICE CHANNELL, in giving judgment, said the case was not free from difficulty. The original employment of plaintiff was by Messrs. Dun and Baker, certainly not by the defendant. The defendant acted simply as agent for country solicitors. The account was delivered to Messrs. Dun and Baker, and no objection was taken, so that at that time the plaintiff had to look to them, and there was an understanding that he should be paid when the money was got out of Court. If Messrs. Dun and Baker had meant to say to plaintiff, "If you will sign the receipt the defendant will pay you," then there would have been a contract by defendant to pay the plaintiff; but if Messrs. Dun and Baker's meaning was that their agent would get the money out and would pay the plaintiff, then the contract would have been with Messrs. Dun and Baker. The letters in the case were consistent with the latter meaning. Down to that time the defendant received the money for Messrs. Dun and Baker, who would have been liable to the plaintiff. The difficulty arose by defendant knowing that the plaintiff had not been paid before he received the money. By receiving the money, which he knew ought to go to the plaintiff, did he enter into an implied contract to pay it over to the plaintiff? He had doubt about it. On the whole he thought there was no such implied contract. One had to act strictly in the matter; one reason was on account of the rights of set off. Suppose the plaintiff owed Messrs. Dun and Baker money, Messrs. Dun and Baker could have asked the defendant to pay them, and would have set that amount off against what was due from plaintiff to them. Upon the whole, he must go by privity of contract. The proper persons to have brought the action were Messrs. Dun and Baker, and the plaintiff should have brought his action against them. There were no circumstances from which to imply a contract to pay the plaintiff, and therefore the action failed, and there must be judgment for defendant with costs.

House of Lords (Lord Halsbury, L.C.), 1898.
Lords Watson, Herschell, Macnaghten,
Morris, and Shand } July 18

PLYMOUTH, STONEHOUSE, AND DEVONPORT TRAMWAYS
COMPANY V. GENERAL TOLLS COMPANY (LIMITED).*

Tolls—Bridge—7 Geo. III., c. lxxiii.—"Coach,"
what is—Tramcar.

Tramcar held to be a coach within the meaning
of 7 Geo. III., c. lxxiii.

Decision of the Court of Appeal (13 *The Times*
L.R., 74) affirmed.

This was an appeal from an order of the Court of Appeal dated November 28, 1896, varying a judgment of Mr. Justice Day dated June 22, 1896. The case is reported 18 *The Times Law Reports*, 74. The only point involved in the appeal was whether the respondents were entitled to charge the appellants in respect of their tramcars passing over Stonehouse-bridge when drawn by three horses the toll of 6d. (as the Court of Appeal found in their favour), or whether they are only entitled to charge the lower toll of 4d. (as Mr. Justice Day held at the trial). By an Act of 7 George III., c. lxxiii., Lord Edgecumbe and Sir John Saint Aubin were authorized to build a bridge across Stonehouse Creek in the county of Devon. In pursuance of the powers conferred by the Act, a bridge known as Stonehouse-bridge was built, and all the powers and authorities created and conferred by the Act upon Lord Edgecumbe and Sir John Saint Aubin were now vested in the respondents. The question was under which of the following provisions with respect to tolls, of section 12 of the said Act, the appellants' tramcars came:—
"For every coach, chariot, Berlin chaise, chair, or calash drawn by two horses the sum of 3d.; for every coach, chariot, Berlin chaise, chair, or calash drawn by more than two horses the sum of 6d.; for every waggon, wain, dray, car, cart, sledge, or other carriage drawn by two horses or oxen the sum of 3d.; for every wagon, wain, dray, car, cart, or sledge, or other carriage drawn by three or four horses or oxen, the sum of 4d." Under the Plymouth, Stonehouse, and Devonport Tramways Act, 1870, the appellants constructed and maintained certain tramways, among them the tramway which passed over Stonehouse-bridge. The tramcars all start from Plymouth, and, passing through Stonehouse, proceed to Devonport, returning from Devonport the same day to Plymouth. On the journey from Plymouth each tramcar is drawn by two horses until it reaches a certain point, where a third horse is attached for the purpose of surmounting the steep gradient up to the bridge, and the tramcar, drawn by three horses, then enters upon and proceeds along the bridge. Until June, 1894, an arrangement subsisted for some time for payment by the appellants to the respondents of lump sums in respect of tolls, but had been determined by the respondents, and the question thus arose to which category the tramcars were to be assigned. Upon this point, at the trial before Mr. Justice Day at Exeter, it was decided that the appellants' tramcars came within the class referred to by the words "other carriage" and were not "a coach, chariot, berlin, chaise, or calash." The Court of Appeal, consisting of Lord Esher, M.R., Lord Justice Lopes, and Lord Justice Rigby, held that the appellants' tramcars were "coaches" within the meaning of the statute.

The case was argued on May 20 and 23 last and their Lordships reserved judgment. Mr. Bousfield, Q.C., and Mr. E. U. Bullen were for the appellants; Mr. Carson,

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

Q.C., and Mr. Alderson Foote, Q.C., for the respondents.

The LORD CHANCELLOR, in moving that the appeal be dismissed, said,—In this case we have to consider the language of a list of tolls which was enacted in the beginning of the reign of Geo. III., and to ascertain, if we can, how far a modern tramcar comes within the description or descriptions which that list of tolls enacted as applicable to the vehicles known at that period of our history. One or two propositions are beyond doubt, and the first is that the particular kind of vehicle now to be made liable to a tax was undoubtedly not in the contemplation of the Legislature at the time—at least that the Legislature had not before its mind that particular form of vehicle with which we are now dealing. Another proposition is that no vehicle of any kind was intended to pass toll free over the road and bridge in respect of which these tolls are to be charged. Another proposition is that for some reason or another the Legislature did undoubtedly intend that vehicles should be divided into different categories, and the conundrum your Lordships are called upon to solve is, Which category is to be selected as the one within which the modern tramcar comes? [His Lordship then read the list of tolls.] So far as the statute itself is concerned, there is nothing except that part of it which enumerated the list of tolls to throw any light upon the question your Lordships have to determine. But for some reason or another the Legislature has divided into different categories the different tolls applicable to the different forms of conveyances into which at the period of the passing of the Act vehicles were divided. The question has been argued here, and apparently justly, upon the alternatives whether the tramcar now in question is a "coach" or whether it is "other carriage." It cannot be denied that the division which the Legislature has sanctioned was even in its then form, and as applicable to the vehicles then in use, somewhat wanting in precision, and during the argument somewhat ludicrous consequences were pointed out as possibly arguable from the want of precision with which the list of tolls was contrived. But the first thing, looking at the statute itself, one has to do is to see whether there is any word in the list which would within its generality include the vehicle under debate, and I have myself come to the conclusion that the word "coach" is the only one which is so applicable as to justify the toll applied to that species of vehicle. I think that at the period when this statute was passed, and, indeed, long before it, the word "coach" was a general word applicable to various kinds of vehicles varying both in shape and capacity of carriage. So Shakespeare says:—

"Thou shin'st in every tear that I do weep;
"No drop but as a coach doth carry thee."

And also:—

"But come, I'll tell thee all my whole device
"When I am in my coach, which stays for us
"At the park gate."

And in Carey's play, *Crononhotontologos*, published not many years before the date in question—viz., in 1734—occurs this passage:—

"Go call a coach, and let a coach be called,
"And let the man who calleth it be the caller;
"And in his calling let him nothing call,
"But Coach! Coach! Coach! O for a coach, ye gods!"

The use of the words "coach-house," "coachman," and "coachbuilder," which, of course, are not appropriated to any particular classes of vehicle, leads to the same conclusion that "coach" is a general name which certainly would comprehend a tramcar, and, therefore, make it primarily the subject of some toll.

But the question still remains, What is the particular toll, where the Legislature has divided into different classes both the tolls and the vehicles? I cannot say that I can regard with complete confidence the conclusion at which I have arrived; but I think that, for the reasons I have given, a tramcar is a coach. I think a category which begins with "coach" and apparently excludes the heavier vehicles appropriated to the carrying of goods rather than passengers is the one in which I must include the tramcar. I think that a category which begins with "wagon" and ends with "sledge," the intermediate words being "wain," "dray," "car," "cart," does appear to suggest the carriage of goods, and not of passengers, as being the genus of vehicle to which that particular toll is applicable. In these circumstances, I think the decision of the Court below was right, and that, therefore, this appeal ought to be dismissed.

LORD WATSON said that he had the advantage of reading his noble and learned friend Lord Herschell's judgment, with which he entirely concurred.

LORD HERSCHELL, after stating the facts, continued:—It is to be observed that the same division into classes is to be found in the section, even where the toll which may be charged is identical, as it is in the case where "two horses" only, or "two horses or oxen" only, are employed. It is evident, therefore, that some common character or quality must have been regarded as attaching in each class to the vehicles which are comprised within it, and as thus creating a distinction between the two classes. It is further to be observed that the words "other carriage," with which the definition of the second class concludes, must, according to well-settled principles, be confined to vehicles *ejusdem generis* with those specifically enumerated. I admit that it is not easy to say with confidence what is the characteristic which was regarded as distinguishing the two classes, but on consideration I have come to the conclusion that, whilst the one class was intended to comprise vehicles employed for the carriage of passengers, the second class had relation to a class of vehicles whose primary use, at all events, was the conveyance of goods. All the vehicles mentioned in the first class are such as were in use for the conveyance of passengers at rapid speed; on the other hand, those enumerated in the second class are all vehicles which were used for the transit of goods. This view is fortified by the consideration that the first class is throughout treated as one in which the beasts of draught will always be horses, whilst the vehicles in the second class are regarded as of a kind drawn either by horses or oxen. If the distinction which I have pointed out be that contemplated by the statute, it is clear that a tramway car cannot fall within the words "other carriage." It is not *ejusdem generis* with those already enumerated. It is contended that it cannot be treated as comprised in the first class, because the vehicles enumerated were all of a well-known form, and that none of the words employed can properly be applied to a tramway car. It is quite true that the word "coach," as distinguished from the other vehicles named, was apt to describe a particular form of vehicle; but, on the other hand, it is impossible to suppose that the Legislature intended to exempt from toll any new form of vehicle which might thereafter be employed, even though it possessed the characteristics shared in common by the vehicles specified in the first class, or that it intended to comprise such a vehicle within the words "other carriage" in the second class, although it did not possess the characteristic by virtue of which the vehicles named in it fell within one class, and were distinguished from the class previously enumerated. I do not think any violence is done to the language used by holding, as the Court of

Appeal have done, that a tramway car is a "coach" within the meaning of the section. That word was, I think, at the time when the Act was passed not confined exclusively to the particular form of vehicle which it undoubtedly described, but was employed in a more general sense. "Chariot, berlin," &c., would, I think, have been properly described as different forms of coaches, and it seems certain that the words coach-box, coachman, and coach-house were employed in relation to all such vehicles. Although the case is not free from difficulty, I am not prepared to differ from the conclusion at which the Court of Appeal have arrived.

LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred, and the appeal was dismissed with costs.

[Solicitors—Ashurst, Morris, and Co., for the appellants; Witham, Roskell, and Co., for the respondents.]

Court of Appeal (A. L. Smith } 1898.
and Rigby, L.J.J.) } July 18.

THE QUEEN (ON THE PROSECUTION OF T. C. DORLING AND T. C. SWIFT) V. SHEERNESS URBAN DISTRICT COUNCIL.*

Local Government—Dramatic performances—Licence for—Conditions imposed by district council—Validity—Application for a *mandamus* dismissed.

The district council appeared to show cause against a rule *nisi* for a *mandamus* directing them to hear and determine an application for a licence for the performance of stage plays at the Victoria-hall, Sheerness. The applicants, T. C. Dorling and T. C. Swift, applied to the Sheerness Urban District Council, who were now the licensing authority for the performance of stage plays within their district, for a licence as above. Certain rules of the district council (which had been in force in the county of Kent before the urban district councils were formed) were made under section 9 of 6 and 7 Vict., c. 68, which statute gave the justices (now the district council) power to make rules for (*inter alia*) ensuring order and decency at the theatres licensed by them within their jurisdiction. One of the rules provided that "no spirituous liquors, wine, ale, beer, porter, cider, perry, or tobacco shall be sold or disposed of in the building." A subsequent rule provided that for every breach of the above rules the managers should pay a penalty not exceeding £5. According to the affidavit of the clerk to the urban district council, upon the application for the licence coming on before the urban district council the applicants applied for a licence free of all restrictions as to the sale of intoxicating liquors, and called evidence in support thereof. Certain objectors were then heard, and it was pointed out that there was a fully-licensed house directly opposite and that there were two large clubs not far off, and that there was no necessity for the sale of intoxicating liquors in the hall. The affidavit went on to state that it was not true that the council refused to consider whether or not a licence should be granted without the imposition of any condition respecting the sale of intoxicating liquors, and that the council heard all parties and all the evidence which was tendered, the only point in dispute being whether the application should be granted free from all restriction as to the sale of intoxicating liquors or subject to the restriction. The council refused to grant the licence except

upon the condition that the applicants undertook not to apply for an Excise licence for the sale of intoxicating liquors. The applicants thereupon applied for a rule *nisi* for a *mandamus* to the district council directing them to hear and determine the application for a licence, contending that the district council had acted upon the general rule above set out, and that this rule was *ultra vires* on the ground that such a rule could not be "for ensuring order and decency" at the theatre within section 9 of 6 and 7 Vict., c. 68, and also on the ground that the district council were by that rule assuming the functions of the Excise authorities, and that the district council, feeling themselves bound by the general rule, had not exercised their discretion in the matter, and had not heard and determined the application according to law. He also contended that the case of "Reg. v. County Council of West Riding of Yorkshire" (1896, 2 Q.B., 386) was wrongly decided. The Divisional Court (Mr. Justice Day and Mr. Justice Phillimore) refused to grant a rule *nisi*. The Court of Appeal having granted a rule *nisi*, the district council appeared to show cause against it.

Mr. Herbert Smith appeared for the district council; Mr. R. G. Glenn appeared for the applicants in support of the rule.

The Court discharged the rule.

LORD JUSTICE A. L. SMITH said that upon the facts appearing on the affidavits, and especially on the affidavit of the clerk to the district council, it was clear that the district council did not consider themselves bound by any hard-and-fast rule. They heard the evidence on both sides, and, according to the affidavit of the clerk to the council, they did not refuse to consider whether the licence should be granted without the condition respecting the sale of intoxicating liquors, the only point in dispute being whether the application should be granted free from all restrictions. The district council did not consider their discretion fettered by any hard-and-fast rule. No doubt they attached great weight to the rule, but they considered all the circumstances and came to the conclusion that they would not grant the licence unless the applicants undertook not to apply for an Excise licence. As regards the case of "Reg. v. County Council of West Riding of Yorkshire," he was inclined to think that that decision was right, but it was not necessary to express any opinion upon it. Whether that decision was right or not, the district council here had heard and determined the application for a licence, and this rule must be discharged.

LORD JUSTICE RIGBY concurred.

[Solicitors—C. T. Wilkinson, for the applicants; V. H. Stallon, Sheerness, for the district council.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Herschell, Macnaghten, Morris, } July 19.
and Shand)

THE GUARDIANS OF PLYMOUTH V. THE GUARDIANS OF AXMINSTER UNION.*

Poor Law—Settlement—Child—Birth settlement—Divided Parishes Act, 1876, sec. 35—Construction.

Decision of the Court of Appeal (13 *The Times* L.R., 185) affirmed.

Judgment was given in this appeal, which was from an order of the Court of Appeal, reported 13 *The Times* L.R., 185. The arguments were heard on June 16 and 17 last, when their Lordships reserved judgment. The facts are given in the judgment of Lord Herschell.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMSON, Esq., Barrister-at-Law.

Mr. Macmorran, Q.C., and Mr. Corrie Grant were for the appellants; Mr. Asquith, Q.C., and Mr. H. E. Duke for the respondents.

LORD HERSCHELL, in moving that the appeal be dismissed, said:—This is an appeal from an order of the Court of Appeal affirming an order of the Queen's Bench Division affirming an order of the Recorder of Plymouth on a case stated by him. The question in dispute is whether Matilda Small, or Manley, a pauper lunatic, was settled in the appellants' union. She was born at Plymouth, in that union, and had never gained a settlement of her own. Her mother, Eliza Manley, a single woman, who also had gained no settlement of her own, was born within the respondents' union. It appeared at the hearing before the Recorder that Eliza Manley was the legitimate daughter of Henry and Matilda Manley, and that Henry Manley was born of English parents, and that he had lived with his father from boyhood at Bridport. The learned Recorder states that he held, "if I could rightly do so, and if it is material," that Henry Manley had a settlement, though he did not make the necessary inquiries to ascertain what that settlement was, and that his daughter Eliza derived that settlement from him. And he adjudged and ordered that the pauper was settled in the appellants' union, that being the place where she was born, as he was of opinion that it could not be ascertained what settlement the pauper derived from Eliza Manley, her mother, without inquiring into Eliza Manley's derivative settlement. The question in controversy turns upon the construction of the 35th section of the 39 and 40 Vict., c. 61. That section, after enacting that no person shall be deemed to have derived a settlement from any other, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of 16, which child shall take the settlement of its father or widowed mother up to that age, and shall retain the settlement so taken till it shall acquire another; and, further, that an illegitimate child shall retain the settlement of its mother until it acquires another settlement, provides as follows:—"If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." It is contended for the appellants that the provision I have just quoted is inapplicable to the present case, and that the pauper is not to be deemed settled in the parish in which she was born, but in the place of the birth settlement of her mother. It was conceded that the birth settlement of the mother was only her *prima facie* settlement, or, as it was put, that it would be displaced if she had a higher settlement such as one derived from her father; but it was argued that until it was shown what the settlement of the father was, and therefore what the settlement she derived from him was, the enactment did not apply. I concur with the Courts below in thinking that this argument is not well founded; in my opinion it would defeat the very object which the enactment had in view. This plainly was to prevent the expense which was often incurred by parishes and unions through prolonged and elaborate inquiries into derivative settlements. It was thought that it would, on the whole, prove more beneficial to Poor Law authorities to lay down the artificial rule that where an inquiry into a derivative settlement would otherwise be involved the place of birth of the pauper should be taken to be the place of settlement. If, in order to bring the clause into operation, it is necessary to proceed with the inquiry to the extent of

ascertaining what the derivative settlement is, I cannot conceive why the place so ascertained should not have been treated as the place of settlement, and why another and wholly artificial place of settlement should have been substituted for it. I think the very purpose of the enactment was to preclude any such inquiry, and the language employed seems to me conclusive against the interpretation sought to be put upon it. The words are not without "ascertaining," but without "inquiring into" the derivative settlement of such a parent. As soon, then, as it appeared that the pauper's mother was the legitimate offspring of an English father I think the case was brought within the enactment I am considering, and the learned Recorder was right in declining to proceed with the inquiry into the settlement of the father, and in adjudging the pauper settled in the parish in which she was born. It may well be that where nothing is known of the circumstance beyond the birth settlement of the pauper's parent, this is to be adjudged the place of the child's settlement; but that is a different case from the one with which your Lordships have now to deal. Although there may be *dicta* in some of the authorities cited not altogether consistent with the conclusion at which I have arrived, I do not think it conflicts with any decision.

LORD MACNAGHTEN.—It seems to me that the learned Recorder was right. I see no reason to alter or modify the opinion I expressed, perhaps unnecessarily, in the case of the Guardians of Reigate Union (14 A.C., 465; 59 L.J., M.C., 29). It appears to me that, where there is an independent inquiry into the settlement of a child, if you find that the settlement of the parent of the child was a derivative settlement, you are not to pursue the inquiry any further. The child is to be deemed to be settled in the place of its birth. The Act prohibits all derivative settlements except in two specified cases. It could hardly have meant that in a case not falling within either of those exceptions the expense of an inquiry into a derivative settlement has to be incurred for the purpose of arriving at a conclusion which must be set aside as soon as it is reached. What the Act, I think, means is this—you must open the door wide enough to see where the path beyond is leading to. If you find that it leads in the forbidden direction, you are to shut the door at once and apply the rule prescribed by the Act. I agree in the motion proposed.

The LORD CHANCELLOR, LORD MORRIS, and LORD SHAND concurred.

[Solicitors—Crowders and Vizard, for the appellants; Geare, Son, and Pease, for the respondents.]

Court of Appeal (A. L. Smith, Rigby,) 1898.
and Vaughan Williams, L.J.) July 19.

HILLIAR V. DADE AND WIFE.*

Malicious Prosecution—Reasonable and probable cause—Facts in dispute—Question for jury.

This was an application by the plaintiff for a new trial of an action tried before Mr. Justice Ridley and a jury, reported in *The Times* of May 16. The action was brought to recover damages for malicious prosecution. The plaintiff, Alice Hilliar, who had been in the defendants' service for five years up to June, 1896, was called as a witness in November, 1897, at the trial of a divorce action brought by a Mrs. Bailey against her husband, Dr. Bailey, in which it was alleged that Dr. Bailey had committed adultery with the defendant Mrs. Dade. The plaintiff gave evidence

*Reported by F. G. EUCKER, Esq., Barrister-at-Law.

on that occasion to the effect that in July, 1895, while the defendant Mr. Dade was spending a week away from home, Mrs. Dade went on a river excursion with 'Dr. Bailey and remained out from 8 o'clock in the morning till midnight, and that Dr. Bailey did not leave the house till about 2 o'clock. The jury at the trial of the divorce action found that Dr. Bailey had not committed adultery with Mrs. Dade, but they added a rider to the effect that Mr. and Mrs. Dade had acted indiscreetly. The plaintiff was subsequently arrested at the instance of the defendants, Mr. and Mrs. Dade, and charged with perjury at Bow-street; but after several remands on bail the charge was dismissed at the request of the prosecuting counsel. This action was then brought for malicious prosecution. On the trial of the action, the learned Judge held that the plaintiff failed to show an absence of reasonable and probable cause, and directed that judgment should be entered for the defendants. It was now contended on behalf of the plaintiff that there was plenty of evidence of an absence of reasonable and probable cause, and that the case ought to have been left to the jury.

Mr. Lewis Thomas appeared for the plaintiff; Mr. Rutter for the defendants.

The Court ordered a new trial.

LORD JUSTICE A. L. SMITH, after going through the facts of the case, said that, in his opinion, where in an action for malicious prosecution there was a dispute as to facts which raised the question whether there was an absence of reasonable and probable cause, the evidence as to those facts ought to be left to the jury, not for them to say whether there was an absence of reasonable and probable cause, but for them to find the facts on which the Judge might determine whether there was an absence of reasonable and probable cause. The withdrawing from the prosecution was not in itself conclusive proof of an absence of reasonable and probable cause, but it was certainly an element which ought to have been taken into consideration. He thought that in this case either all the evidence was in the plaintiff's favour, or at least there was a dispute as to facts which ought to have been left to the jury. Mrs. Dade must have known whether what the plaintiff said in the Divorce Court was true or untrue. If she knew it to be true, there was clearly on her part an absence of reasonable and probable cause. If she knew it to be untrue, then she ought to have been called as a witness before the jury. In his opinion the learned Judge had been too quick in ruling the plaintiff out of Court, and therefore they ought to order a new trial.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS concurred.

Chan. Div. } 1898.
(Wright, J.) } July 19.

IN RE MOORE BROTHERS AND CO. (LIMITED).
Company — Winding up — Contributories — Directors.

In the winding up of a company the directors were held liable as contributories in respect of the ordinary shares, the prospectus having stated that the whole of the ordinary shares would be taken by the directors, though in fact no shares were ever allotted to them.

In the winding up of this company an interesting question was raised touching the liability of directors

who authorize the issue of a prospectus and therein state that they are going to take a proportion of the shares. The company was registered under the Companies Acts about the end of September, 1893, Clauses 77 and 78 of its articles of association being as follows:—"77. Until otherwise determined by a general meeting the number of the directors shall not be less than three nor more than six. The following gentlemen shall be the first directors of the company—viz., Alfred Watson, James Moore, William Moore, Henry Blatch Wells, Milton Bartholomew, Robert Colman. 78. The qualification of every director shall be the holding of shares or stock of the company of the nominal value of £500." On October 28, 1893, the directors held what was apparently their first meeting, and it was attended by all the six directors, including Mr. Bartholomew. The minutes of that meeting contained the following statement:—"The draft prospectus was approved and settled, and the secretary was instructed to place same in the printer's hands." As printed the prospectus stated that the capital was "1,500 ordinary shares of £20 each (the whole of which will be taken by the directors), 750 £6 per cent. preference shares of £20 each, and 300 £5 per cent. debentures of £50 each." The prospectus also stated the names and addresses of the six directors, and stated (*inter alia*) as follows:—"The vendors, after discharging every liability up to the date of purchase, will reinvest the whole of the purchase money in the company, principally in the ordinary stock, on which they will receive no dividend until the £5 per cent. interest on the debentures and the £5 per cent. dividend on the preference shares have been paid. Seeing that—with the other directors—they take the whole of the ordinary shares, investors have the best possible assurance that every effort will be made to ensure the prosperity of the company's business." The prospectus invited application for the preference and debenture capital. After a discussion which took place some time ago before Mr. Justice Romer, three of the directors, Mr. Watson, Mr. Wells, and Mr. Colman, were retained on the list of contributories in respect of ordinary shares, and the question was now raised, on an application for a balance-order against Mr. Bartholomew, whether that gentleman, by reason of the statements in the prospectus, was liable as an ordinary shareholder. None of the four directors was ever placed on the register of members of the company, and the ordinary shares were never allotted to them.

Mr. Grosvenor Woods, Q.C., Mr. Sheldon, Mr. Whinney, Mr. T. L. Wilkinson, Mr. Haldane, Q.C., and Mr. Gore Browne were counsel for the parties.

MR. JUSTICE WRIGHT, after stating the facts of the case, delivered judgment to the following effect:—"If the question had arisen between the directors and those who applied for preference shares and debentures on the faith of the prospectus, there would be little doubt as to the liability of the directors and of the company. But the question is between Mr. Bartholomew and the company, and what I have to decide is whether there are in the prospectus representations of a contract to take ordinary shares on which he can be held liable. I am unable to follow some of the arguments of those who represent the liquidator. I do not say those arguments are not based on law or facts; I only say that I fail to understand them. I cannot see that by the statements any estoppel arises as between the directors and the company. But it is also contended that the directors became liable, on account of the statements in the prospectus, on the same principle as that on which it has been held that, although articles of association are not a contract in themselves, directors by acting on them show that they have entered into a contract on the terms of the articles. So it may

be in the case of a prospectus. And when these directors on October 28 put the document forward as the prospectus of the company they must be taken to have agreed to act as directors on the terms mentioned in the prospectus, one of which was that as a matter of contract they would take all the ordinary shares. It is not necessary to say whether the directors could have made the company allot them all the ordinary shares, but probably the company could have made them take such of the shares as they called upon them to take. There is evidence on which I can find that there is such a contract as I have mentioned. Moore and De La Torre's case (L.R., 18 Eq., 661), although not exactly in point, assists me in arriving at that conclusion. It is said that Mr. Justice Romer in the case of three other directors who applied to be taken off the list of contributories came to the same conclusion, but I have been unable to find out on what grounds. I must hold that the directors, including Mr. Bartholomew, became jointly and severally liable in respect of the ordinary shares, and the order must be made against that gentleman, and he must pay the liquidator's costs. There is no doubt that Mr. Bartholomew knew for some time before its issue what was to be stated in the prospectus. His Lordship stayed execution pending an expected appeal.

[Solicitors—G. A. King; Taylor, Hoare, and Pilcher, for Nodder and Trethowan, Salisbury; Long and Gardiner, for A. Whitehead, Salisbury; Ranger, Burton, and Frost.]

Court of Appeal (Lindley, M.R.,) 1898.
Chitty and Collins, L.J.J.) July 20.

IN RE DIXON—TOUSEY V. SHEFFIELD.*

Practice—Costs—Evidence on affidavit—
Attendance of country solicitor on hearing of
summons—Discretion.
Decision of Byrne, J. (*ante*, p. 498), affirmed.

This was an appeal against a decision of Mr. Justice Byrne (reported *ante*, p. 498). The application was made to his Lordship as the Judge of the Chancery Division, to whom Chancery proceedings commenced in the Manchester and Liverpool District Registries of the High Court of Justice are assigned. In these cases a London agent is not usually employed by the country solicitor, and the latter often comes up to town to attend proceedings in Court or Chambers which are heard by the Judge personally. A summons was taken out to review a taxation as between party and party in respect of allowances by the District Registrar for the attendance of Liverpool solicitors in London on the hearing of an originating summons, all the evidence having been by affidavit. The case was initiated by summons under the Judicial Trustees Act, 1896, which was equivalent to a hostile action to remove trustees on the ground of misconduct. What his Lordship described as "unjustifiable charges (including charges of gross personal misconduct, unsupported by evidence)" were made, and his Lordship dismissed the summons with costs. On taxation of these costs the District Registrar allowed for the attendance in London of Liverpool solicitors at the hearing upon two occasions—viz., when the case was part heard and on the adjourned hearing. Mr. Justice Byrne was of opinion that the taxing officer had a discretion in the matter, and that, though as a general rule the costs of the attendance of the country solicitor would not be allowed, they might be allowed in rare and exceptional cases in the exercise of the

taxing officer's discretion. The present case was a very exceptional one. The discretion of the Registrar had been exercised with care, and his Lordship was not prepared to interfere.

Mr. A'BECKETT TERRELL, for the appellant, argued that this was not the case of a country solicitor attending in London, but the solicitor was attending in the Court in which he practised, though it happened that he had to come to London to do so, and that, consequently, he could not be allowed any additional costs because he had come a long distance. The costs could not be increased because the solicitor chose to live a long distance from the Court in which he practised. But, even if the rule as to allowing a country solicitor in exceptional cases the costs of his coming to London to attend proceedings applied, that rule had never been extended to a case in which the evidence was taken by affidavit. By not employing a London agent the local solicitor obtained the benefit of the whole of the profit costs, instead of sharing them with the London agent.

Mr. PRESTON (with whom was Mr. Eve, Q.C.), for one respondent, urged that the learned Judge had exercised his discretion, and that this Court would not interfere, and also that proceedings in the Liverpool and Manchester District Registries stood in a different position from those in other district registries.

On the second point he was stopped by the COURT.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that in this particular case he was satisfied that the Court ought not to differ from Mr. Justice Byrne. Bearing in mind the nature of the case and the very serious attack made upon these trustees, though it was made only by affidavits, the country solicitor was better able than a London agent to give information which might be required, and it was not unreasonable that he should attend at the hearing. Upon the general question which had been raised by the respondent's counsel, but upon which he had not been heard, it was not necessary to express any opinion, and his Lordship would not do so.

LORD JUSTICE CHITTY said that Mr. Justice Byrne, after taking great care and consulting one of the London taxing masters, had come to the conclusion that the circumstances of the present case were very exceptional, and, though it was more difficult to establish that when the evidence was given by affidavit, there was no inflexible rule that the cost of the attendance of the country solicitor should not be allowed in such a case. The learned Judge had held that the present case was a very exceptional one, and on that ground this Court could not differ from his decision. On the more general question raised by the respondent's counsel the Court would express no opinion now.

LORD JUSTICE COLLINS concurred.

[Solicitors—J. F. Harrison and Burton, Liverpool; Norris and Sons, Liverpool; Tyrer, Kenion, and Co., Liverpool.]

Chan. Div. } 1898.
(Wright, J.) } July 20.

IN RE ATRIFEROUS PROPERTIES (LIMITED).*

Company—Winding up—Calls in arrear—Money lent—Set-off.

One company, B, owed another company, A, for calls made and in arrears, while A owed B for money lent. Both companies went into liquidation.

Held, that B could not take any dividend on

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

*Reported by F. EVANS, Esq., Barrister-at-Law.

their debt until they had paid up all calls in the winding up of A.

The African Gold Properties (Limited) hold shares in the Auriferous Properties (Limited), and before either company went into liquidation calls were made on the shares and the Auriferous Company became indebted to the Gold Company for money lent. The Auriferous Company in this state of things was ordered to be wound up, and the Gold Company went into voluntary liquidation. Mr. Justice Wright held, on May 4 last, that the liquidator of the Gold Company could not set off the debt against the calls (*ante*, p. 390; [1898] 1 Ch., 691). Before the order embodying this decision was drawn up the liquidator of the Auriferous Company sought to have inserted in the order a declaration that in the winding up of that company the Gold Company could not take any dividend upon their debt owing from the Auriferous Company until the Gold Company had paid up all calls in the winding up of the Auriferous Company on the shares in it held by the Gold Company.

Mr. Howard Wright was for the liquidator of the Auriferous Company; and Mr. George R. Northcote for the liquidator of the Gold Company.

MR. JUSTICE WRIGHT delivered the following judgment:—I have already considered this case in one of its aspects, with the result that, in my judgment, the liquidator of the Gold Company could not set off, against calls made by the liquidator of the Auriferous Company, the debt owed by the latter to the former company. A further question was not discussed on the first argument, and remains to be considered. The liquidator of the Auriferous Company is paying a dividend to its creditors, and he asks for a declaration to the effect that he is entitled to hold the dividend due to the Gold Company against the liability of the latter company for calls in arrear on its shares in the Auriferous Company. *Prima facie* the Gold Company is entitled to take its dividend. Its claim as a creditor has been duly ascertained in the appropriate proceeding, and it is *prima facie* immaterial that the creditor happens to be also a debtor to the Auriferous Company. There is no contract for a set-off, nor do the articles of association of either company appear to contain any provision for it, nor do the general statutes of set-off apply. Nor, as it seems, is the doctrine of set-off in bankruptcy, which under section 10 of the Judicature Act, 1875, is extended to the liquidation of companies (*"Mersey Steel and Iron Company v. Naylor,"* L.R., 9 App. Cas., 434), applicable to this case. That doctrine has been held to apply only to cross rights existing at the commencement of the winding up (*"In re Milan Tramways Company,"* 25 Ch.D., 587); but here the call has been made in the liquidation, and until it was made there was only a contingent liability which might never become enforceable and could not be set off, unless, perhaps, after some process of valuation. But in my opinion this case is governed by the principle established in *Grissell's case* ([1866] L.R., 1 Ch., 523) and is within the express terms of the Lord Chancellor's judgment in that case. If the creditor contributory were allowed to take the dividend without paying the call he would be receiving payment of a part of the debt which the company owes to him without making his contribution to the fund out of which that debt, with the other debts of the company, was to be paid. "If," Lord Chelmsford says at pp. 536-537, "the amount of an unpaid call cannot be satisfied by a set-off of an equivalent portion of a debt due to the member of a company upon whom it is made, it necessarily follows, in the last place, that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The

amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company. The dividend will be, of course, upon the whole debt, and the member of the company will from time to time, when dividends are declared, receive them in like manner when either no call has been made, or, having been made, when he has paid the amount of it." This passage is cited as authoritative by Fry, J., in *"In re West of England Bank"* (12 Ch. D., 823). There must be an order as asked by the liquidator.

[Solicitors—Freshfields and Williams; W. H. Hudson.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } July 21.

ARNOLD AND ANOTHER V. STRATTON.*

Contract—Agreement—Construction—Music-hall engagement—"Re-engagement," what is—Question for jury.

This was an application by the plaintiffs for judgment or for a new trial of an action tried before Mr. Justice Kennedy and a common jury, reported in *The Times* of June 10. The action was brought to recover commission on certain music-hall engagements. On October 31, 1892, the defendant, Eugene Stratton, entered into an agreement of agency with Messrs. Diddcott and Co., a firm of theatrical agents, whereby he agreed to pay them a commission of 10 per cent. on all engagements obtained by him through them, and the same on all his re-engagements with the same halls. Diddcott and Co. carried through contracts for the defendant's appearance at three music-halls—viz., the London Pavilion, the Tivoli, and the Oxford, during a period of ten weeks in the first half of the year 1893, and another period of ten weeks in the second half of the year; and a similar arrangement was made with regard to the year 1894 and the year 1895. On November 19, 1894, while those contracts were existing, the defendant, without an agent, entered into agreements to appear at the same three music-halls during 1896. The plaintiffs, who had been appointed receivers of the estate of Diddcott and Co., contended that these were re-engagements, and claimed commission. A verdict and judgment were entered for the defendant.

Mr. Joseph Walton, Q.C., and Mr. Rufus Isaacs, Q.C., appeared for the plaintiffs in support of the application; Mr. Montague Lush appeared for the defendant.

THE COURT, without calling upon counsel for the defendant, dismissed the application.

LORD JUSTICE A. L. SMITH said the case turned on the construction of the contract of October 31, 1892, the dispute being as to the meaning of the word "re-engagements" in that contract. He agreed that the construction of the contract was for the Judge. But the question here was whether another contract—viz., that of November 19, 1894, came within the terms of the former contract. That was a question which was rightly left to the jury. By the earlier contract the defendant agreed to accept engagements through the firm of Diddcott and Co. at three music-halls for certain periods during 1893 and the two following years, at a certain salary and on certain conditions, and he agreed to pay 10 per cent. commission on those engagements and on all his re-engagements at those establishments. On November 19, 1894, the defendant, without the instrumentality of Diddcott and Co., entered into con-

*Reported by F. G. BUCKER, Esq., Barrister-at-Law.

tracts to appear at the same music-halls in 1896. But in these contracts the salary was different, and there were differences in the other terms. The plaintiffs claimed that these were re-engagements. In his opinion it was impossible to say as a matter of law that they were re-engagements as distinguished from fresh engagements. Where there were differences in the terms of engagement, the Judge could not lay it down that the case in question was a re-engagement; but it was right to leave the matter to the jury. Neither did he think that the learned Judge had misdirected the jury in this case. It was, he thought, impossible to give an exact definition of "re-engagement." In his opinion the proper thing to do was that which the learned Judge had done here—viz., to give the jury instances of what would be a re-engagement and of what would be a fresh engagement, and ask them under which category they thought the present case came. The learned Judge pointed out to the jury the differences in the agreements, and they came to the conclusion that this was a fresh engagement, and not a re-engagement. He thought that they could not interfere with the verdict.

LORD JUSTICE RIGBY was of the same opinion. He thought that the word "re-engagement" was a word which had no definite legal meaning, and that it could only be explained by illustrations.

LORD JUSTICE VAUGHAN WILLIAMS also agreed that the application should be dismissed, though he would not have come to the same conclusion as the jury arrived at in the present case, and he doubted whether the learned Judge had sufficiently directed the jury by the illustrations which he gave them. It was, however, a question of degree, and not of law.

[Solicitors—Hicks, Arnold, and Mozley, for the plaintiffs; Stanley, Woodhouse, and Hedderwick, for the defendant.]

Court of Appeal (Lindley, M.R.,)
Chitty and Collins, L.J.J.)

1898.
July 22.

IN RE J. BATT AND CO.*

Trade Mark—Registration—Validity.

A man may not properly register a trade mark for goods in which he does not deal or intend to deal.

This appeal raised a question of considerable importance under the Patents and Trade Marks Acts—viz., as to the right of a dealer in goods of various descriptions to register a trade mark for goods in which he does not deal and has no definite intention of dealing. The appeal was brought by Mr. Kottgen, trading as J. Batt and Co., in the name of the firm, from an order of Mr. Justice Romer expunging two trade marks from the register (see *The Times* of April 23). One trade mark, No. 27,850, was registered in July, 1882, in the name of J. Batt and Co., for several classes of goods, including class 42. The other trade mark, No. 72,790, was registered in August, 1888, in the same name, for class 42 alone. Both trade marks consisted of a butterfly with open wings. Class 42 was as follows:—"Substances used as food or as ingredients in food." Messrs. James Carter and Co., the well-known seed merchants, applied to register a butterfly with closed wings for oats, which were comprised in class 42. The Comptroller refused the application on the ground that there were already on the register the butterflies of J. Batt and Co. for class 42. Thereupon Messrs. Carter and Co. applied to expunge these marks.

The main ground for expunging them was that J. Batt and Co. never dealt in goods in class 42, and were not justified in registering any trade mark for goods in that class, and the learned Judge, in ordering the marks to be removed, proceeded upon that ground.

Mr. Levett, Q.C., and Mr. Sebastian were for the appellant; Mr. Neville, Q.C., and Mr. Austen-Cartmell were for Messrs. Carter and Co.; and Mr. Ingle Joyce appeared for the Comptroller.

The appeal was heard on July 13.

The MASTER of the ROLLS delivered the judgment of the Court dismissing the appeal. After stating the facts as above and observing that the appeal was based on two grounds—(1) that the evidence did not warrant the conclusion of fact arrived at by the learned Judge, and (2) that, assuming the fact to be as he stated, such fact was not sufficient to entitle the Court to remove the marks from the register—his Lordship discussed the evidence as to the fact of user and agreed with the finding of the learned Judge. He then proceeded as follows:—"This brings us to the question of law. We will assume that Mr. Kottgen, when he obtained registration of his marks, was a general exporter and dealer, exporting and dealing in goods of various descriptions, but not, in fact, exporting or dealing in goods in class 42, although ready to do so if opportunity offered. We will assume, further, that he has always been and is still ready to do so, but that he has not even yet exported or dealt in any goods in that class except confectionery, biscuits, and butter, which exception we will assume in his favour. A question of law then arises which may be stated shortly as follows. Can a man properly register a trade mark for goods in which he does not deal or intend to deal? meaning by intending to deal having at the time of registration some definite and present intention to deal in certain goods, or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable. This question we answer in the negative. To answer it otherwise will be unduly to strain the language of the Acts relating to trade marks and to render those Acts extremely mischievous instead of beneficial to trade and commerce. The Trade Mark Registration Acts presuppose some business or trade in some kind of goods made, sold, or otherwise dealt with in the way of business. Although section 75 of the Act of 1883 said that "registration of a trade mark shall be equivalent to public use of the trade mark," this language, even when in force, did not and could not mean that continued registration was equivalent to continued user. So to construe the language would lead to the irrational conclusion that a man might properly register a trade mark for any goods he chose, although he carried on no trade or business in them at all. Such a person if properly on the registry might then object to anybody else registering that mark (see section 72) without buying him off. Section 75 was addressed to the time of registration; it substituted registration for previous user and reputation gained by it. The corresponding section of the prior Act of 1875 (viz., section 2) was discussed in *Edwards v. Dennis* (30 Ch. Div., 454), and the contention that the language of that section meant more than we have stated was emphatically repudiated by the Court of Appeal, although it had found favour in the Court below. That decision fairly looked at really governs this case in principle. It is true that in *Edwards v. Dennis* the Court had to deal with the assignee of a trade mark; but the rights acquired by his assignor on registration were very carefully examined, and Vice-Chancellor Bacon, at

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

p. 465, and also Lord Justice Cotton, on p. 474, and another Lord Justice, on pp. 476, 477, all expressed clear opinions that the assignor had no right to register his trade mark for goods with which he had no concern. Lord Justice Fry went less fully into this question, but it is plain that his view was the same (see p. 479). The Act of 1883 must of course be looked at to see whether its language has rendered it necessary to come to a different conclusion on this point, and we have looked at it carefully, but we cannot find that it has. Section 75 of the Act of 1883, on which Mr. Levett based his argument, was repealed by section 17 of the Act of 1888, and that section, which is retrospective, makes "application for registration" instead of "registration" equivalent to public use. This alteration makes it still plainer than before that the public use referred to is not use since registration, but use and reputation at the time of application. Section 65 of the Act of 1883 says that "a trade mark must be registered for particular goods or classes of goods." This leaves open the question what goods or classes of goods are referred to. Does the section refer to goods or classes of goods which the applicant for a registered mark makes or deals in or intends to make or deal in in the sense above explained, or does it refer to goods or classes of goods which he does not make or deal in and which he has no definite intention of making or dealing in? Common sense and "Edwards v. Dennis" concur in confining the goods or classes of goods to those which a man makes or deals in or intends to make or deal in when he applies for registration. It remains only to consider whether section 90 of the Act of 1883 (the rectification section) is applicable to this case. We are of opinion that it is. The applicants are parties aggrieved; for the trade mark they desire to have registered is kept off the register by reason of the presence on it of the marks of J. Bat and Co. The entry of these marks is "an entry made without sufficient cause in the register." We are not disposed to put a narrow construction on this expression; nor to read it as if the word "made" were the all-important word and as if the words "made without sufficient cause" were "made without sufficient cause at the time of registration," so as to be confined to that precise time. If any entry is at any time on the register without sufficient cause however it got there, it ought in our opinion to be treated as covered by the words of the section. The continuance there can answer no legitimate purpose; its existence is purely baneful to trade, and in our opinion in the case supposed the Court has power to expunge or vary it. But, however this section is construed, the present case falls well within it. It may be said that this decision may impose undue restrictions on the acquisition of trade marks by general dealers in goods of many sorts. We do not, however, believe it will fetter legitimate trade. A man can always apply to register a mark or marks as he really wants them. But if a man procures a mark to be registered for goods in which he does not deal, either when he applies for registration or within a reasonable time afterwards, he does so at his peril (to use Lord Justice Fry's expression) and he exposes himself to the risk of having his mark expunged or varied, and of having the monopoly conferred by registration restricted to his legitimate requirements. The trade mark 72,790 is confined to goods in class 42 and the learned Judge was right in expunging that entry. The trade mark 27,850 ought to be expunged as to goods in class 42, but on the evidence before us there is no reason for expunging it from the register as regards other goods. The order ought to be cancelled in this respect. But this variation, which rectifies what is probably a slip made in drawing up the order, will

not affect the appeal, which must be dismissed with costs.

[Solicitors—Shepherds; Mann and Taylor; The Solicitor to the Treasury.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } July 22.

MOORE V. RANSOME'S DOCK COMMITTEE.*

Negligence—Personal injuries—Bargeman—
Dangerous condition of dock—Evidence of
negligence—New trial ordered.

This was an application by the plaintiff for a new trial, in an action tried before Mr. Justice Wills and a special jury. The action was brought by the widow of a bargeman, under Lord Campbell's Act, to recover damages for the death of her husband, owing to the alleged negligence of the defendants. The deceased man was on the night of August 7, 1897, navigating two laden barges fastened together into Ransome's Dock, Battersea, and it was his duty to moor the barges in the dock. According to the evidence given on behalf of the plaintiff the deceased man did not come home that night and next morning his son went to look for him, when he found the head of the first barge moored to the quay of the dock, but the other barge was not moored. Upon the next day after that the deceased man's body was found in the dock. There was no evidence as to how the deceased man got into the water. At the time when the barges were brought into the dock there was a space of 14ft. between the surface of the water and the top of the dock wall. There were 4ft. of water in the dock and a considerable amount of mud at the bottom. There were no facilities, such as chains or ladders, at the dock walls for persons who fell into the water, to get out again. There was also evidence that a lighterman, a coachman, and three children had been previously drowned in the dock and that complaints had been made to the defendants as to the dangerous condition of the dock. There was evidence that the deceased man could swim. At the end of the plaintiff's case Mr. Justice Wills held that there was no evidence of negligence causing the death of the deceased, and directed judgment for the defendants.

Mr. Griffith Jones appeared for the plaintiff; Mr. Witt, Q.C., and Mr. J. E. Bankes appeared for the defendants.

The COURT allowed the application.

LORD JUSTICE A. L. SMITH said that the defendants knew that there were no means, if a man fell into the water, of escape. They knew that the dock was in a dangerous condition to persons using it. There had been some persons, including a lighterman, drowned there before, and the defendants had received complaints from lightermen using the dock as to its dangerous condition. It was said that there was no case made out of negligence occasioning the death, and that "Wakelin v. London and South-Western Railway Company" (12 App. Cas., 41) governed the present case. That was a case of a man killed at a level crossing, and his body was found upon the line near the crossing. There was no proof in that case of negligence causing the death. In the present case there was ample evidence of knowledge on the part of the defendants of the dangerous condition of the dock, and, in his opinion, there was evidence to go to the jury of negligence causing the death of the deceased man. There must, therefore, be a new trial.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS concurred.

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

Q.B. Div.
(Darling, J.) }

1898.
July 22.

ADAM V. BRITISH AND FOREIGN STEAMSHIP COMPANY
(LIMITED)—STEWART, YSEBOOT, AND MICHELS V.
SAME.*

Alien—Lord Campbell's Act—Collision—Negligence.

Lord Campbell's Act (9 and 10 Vict., c. 93)
does not apply for the benefit of aliens.

These four actions were tried before his Lordship and a common jury on the 19th inst., and a report of the trials appeared in *The Times* of the 20th inst. The jury found verdicts for the plaintiffs in all four cases, but his Lordship reserved judgment after argument upon the question whether the actions (which were brought under similar circumstances) would lie.

MR. JUSTICE DARLING gave judgment for the defendants in all the actions. The facts and arguments sufficiently appear from the judgment in Adam's case, which was read by Mr. Justice Darling, and was as follows:—This is an action brought by the mother of one Adam, a Belgian subject, a sailor on board a Belgian ship, the *Concha*. He was drowned owing to a collision between that ship and the *Saint Fillans*, a ship of the defendants' (English subjects). The collision took place on the high seas, outside the jurisdiction of this Court, and, it is admitted, was caused by the negligence of the defendants. The jury awarded the plaintiff £200 damages. The questions to be determined are of no ordinary difficulty, and of much more than ordinary interest and importance. On behalf of the defendants it was argued by Mr. Horridge that the provisions of Lord Campbell's Act, 9 and 10 Vict., c. 93, and 27 and 28 Vict., c. 95, do not apply for the benefit of aliens. By section 1 of Lord Campbell's Act it is enacted "That whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." No point was raised as to whether the plaintiff was a person having the necessary *status* within section 2 of Lord Campbell's Act; and I therefore in this action, and in the others arising out of the same circumstances, proceed on the assumption that the plaintiffs are entitled to maintain the actions respectively, provided any representatives of aliens may sue in the circumstances of this case. There can, I think, be no doubt that had the deceased been an English subject this action would have lain, notwithstanding that the negligence and death both occurred upon the high seas, and therefore outside the territorial limit and jurisdiction. It is unnecessary for this proposition to do more than refer to the cases of "*Mostyn v. Fabrigas*" (1 Cowper, 161) and to the "*British South Africa Company v. Companhia do Moçambique*" (L.R., App. Cas. [1893], page 602), and to the various authorities there cited. Mr. Kemp, Q.C., on behalf of the plaintiffs, relied upon the case of the *Explorer* (L.R., 3 A. and E., 289) as an authority for saying that such an action as this would lie. And no doubt the judgment in that case assumes that it would do so; but this question was not argued, and the judgment there given is, upon the points there in issue,

reversed by the case of "*Seward v. Vera Cruz*" (L.R., 10 App. Cas., 67), as is also the case of the *Guldfaxe*, upon which judgment in the *Explorer* case proceeded. This case of the *Guldfaxe* had already been sufficiently discredited in "*Simpson v. Blues*" (L.R., 7 C.P., 290). Independently of Lord Campbell's Act it was conceded that the representative of an alien killed by the negligence of a British subject on the high seas cannot maintain an action in this Court. Now Lord Campbell's Act gives a new cause of action. That is decided by Lord Selborne in the case of the *Vera Cruz*; but it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, and unless the language of the statute expressly refers to them. In the case of the *Zollverein* (2 Jur., N.S., 429) Dr. Lushington says:—"In looking to an Act of Parliament, and in considering whether it applies to foreigners or not, we are always to bear in mind the power of the British Legislature; for it is never to be presumed, unless the words are so clear that there can be no possibility be a mistake, that the British Legislature exceeded that power, which, according to the law of the whole world, properly belongs to it. The power of this country is to legislate for its own subjects all over the world and as to foreigners within its jurisdiction, but no further." And Lord Esher, in "*Colquhoun v. Heddon*" (25 Q.B.D., 125), expresses himself as follows:—"The proper construction to be put on general words used in an English Act of Parliament is that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when Parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our Parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and unless it does so in express terms so clear that their meaning is beyond doubt the Courts ought always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of Parliament." Further, Lord Chief Justice Jervis, in "*Jefferys v. Boosey*" (4 H. of L. Cases, 946), lays down the law in these words:—"Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the Legislature to protect. Natural born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom and are within the benefits conferred by the Legislature, but no duty can be imposed upon aliens resident abroad, and with them the Legislature of this country has no concern either to protect their interests or to control their rights." Now, I ask, Is there anything in Lord Campbell's Act to show that it was intended to apply for the benefit of foreigners not resident in this kingdom? I do not think that there is. The intention of the Legislature is to be collected from the statute, and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 and 10 Vict., c. 93. Moreover, that statute provides in section 2 for the division of the damages recovered amongst the various persons to be benefited in proportions to be assessed by the jury. It appears to me impossible that it was intended, there being no expression to that effect, to cast upon juries such a duty as this in regard to the distant family of a deceased, and possibly polygamous,

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

alien. An Act of the British Parliament is not an allocation addressed *urbi et orbi*. My judgment is, for the reasons I have given, for the defendants in this case and in the three actions brought against them in respect of the collision between the Saint Fillians and the Concha.

Judgment for defendants.

Mr. Kemp, Q.C., and Mr. L. Noad appeared for the plaintiffs; Mr. Horridge and Mr. Crompton for the defendants.

[Solicitors—W. A. Crump and Son, for the plaintiffs; T. Cooper and Co., agents for Simpson, Worth, and Co., Liverpool, for the defendants.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } July 25.

MAYOR, &C., OF THETFORD V. COUNTY COUNCIL OF NORFOLK.*

Local Government—County Council—Expenses of quarter sessions—Liability for—Local Government Act, 1888, sec. 84.

Sec. 84 of the Local Government Act, 1888, does not impose on a County Council the obligation to pay the expenses of quarter and petty sessions in the case of a borough having a separate Court of quarter and petty sessions and a population of less than 10,000.

"*Ex parte Kent County Council*" ([1891] 1 Q.B., 389) and "*In re County Council of Herefordshire*" ([1895] 1 Q.B., 43) over-ruled.

This was an appeal from the judgment of Mr. Justice Wills. The question was whether, in the case of a borough with a population of less than 10,000 and having separate Courts of quarter and petty sessions, the salaries of the Recorder, of the clerk of the peace, and of the clerk to the borough justices in petty sessions in such borough, and also certain other expenses connected with the quarter and petty sessions, were transferred from the borough fund to the county fund. The borough of Thetford was a borough containing a population less than 10,000, and was situate for administrative purposes within the county of Norfolk. It had a separate Court of quarter sessions presided over by a Recorder who was paid a salary of £40 per annum, and there was a clerk of the peace who was paid by fees. Before and since the Local Government Act, 1888, the salary of the Recorder and the fees (with certain exceptions) of the clerk of the peace were paid out of the borough fund. The borough had also a separate Court of petty sessions, and the clerk to the borough justices in petty sessions was paid a salary out of the borough fund. The Courts of quarter and petty sessions were held at the Guildhall, and the plaintiffs had paid the expenses incurred in connexion therewith. The plaintiffs contended that by the Act of 1888 the liability for the above expenses was transferred to the defendants, and they claimed a declaration to that effect; and they also claimed to be reimbursed the expenses so paid by them. Mr. Justice Wills, refusing to follow the decision of a Divisional Court (consisting of Mr. Justice Stephen and Mr. Justice Vaughan Williams) in "*Ex parte Kent County Council and Borough of Sandwich*" ([1891] 1 Q.B., 389), held that the obligation of paying the above expenses had not been transferred to the county councils except in the case of the clerk to the borough justices in petty sessions, which was transferred to the county

council, but that the arrears of his salary recoverable must be limited to six months, having regard to the power of making county rates. The plaintiffs appealed, and the defendants gave cross-notice of appeal. By section 35 of the Local Government Act, 1888, in the case of the quarter sessions of a borough, not being one of certain specified boroughs, but containing a population of 10,000 or upwards, the following provisions were to apply:—Subsection 5.—"The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough may be assessed to county contributions, and all costs of prosecutions mentioned in section 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund." Section 38 applied to boroughs having a separate Court of quarter sessions and containing a population of less than 10,000, but there was no subsection similar to subsection 5 of section 35.

Mr. Crump, Q.C., and Mr. Le Riche (Mr. Rufus Isaacs, Q.C., with them) appeared for the plaintiffs; Sir R. T. Reid, Q.C., and Mr. W. Wills appeared for the defendants.

The COURT, having taken time to consider, delivered judgment dismissing the appeal and allowing the cross-appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The main question to be determined in this case is whether the Corporation of the Borough of Thetford or the County Council of the County of Norfolk are liable to pay the salaries of the Recorder of Thetford and of the clerk of the peace of that borough. There is also a question raised by cross-appeal as to the payment of the salary of the clerk to the petty sessions holden in and for that borough, which I will deal with separately. There is no doubt that prior to the passing of the Local Government Act, 1888, the Corporation of Thetford, which was a quarter sessions borough, was liable to pay the salaries of its Recorder and clerk of the peace, and for that purpose might have recourse to the borough fund. The Municipal Corporations Act, 1882, section 140, and schedule 5, part 1, is clear as to this, and it is wholly unnecessary to go back to the Municipal Corporations Act of 1835, or prior thereto, as we were invited to do by counsel. The sole point we have to determine as to the salary of the Recorder and clerk of the peace is this—Has the Local Government Act, 1888, taken off the shoulders of Thetford the obligation of paying its Recorder and clerk of the peace and transferred the obligation on to the shoulders of the County Council of the County of Norfolk? This entirely depends upon what is to be found in the Local Government Act, 1888, and, without travelling into what I conceive to be matters irrelevant to what I have to decide, I will point out as concisely as I can how the matter stands. By the Local Government Act, 1888, the boroughs of England and Wales were divided into three classes. The first class consists of boroughs which contained a population of not less than 50,000 on June 1, 1888, or were counties in themselves. These are called "county boroughs." The second class consists of quarter sessions boroughs, not being county boroughs, which contained a population of 10,000 and upwards according to the census of 1881. These I will call the larger boroughs. And the third class consists of quarter sessions boroughs which contained a population of less than 10,000 according to the census of 1881. These I will call the smaller boroughs. The borough of Thetford falls within this last class of boroughs. It is clear that the Legislature had a reason for splitting up the boroughs of England and Wales into these three classes, but why it did so is not for me to speculate upon or determine; it is sufficient to say that upon reading sections 31, 35, and 38 of the Act of 1888 it is mani-

*Reported by F. G. BUCKEN, Esq., Barrister-at-Law.

fest that the Legislature has done so. Now, as regards this first class of boroughs—i.e., the county boroughs—sections 31-34 of the Act are made to apply to them, and to them alone. I have not to consider the why and the wherefore the special provisions of these four sections are made applicable to this class of boroughs and not to the other two classes of boroughs, but that they are so applied is clear, and I have nothing more to say upon this matter, especially as the borough of Thetford does not fall within this class. I now come to the second class of boroughs, to which, and to which alone, section 35 with all its subsections applies. This section commences:—"In the case of a quarter sessions borough, not being a county borough, containing a population of 10,000 or upwards, the following provisions shall . . . apply." Then come special and specific provisions applicable to this class of borough, and in my opinion to this class alone. By subsection 5 of this 35th section it is enacted:—"The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough"—obviously, in my opinion, meaning the larger boroughs—"may be assessed to county contributions, and all costs of prosecutions mentioned in section 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund." So far as this subsection 5 of section 35 is inconsistent with section 169 of the Municipal Corporations Act, 1882, it repeals it; see especially section 126 of the Local Government Act, 1888. It is said that this subsection relieves the larger boroughs from payment of their Recorders and clerks of the peace. It may or may not do so. I have not to decide the point, for I have only to deal with the Corporation of Thetford, which is not a larger but a smaller borough. I now come to what I have to decide—viz., whether, by reason of section 38 of the Act of 1888, the Corporation of Thetford is relieved from paying its Recorder and clerk of the peace, and whether this burden is cast upon the County Council of the county of Norfolk. Section 38, which has application to the smaller boroughs alone, is wholly dissimilar in its provisions from section 35 of the Act which has application to the larger boroughs alone. Why the Legislature has determined to deal differently with the three classes of boroughs, as I have before said, it is not for me to speculate upon; it has done so. This section 38 enacts that "Where a borough having a separate Court of quarter sessions contained according to the census of 1881 a population of less than 10,000"—which is the case of Thetford—" (1) there shall be transferred to the county council the powers, duties, and liabilities of the council and justices of the borough " relating to pauper lunatic asylums, to coroners, to analysts, to reformatory and industrial schools, to fish conservancy, to explosives, and also to the Highways and Locomotives Act, 1878. Power is given by this section for the council of the borough to apply to the county council to declare certain roads in the borough to be main roads. By subsection 5 of section 38 it is enacted that "the area of the borough shall for the purposes of the above-mentioned Acts and all other administrative purposes of the county council be included in the county as if the borough had not a separate quarter sessions, and accordingly shall be subject to the authority of the county council and the county coroners, and may be annexed by the county council to a coroner's district of the county, and the parishes in the borough shall be liable to be assessed to all county contributions." The administrative purposes mentioned in the section have nothing to do with judicial functions of the borough. Administrative purposes are not judicial functions. It will be noticed that the salaries of recorders and clerks of the peace in section 38, which deals with the smaller boroughs, are in no

way touched or dealt with; they are left to be paid as they were before the passing of the Local Government Act, 1888—i.e., by the corporations of the smaller boroughs. By subsections 7 and 8 of section 38 power is given to the council of any borough of less than 10,000 inhabitants according to the census of 1881, whether a quarter sessions borough or not, to petition her Majesty to revoke the grant of a Court of quarter sessions to the borough, and also to revoke the grant of a commission of the peace for the borough. It was argued on behalf of the borough that the Legislature must have meant to place the payment of salaries of the recorder and clerk of the peace of the smaller boroughs upon the county, because it had done so in the case of the larger boroughs (whether it has or not I do not decide), and because by subsection 5 of section 38 Thetford, a smaller borough, is made liable to be assessed to all county contributions, and therefore it should be held that, if the transfer of the burden of paying the recorder and clerk of the peace to the county council cannot be found in section 38 of the Act, which it clearly cannot be, subsection 5 of section 35 must be pressed into the service and construed as a general provision not limited to the larger boroughs, as in my opinion it unquestionably is, and made applicable to the smaller boroughs as well. It is said, if this be not done, the Act would work injustice, and therefore this subsection 5 of section 35 should be so read. With all submission to the late Mr. Justice Stephen and to my brother Vaughan Williams, who, in the case of "*Ex parte Kent County Council*," held that subsection 5 of section 35 was to be read as a general provision applicable to both the larger and smaller class of boroughs, I cannot agree. To hold so would, in my opinion, be doing such violence to the provisions and framework of the Act as no Court would be justified in doing, even if the suggested imputations upon the legislation be well-founded, which I am by no means convinced of. The special provisions of subsection 5 of section 35 applicable to the larger boroughs are in my judgment purposely omitted from section 38, which is applicable to the smaller boroughs. The special provisions of subsection 5 of section 38 are, as was pointed out by Sir Robert Reid, such as to tax the borough for the expenses of the county, and not the county for the expenses of the borough; and yet it is now said by the borough that the true reading of the Act is that the county should pay these expenses (salaries of Recorder and clerk of the peace) of the borough. It is, too, significant that the Legislature in this section 38 has given to the smaller boroughs an easy way out of these difficulties, if they do not desire to continue to pay their Recorder and clerk of the peace when made liable to county contributions; for they may, under subsection 7 of section 38, petition her Majesty to revoke their grant of a Court of quarter sessions and also their grant of a commission of the peace. This right is not given, it will be seen, to the larger boroughs. As to the suggestion that the borough of Thetford is unable by reason of the Act of 1888 to pay out of its borough fund the salary of its Recorder and clerk of the peace, I cannot find that it is well-founded, and do not agree with it. The construction of section 38 of the Act of 1888 appears to me to be clear, and, in my judgment, nowhere in that section nor anywhere else in the Act of 1888 can it be found that the obligation of the borough of Thetford to pay its Recorder and clerk of the peace has been taken from the borough and transferred to the County Council of Norfolk. Section 36 in no way deals with the liability of a corporation and has no bearing on this case. I agree with my brother Wills that the liability of the corporation to pay its Recorder and clerk of the peace has not been transferred by the Act of 1888 to the

county council, and I am of opinion that the appeal of the Corporation of Thetford from his judgment should be dismissed. I now come to the cross-appeal of the county council as to whether the borough of Thetford or the County Council of the County of Norfolk is liable to pay the salary of the clerk of the borough justices in petty sessions holden in and for the borough of Thetford. My brother Wills has followed and agreed with the case of "*In re County Council of Herefordshire*" ([1895] 1 Q.B., 43), where a Divisional Court held, following the case of "*County Council of Cornwall v. Town Council of Truro*" (63 L.J., M.C., 60), which was a borough with a population of over 10,000, that the salary of the clerk to borough petty sessions had since the Act of 1888 to be paid by the county council, and not by the borough. The correctness of this decision is now challenged in this Court, and we have to say if it be rightly decided. The way in which it is said that the county council and not the borough is liable to pay the salary of the clerk to petty sessions of the borough is this. First of all, the Act of 1849 is referred to, which is "An Act for holding petty sessions of the peace in boroughs," not in counties. This Act, after reciting that "petty sessions of the peace are holden in and for certain divisions of the several counties of England and Wales, called petty sessional divisions, . . . and that important duties have lately been assigned to justices and their clerks attending such sessions by certain Acts of Parliament, and that it is desirable to . . . enact that the sittings of justices of the peace . . . in and for every borough . . . having a separate commission of the peace should be deemed a petty sessions of the peace within the meaning of such Acts," enacts that "every sitting and acting of justices of the peace . . . in and for any borough . . . having a separate commission of the peace within England and Wales . . . shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament already made or hereafter to be made, having relation to such petty sessions or to any business to be transacted thereat." It is not suggested that any Act prior to the Act of 1849 (12 and 13 Vict., c. 18) places the appointment and payment of a salaried clerk to a borough petty sessions in the county council, and it is not denied that prior to the passing of the Act of 1888 the borough appointed and paid the salaried clerk to its own petty sessions. It is, however, said that the Local Government Act of 1888 changes all this, and that section 84 is the section which effects this. Section 84, subsection 1 of the Act of 1888 runs thus:—"(1) The salaried clerk of every petty sessional division shall be from time to time appointed and removed as heretofore. (2) The county council shall pay to the salaried clerks of petty sessional divisions such salaries" as by this subsection are enacted, and the standing joint committee are substituted for quarter sessions justices and the local authority respectively. It is true that by the Act of 1849 the borough bench is made a petty sessional division—that is, so far as this is concerned, they are placed on a par with county petty sessions; but with what salaried clerks is section 84 of the Act of 1888 dealing? Now it will be seen that section 3, subsection X. of the Act of 1888, which is the transfer section to the county council, deals, amongst other things, with salaried clerks of county justices, but not with salaried clerks of borough justices. Section 84 of the Act of 1888 also in my opinion deals with the salaried clerks of county petty sessional divisions, and not with the salaried clerks of a borough petty sessional division, and for these reasons. Section 84 is part of a group of sections

commencing with section 83, which group is headed "officers." Section 83 refers to county and not to borough officers; this is clear. The joint committee (appointed under section 30) mentioned in this section, as also in section 84, is composed of an equal number of county justices and county councilmen. This committee cannot interfere with the judicial functions of a larger or smaller borough. Section 84, which follows section 83, deals in my judgment with exactly the same class of salaried clerks as section 83—i.e., salaried clerks of county petty sessional divisions, and not with salaried clerks of borough petty sessional divisions. The words "Every petty sessional division" in section 84, according to the context and whole scope of the Act, mean in my opinion a county and not a borough petty sessional division. It will be seen that by section 84 (2) the appointment as well as the removal of the salaried clerk mentioned in the section is expressly left where this had been prior to the passing of the Act—that is, the appointment and removal of a county petty sessional salaried clerk is left with the county authority. If this subsection applied to a borough petty sessions salaried clerk, which, I think, it does not, then the appointment and removal of a borough petty sessional salaried clerk is left with the borough authority. Subsection 2 of section 84 also appears to throw light upon this, for by it the joint committee, composed as above-mentioned of county men, is introduced to deal with the "officers" mentioned in sections 83 and 84. What has such a committee to do with a borough officer, to whose selection, appointment, and removal they are strangers, and advisedly kept strangers, by the Act, though it is now said they are by reason of the Act to pay his salary? I do not see the object or sense of this, and, in my opinion, it is not the true construction of the Act. In my judgment section 84 of the Act of 1888 does not apply to borough petty sessions salaried clerks at all, and, therefore, does not shift the payment of such salaried clerks on to the county council. In my judgment, the Corporation of Thetford is liable to pay the salary of its own clerk to its own borough petty sessions, as it was before the passing of the Act of 1888, and this obligation is not by the Act cast upon the county of Norfolk; and the case of the County Council of Herefordshire was not rightly decided; and, consequently, this appeal by the county council must be allowed. I have heard nothing about a point apparently taken in the Court below, but not taken here, as to the salary of the clerk of the justices acting as visitors of licensed houses for lunatics in the borough of Thetford, and I therefore say nothing about it. As the county council has succeeded in this appeal and cross-appeal, first as respondents, and secondly as appellants, they must have their costs of each appeal both here and below.

LORDS JUSTICES RIGBY and VAUGHAN WILLIAMS read judgments to the same effect.

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } July 25.

KELLY V. CROFT.*

CONTRACT—AGREEMENT—CONSTRUCTION—CLAIM FOR
COMPENSATION AFTER DETERMINATION OF AGREEMENT.
Division of Divisional Court (*ante*, p. 348)
affirmed.

THIS was an appeal by the plaintiff from the judgment of a Divisional Court, Mr. Justice Day and Mr. Justice Phillimore, on a special case, reported *ante*, p. 348. The

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

question was whether on the true construction of an agreement made between the parties the plaintiff was entitled to certain commission after the determination of the agreement. By the agreement in question, which was dated March 1, 1892, it was agreed that the plaintiff should be appointed sole London agent for the sale of all goods that were then manufactured or that might be manufactured by the defendants. The plaintiff agreed to give the defendants the benefit of any existing connexion he might have with merchants and buyers while he held their agency and to assist in every way he could in developing their business. The defendants agreed to pay the plaintiff a commission of 2½ per cent. upon the invoice value of all goods sold by them to London houses or to his customers. The agreement was to be determinable by the mutual consent of the parties, six months' notice to be given on either side. The agreement was duly determined on September 1, 1894. Since that date the defendants had received and executed orders from houses and firms introduced by the plaintiff to them prior to that date. The said orders were not sent through the plaintiff, but were sent to the defendants by the houses or firms ordering. The plaintiff claimed to be entitled to commission upon the said orders. The Divisional Court gave judgment for the defendants. The plaintiff appealed.

Mr. English Harrison, Q.C., and Mr. Samuel Green appeared for the plaintiff; Mr. Joseph Walton, Q.C., and Mr. Herbert Chitty for the defendants.

The COURT dismissed the appeal.

Q.B. Div. } 1898.
(Bigham, J.) } July 25.

ADIE AND SONS V. THE INSURANCES CORPORATION
(LIMITED).*

Contract—Offer and acceptance—Fire insurance—
Binding contract.

The claim in this action was for £275 for a loss under a policy of fire insurance. The plaintiffs were the owners of certain business premises at Voe, Shetland, which they had insured with the Yorkshire Fire Company, and also with two other companies, each company being liable for a rateable proportion of any loss. The Yorkshire Company's policy expired in November, 1896. On February 15, 1897, the plaintiffs wrote to the defendants enclosing a copy of the Yorkshire policy:—"Kindly advise us if your office will take up the Yorkshire portion." This letter was received by the defendants on February 18, on which day they answered:—"Proposal £1,972 10s. We are prepared to accept the above amount. We have sent the papers to our Glasgow branch to be dealt with there." On February 19 the Glasgow branch wrote to the plaintiffs:—"The head office have forwarded to us your favour of the 15th inst. for attention, and have intimated their acceptance of the proposal. . . . We will let you have our policy as early as possible." On February 20 the plaintiffs' premises were burnt down, and on February 24 they wrote to the defendants informing them of this, saying:—"It is, therefore, needless to draw your policy at present." This letter was not received by the defendants until March 1. Meanwhile on February 26 they had executed the policy and sent it to the plaintiffs. The policy was dated as from February 18. On receipt of the policy the plaintiffs sent a cheque for the first year's premium. The defendants refused to accept it, and demanded the return of the policy. The defence raised in this action was that at the date of the fire there was no

binding contract to issue a policy of insurance, and that on February 24 the plaintiffs had withdrawn their proposal.

Mr. Cohen, Q.C., and Mr. Lacy Smith appeared for the plaintiffs; Mr. Tindal Atkinson, Q.C., and Mr. Arthur Powell for the defendants.

MR. JUSTICE BIGHAM, in giving judgment, said that in his opinion the defendants ought to pay this claim and were bound in law to do so. The plaintiffs' letter of February 15 was a proposal to the defendants to effect the insurance which had previously been effected with the Yorkshire Company, and on the same terms. It was clear that the defendants read that letter in the sense of a proposal. There having been a proposal, the only thing necessary to make a binding contract was that the proposal should be accepted, and on February 18 the defendants wrote their letter of that date, which was an acceptance. The position then was that the plaintiffs were bound to pay the premium and the defendants were bound to issue a policy in the ordinary form employed in their office, and it was immaterial that the parties had not discussed and expressly agreed to every individual term of the policy. The fire occurred on February 20, and under those circumstances the defendants were clearly liable. It was suggested that the plaintiffs' letter of February 24 somehow affected the matter. That letter seemed to have been written under the mistaken notion that there was no contract binding on the defendants, but when it was ascertained that there was a binding contract the legal position of the parties could not be affected by any subsequent letters. There would be judgment for the plaintiffs.

[Solicitors—Wilson, Bristows, and Carmael, for the plaintiffs; Foster, Grave, and Co., for the defendants.]

Q.B. Div. } 1898.
(Bigham, J.) } July 25.

BEAUCHAMP V. FABER.*

Contract—Policy of insurance—Construction—
"To pay the same . . . as may be settled
by the Sun Insurance Company on their
policy."

In this case the plaintiff sought to recover a loss under a policy of fire insurance effected with the defendant and others, underwriters at Lloyd's, by which the profits and goodwill of a grocery and provision business carried on by the plaintiff in partnership with his brother were insured for one year for £8,000. The stock-in-trade of the business had been insured with the Sun Insurance Company for £12,600. The Lloyd's policy contained the following clause:—"In the event of fire to pay the same percentage on this policy as may be settled by the Sun on their policy." A fire occurred at the plaintiff's premises, and a claim for £12,000 was made against the Sun Company, which was referred to arbitration. The arbitrator made an award in which he found that the value of the stock on the premises at the time of the fire was £4,656, but that the claim was so grossly exaggerated as to be fraudulent, and, as the Sun policy contained a clause that if a fraudulent claim was put forward all benefits under the policy should be forfeited, the arbitrator awarded that nothing was due under the Sun policy.

Mr. J. A. HAMILTON, for the plaintiff, contended that in order to entitle the plaintiff to recover under the Lloyd's policy it was not necessary that anything should have been paid under the Sun policy. The parties to the Lloyd's policy intended to avail them-

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

selves of the machinery of the Sun company to ascertain the amount of the loss, and that had been done in this case, but the conditions in the Sun policy, which prevented the claim from being sustained against the Sun company, did not apply to the Lloyd's policy. Secondly, he contended that if there had, in fact, been no settlement by the Sun company the defendant was nevertheless still liable on his policy, and the amount of the loss could be proved by evidence.

Mr. Cohen, Q.C., and Mr. Wood Hill appeared for the defendant.

MR. JUSTICE BIGHAM said that he had no doubt as to what was meant by the policy subscribed by the defendant. The meaning was that when the Sun company had accepted liability for a loss and had agreed the amount and nothing more to be done beyond paying the money, then the defendant and the other underwriters would pay the same percentage of the sum insured by them as the sum agreed to by the Sun company bore to the entire sum insured by the company. In this case there never had been any settlement by the Sun company, because of the fraudulent claim which had been made. The plaintiff, therefore, was not entitled to recover under the defendant's policy, because it was a condition precedent that there should be a settlement with the Sun company, and that condition precedent had never been performed. There would be judgment for the defendant.

[Solicitors—Harper and Batcock, for the plaintiff; Dawes and Sons for the defendant.]

Q.B. Div. (Manchester Assizes) } 1898.
(Bruce, J.) } July 20.

SLEY V. TILLOTSON AND SON.

Practice—Costs—Libel—Newspaper—Payment into Court and apology under 6 and 7 Vict., c. 96.

The Judge refused to deprive the plaintiff of his costs in an action of libel where he recovered less than a sum paid into Court with an apology under 6 and 7 Vict., c. 96, the apology being admittedly insufficient.

At Manchester, before Mr. Justice Bruce and a jury, the action "Sley v. Tillotson and Son" was heard. It was an action to recover damages for a libel, and an important question of procedure was raised. Mr. Shee, Q.C., and Mr. Bradbury were for the plaintiff; and Mr. C. A. Russell, Q.C., Mr. Jordan, and Mr. Gibbons for the defendants. The plaintiff, William Sley, was the proprietor of a pantomime called "Aladdin," which he was exhibiting with a travelling company in various towns in Lancashire and elsewhere. On March 7 "Aladdin" was produced at the Bolton Theatre, and on the following day the defendants, who are the publishers and proprietors of the Bolton *Evening News*, which has a large circulation in Blackpool, where the plaintiff's company afterwards went, and other towns in Lancashire, inserted an article which described "Aladdin" as a very tame production, and said that the scenery, acting, singing, and everything connected with the alleged pantomime were of the most mediocre description and that no one would go twice to see it. In consequence of this article the plaintiff alleged that he was prevented from making the profits he would otherwise have done at Bolton and Blackpool. The defence was that the article was published without malice and without gross negligence and that an apology was afterwards inserted in the defendants' newspaper. Evidence was given for the plaintiff, and his losses at Bolton and Blackpool, said to be caused by the insertion of the article complained of, were estimated between £250 and £300.

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His Lordship, in directing the jury, said that in writing of a matter of public interest, such as a public performance, a critic was entitled to express his honest judgment about the merits of the piece. It would never do if critics were always to pronounce favourable opinions, and so long as their honest opinions were founded upon facts it was not a libel. But in this case there was an admission that the words exceeded fair and honest criticism; therefore the only question for them to consider was how much the plaintiff was entitled to. The jury gave a verdict for £35, and judgment was given accordingly; but Mr. Russell asked the learned Judge to deprive the plaintiff of his costs, as the defendants had paid into Court with their plea of apology the sum of £50, and the plaintiff could have taken such sum out in satisfaction of his claim. During the hearing of the case Mr. Russell admitted that the apology was insufficient, and Mr. Bradbury, for the plaintiff, now contended that he could not be deprived of his costs as he never had an opportunity of taking the £50 without accepting the apology. His Lordship took time to consider, and subsequently decided the point in favour of the plaintiff. He referred to Lord Campbell's Act, 1843 (6 and 7 Vict., c. 96), and to 8 and 9 Vict., c. 75, sec. 2, which enacted that it should not be competent to a defendant, whether in England or Ireland, to file any such plea as is allowed by the Act of 1843 without making a payment into Court by way of amends "as provided by the said Act." In 1879 an Act called the Civil Procedure Acts Repeal Act, 1879, repealed the last-mentioned words in the last-mentioned Act, "as provided by the said Act," and the same Act of 1879 repealed so much of the first-mentioned Act (1843) as related to the payment of money into Court. The defence allowed by the 2nd section of the 1843 Act, continued his Lordship, cannot be filed without at the same time making a payment into Court by way of amends, but there is no existing provision of the Legislature stating whether the payment into Court is to be subject to any rules or regulations. The only provisions that I know of that can be held to apply are the provisions of Order XXII. of the Rules of the Supreme Court. But although it seems that that order may perhaps be held to apply to a case where liability is admitted and payment into Court is the only defence, yet it seems to be clear on the authority of "Oxley v. Wilkes" ([1898] 2 Q.B., 56) that when money is paid into Court as part of the defence under the Libel Act, 1843, the defendants cannot avail themselves of the payment into Court as being made under Order XXII. The defendants have raised amongst other defences, and as an alternative defence, a plea founded upon the provisions of the Libel Act of 1843. Pleading in such form, the payment into Court afforded no defence in itself; it was only a necessary part of a special defence in the material parts of which the defendants have failed, for they offer no evidence of an apology. I do not think that I ought to allow the plea on which the defendants have failed to influence my decision on the question of costs. The plaintiff never had an opportunity of taking the money out of Court without confessing a plea which contained averments which were not true. The defence must, therefore, be treated as one that has altogether failed.

Judicial Committee of the Privy Council } 1898.
(Lords Watson, Hobhouse, and Davey) } July 27.

THE CANADA SUGAR REFINING COMPANY (LIMITED) V.
THE QUEEN (ON THE INFORMATION OF THE ATTORNEY-
GENERAL FOR CANADA).*

Privy Council Appeals—Canada—Revenue—Im-

*Reported by W. J. SOUTHEY, Esq., Barrister-at-Law.

port duties—Custom Tariff Acts and Customs Acts—Construction—Customs Tariff Act, 1894, sec. 4—"Imported," meaning of.

This was an appeal from a judgment of the Supreme Court of Canada of May 1, 1897, reversing a decree of the Court of Exchequer.

Mr. Bray, Q.C., and Mr. J. J. Gormully, Q.C. (of the Canadian Bar), appeared for the appellants; the Hon. E. Blake, Q.C., the Hon. C. Fitzpatrick, Q.C. (Solicitor-General for Canada), Mr. E. L. Newcombe, Q.C. (all of the Canadian Bar), and Mr. H. W. Lochnis for the respondent.

LORD DAVEY, in giving their Lordships' considered judgment, said the action was commenced by the Attorney-General of Canada in the Exchequer Court to recover a large sum for duties on raw sugar imported by the appellants into Canada by the steamship *Cynthiana*. The decision of the Exchequer Court was in favour of the appellants, but their judgment was reversed by the Supreme Court—Justices King and Girouard dissenting. The principal question in the case was the date of the "importation" of the sugar, and that depended on the construction and effect to be given to the Custom Tariff Acts and certain sections of the Customs Acts. The Customs Tariff Act, 1894 (57 and 58 Vict., c. 28) enacted as follows:—"Section 4.—Subject to the provisions of this Act and to the requirements of the Customs Act, ch. 32 of Revised Statutes as amended, there shall be levied, collected, and paid upon all goods enumerated or referred to as not enumerated in Schedule A to this Act the several rates of duties of Customs set forth and described in the said schedule and set opposite to each class respectively or charged thereon as not enumerated when such goods are imported into Canada or taken out of warehouse for consumption therein." In accordance with Schedule A raw sugar of the same description as those which formed the cargo of the *Cynthiana* could be imported free. But by the Tariff Act, 1895 (58 and 59 Vict., c. 23), Schedule A to the previous Act was amended and a duty of $\frac{1}{2}$ per cent. per lb. was imposed upon that description of sugar. By section 4 of the Act of 1895 it was enacted that the Act should be held to have come into force on May 3, 1895. Many sections of the Customs Act, 1886 (49 Vict., c. 32), and the subsequent amending Acts were referred to in the course of the argument. The more important for the present purpose were sections 25, 31, 34, and 156, which so far as material are as follows:—"Section 25.—The master of every vessel coming from any port or place out of Canada, or coastwise, and entering any port in Canada, whether laden or in ballast, shall go without delay, when such vessel is anchored or moored, to the Customs-house for the port or place of entry where he arrives, and there make a report in writing to the collector, or other proper officer, of the arrival and voyage of such vessel, stating her name, country, and tonnage, the port of registry, the name of the master, the country of the owners, the number and names of the passengers, if any, the number of the crew, and whether the vessel is laden or in ballast, and if laden, the marks and numbers of every package and parcel of goods on board, and where the same was laden, and the particulars of any goods stowed loose, and where and to whom consigned, and where any and what goods, if any, have been laden or unladed, or bulk has been broken during the voyage, what part of the cargo and the number and names of the passengers which are intended to be landed at that port, and what and whom at any other port in Canada, and what part of the cargo, if any, is intended to be exported in the same vessel, and what surplus stores remain on board—as far as

any of such particulars are or can be known to him." "Section 31.—If any goods are brought in any decked vessel from any place out of Canada to any port of entry therein, and not landed, but it is intended to convey such goods to some other port in Canada in the same vessel there to be landed, the duty shall not be paid or the entry completed at the first port, but at the port where the goods are to be landed, and to which they shall be conveyed accordingly under such regulations and with such security or precautions for compliance with the requirements of this Act, as the Governor in Council from time to time directs." "Section 34.—Every importer of goods by sea or from any place out of Canada shall within three days after the arrival of the importing vessel make due entry inwards of such goods and land the same." "Section 156 (as amended by 52 Vic., c. 14, section 12).—Whenever, on the levying of any duty or for any other purpose, it becomes necessary to determine the precise time of the importation or exportation of any goods or of the arrival or departure of any vessel, such importation, if made by sea, coastwise, or by inland navigation in any decked vessel, shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported, and if made by land or by inland navigation in any undecked vessel, then from the time such goods were brought within the limits of Canada." There was no dispute as to the facts. The *Cynthiana* sailed from Antwerp with a general cargo, including the sugar in question consigned to Montreal. On April 29, 1895, the vessel put into the port of North Sydney in Cape Breton, Canada. It was stated that she put into that port to coal, but there was no evidence on that point or whether she was bound to call there. On her arrival at North Sydney the master made his report inwards of his ship and cargo in compliance with section 25 of the Customs Act, and on the same day made his report outwards, and obtained the Customs certificate of clearance for Montreal. The *Cynthiana* reached her wharf in the port of Montreal between 5 and 6 p.m. on May 4, 1895, and it was agreed that she did not come within the limits of that port until after May 3, 1895. It should be mentioned that on May 2, 1895, and therefore before the arrival of the vessel, the appellants, who were the importers of the sugar, made entry at the Montreal Customs-house of the goods, and a landing warrant was issued for the landing thereof as duty free. It was stated that this was done in accordance with a common practice at the port of Montreal. However, on May 14 the Collector of Customs cancelled the free entry, claiming that the goods were liable to duty, and detained such portions of the sugar as then remained in the possession of the appellants. On those facts it was contended for the appellants that the importation of the sugar was complete on the arrival of the vessel at North Sydney, and as that event took place before May 3 the sugar was free from the duty imposed by the Tariff Act, 1895. It was also contended, in the alternative, that the importation took place at the latest on May 2, when the appellants made entry at Montreal and such entry was accepted by the Customs authorities. The latter point, however, was not seriously pressed by the learned counsel for the appellants, and it is clear that the Crown was not estopped by the irregular act of the Customs officer from claiming the duty if it was payable. On the other hand, it was contended that the goods were not "imported" within the meaning of the Tariff Act until they were landed, or at any rate arrived within the limits of the port of Montreal, and that, having regard to the context and other sections of the Act, the words "the port at which they ought

to be reported" in section 150 of the Customs Act mean the port at which the effective report is to be made for the purpose of the importation. The real question, of course, was whether the sugar was "imported" within the meaning of section 4 of the Tariff Act, 1894, before or after May 3, because it was by that section, as amended by the Act of 1895, that the duty was imposed. By the provisions of section 4 the duties are to be "levied, collected, and paid" (which means nothing more than paid) upon the enumerated goods, "when such goods are imported into Canada" or taken out of warehouse for "consumption therein." Their Lordships made the following observation upon that language. (1.) The imposition of the duties is contained only in the direction for their payment. There are no words which render the goods liable for the duty or make the duty (as it is said) attach at any date prior to the date of payment. (2.) The words "when such goods are imported into Canada" express the time at which the duties are to be paid. If, therefore, the goods are imported into Canada when the vessel enters a port of call on her way to her ultimate destination the duties would be payable at that date, which is highly improbable and contrary to the express provisions of section 31. (3.) The duties are payable at one of two dates—either the date of importation or the date when they are taken out of warehouse. There is no real contrast between the date of arrival at a port of call, and the date when the goods are taken out of warehouse, because, if the words mean in the first case that the duty attaches when the vessel arrives at a port of call, it must equally do so whether on arrival at the port of discharge they are delivered to the importer or warehoused in bond. The true contrast was that which their Lordships had just indicated, and the words appeared to them to mean—when the goods were landed and delivered to the importer or to his order or when they were taken out of warehouse if instead of being delivered they have been placed in bond. (4.) The result was that, in the opinion of their Lordships, the words "imported into Canada" must, in order to give any rational sense to the clause, mean imported at the port of discharge, and could not be used in the sense attributed to the word "imported" by the appellants in accordance with the construction placed by them on the definition in section 150 of the Customs Act. (5.) If the goods were "imported" within the meaning of the Tariff Act on or after May 3—in other words, if the duty became payable after that date the Crown was entitled to it. But their Lordships did not find it necessary to adopt the appellants' construction of section 150. Every clause of a statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter. Their Lordships thought that the "report" spoken of in section 150 might well mean the report to be made by the master under section 25 completed by the entry to be made by the importer under section 34. According to that construction the port spoken of in section 150 would be the port at which the goods were to be landed mentioned in section 31. And that construction appeared to their Lordships to place a consistent, rational, and probable meaning on the whole of the sections referred to when read together. The report made by the master at the port of call or at any port which he entered for any purpose other than that of discharging his cargo was no doubt useful for the purpose of checking what might be called the effective report to be made on arrival at the port of discharge. The object of the definition in section 150 was not to define the port of importation or the meaning of

"imported," but the time when the goods were to be deemed to be first imported. The words in question applied equally to importation coastwise or by inland navigation in any decked vessel. If made by land or by inland navigation in any undecked vessel, then the time was when such goods were brought within the limits of Canada. That was probably because goods conveyed by land and goods conveyed by small undecked vessels would not be discharged at a port of entry within the meaning of the Act. The distinction between goods brought in decked and undecked vessels or vessels of small size ran through the whole Act. Their Lordships would, therefore, humbly advise her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

[Solicitors—Nicol, Son, and Jones, for the appellants; Day, Russell, and Co., for the respondents.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J.) } July 27.

WALL V. THE LONDON AND NORTHERN ASSETS CORPORATION.*

Company—Management—Interference of the Court—Majority and minority of shareholders—Injunction refused.

Decision of Stirling, J. (*ante*, p. 496), affirmed.

This was an appeal by the plaintiff against a decision of Mr. Justice Stirling (reported *ante*, p. 496). The plaintiff, suing on behalf of himself and all other shareholders in the defendant company, except those who voted for a certain special resolution which had been passed by the shareholders, moved for an injunction to restrain the company and the directors from carrying that resolution into effect. The London and Northern Assets Corporation was incorporated in 1888, its principal object being to carry on a financial and investment business. In 1889 another company, called the London and Northern Debenture Corporation, was incorporated, its objects being practically the same as those of the Assets Company, and the two companies had for some years past been working a joint business, and the board of directors of each company was the same. The capital of the Assets Corporation consisted of 100 founders' shares and 50,204 ordinary shares, all of £2 each, of which £1 10s. per share was paid up. The issued capital of the Debenture Corporation was 99 founders' shares and 34,600 ordinary shares of £2 each, fully-paid, but in March, 1893, these had been subdivided into £1 shares. In February, 1898, as the plaintiff alleged, the annual report of the Debenture Corporation stated a deficiency of assets to the extent of £5,165, and that only £1 17s. per £2 share was represented by assets. The market value of the shares at that date was £1 5s. per £2 share. In that month a scheme and agreement for the amalgamation of the two corporations was proposed by the directors. The scheme provided for the purchase of the whole undertaking of the Assets Corporation by the Debenture Corporation in consideration of shares in the Debenture Corporation, and the agreement further provided that out of the proceeds of sale each holder of a founder's share in the Assets Corporation should receive 13 ordinary fully-paid £1 shares in the Debenture Corporation, while each ordinary shareholder in the Assets Corporation was to receive 13 ordinary fully-paid £1 shares in the Debenture Corporation and 5s. in cash or shares for every ten ordinary shares held by him in

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

the Assets Corporation. The plaintiff, who was the holder of three founders' shares and 1,800 ordinary shares in the Assets Corporation and one founders' £2 share and four ordinary £2 shares in the Debenture Corporation, objected to the scheme on the ground (*inter alia*) that the Debenture Corporation were making a profit out of the Assets Corporation, because the scheme provided for paying for the assets of the Assets Corporation on a cash basis in shares in the Debenture Corporation on the basis of their nominal value, whereas the fact was that the Debenture Corporation shares were much depreciated in value. An extraordinary general meeting of the Assets Corporation was held on March 22, 1898, to consider the requisite resolutions to carry out the proposed scheme. The plaintiff complained that at this meeting, while he and other shareholders were desirous of addressing the meeting, the chairman put a resolution that the discussion should be terminated. That resolution was carried, and then a resolution approving of the scheme was also passed. A meeting to confirm that resolution was held on April 6. On that occasion, the resolution having been proposed and seconded, an amendment was proposed, but ruled out of order by the chairman. The plaintiff alleged that a shareholder then moved the adjournment of the meeting, and upon his rising to second that resolution the chairman refused to allow him to speak, but at once put to the meeting a resolution that the original resolution "be now put." That resolution was carried. The plaintiff thereupon demanded a poll upon the question that "the resolution be now put," but the chairman refused to grant a poll thereon. The special resolution was then put and carried. The plaintiff thereupon demanded a poll, which was granted by the chairman, and it resulted in 25,593 votes in favour of the resolution, and 10,866 against it. The plaintiff then commenced this action, and moved for an injunction upon the grounds—(1) that the company had no power to sell its undertaking; (2) that the proposed distribution of assets was not in accordance with the rights of the shareholders; (3) that the minority had been unfairly treated; and (4) that the proceedings at the meetings were irregular. Mr. Justice Stirling held, upon the construction of the memorandum of association, that the scheme was *intra vires* of the company. In his opinion the distribution of the assets contemplated by the scheme was not in accordance with the rights of the parties interested, because it altered their relative rights. But he thought that the justice of the case would be met by accepting from the defendants an undertaking not to distribute the shares to be received under the agreement otherwise than in accordance with the rights of the shareholders under the memorandum and articles of association. His Lordship held that the minority had not been in any way unfairly treated, and that there had been no irregularity in the proceedings which would justify the Court in interfering. His Lordship accordingly, upon the defendants giving the undertaking above mentioned, made no order upon the motion, except that the costs should be costs in the action. The plaintiff appealed.

Mr. W. H. Cozens-Hardy was for the plaintiff; Mr. Jenkins, Q.C., and Mr. W. F. Hamilton were for the company; Mr. Lailey was for the directors.

The Court dismissed the appeal.

The MASTER of the ROLLS said that he thought Mr. Justice Stirling's decision was correct, and that part of it which related to the distribution of the shares to be received from the Debenture Corporation among the shareholders of the Assets Corporation ought not to be disturbed. The Assets Corporation had nothing in the shape of an undertaking; it was a financial company, the object of which was to speculate in the shares and

securities of other companies. Their assets consisted of the shares and securities which they held. Among others they held over 3,000 shares in the Debenture Corporation. The agreement in question was for the sale of all their assets, except the shares in the Debenture Corporation, to that corporation, which could not of course buy its own shares. It appeared to his Lordship that this agreement was distinctly authorized by the memorandum of association, either as a sale of assets or an amalgamation with another company. No very precise meaning could be given to the word "amalgamate" when the power given was to amalgamate with any person, company, or firm. His Lordship was not prepared to give a very sharp definition. No doubt the word would include the formation of a third new company, but it was not confined to that. And he did not see how there could be an amalgamation without a sale. The agreement and the resolution were, therefore, not *ultra vires*. Another point made by Mr. Cozens-Hardy, who argued the case with his usual ability, was that the consideration for the sale was illegal. That would be a serious objection if it were sustained. There was, however, nothing illegal, so far as the purchasers were concerned. The only objection was to the distribution of the shares among the shareholders of the Assets Corporation. Each holder of a founder's share was to have ten times as much as a holder of an ordinary share. It was said that this was inconsistent with the provisions of the memorandum of association of the Assets Corporation. His Lordship did not know whether it was or not. Mr. Justice Stirling had not decided this question; it would be decided at the trial of the action. This did not taint the consideration with illegality, and the undertaking which had been given by the defendants was sufficient for the purpose. As to the alleged irregularities in the proceedings, his Lordship would deal with them very shortly. They were not such as to induce the Court to interfere. He would only refer to the "closure" of the discussion by the chairman. After several persons had been heard the meeting thought that enough had been said. It would be a bad precedent if this Court were to interfere. The principle laid down by Lord Eldon in "*Const v. Harris*" (T. and R., 496, 525) as to the rights of a minority, was as important now as it ever was. But it did not mean that the minority were not to yield to the majority; it only meant that the majority must not be tyrannical. There had been nothing of that kind here.

LORD JUSTICE CHITTY delivered a judgment to the same effect, in the course of which he said that, if the Court were to lay down that a chairman, supported by the large majority of the meeting, could never put a stop to the speeches of the minority, they would enable a small minority to tyrannize over the majority. There might be "all night sittings." There had been nothing oppressive here. He did not mean to say that the majority must not listen to the reasonable arguments of the minority. His Lordship also thought that the chairman was quite right in refusing to allow an amendment to be put at a meeting which was called only for the purpose of confirming or rejecting the resolution passed at the previous meeting.

LORD JUSTICE COLLINS concurred.

[Solicitors—A. E. Greville; Baker, Blaker, and Hawes.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.) } July 27.

FETHICK AND OTHERS V. COUNTY COUNCIL OF
DORSET.*

Highway—Repair—Extraordinary Traffic—Con-

*Reported by E. G. BUCKER, Esq., Barrister-at-Law.

tractor—Sub-contract—Person by whose order extraordinary traffic is conducted—Highways and Locomotives Act, 1878, sec. 23.

This was an appeal by the County Council of Dorset from the decision of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrence) upon a case stated by justices, raising the question whether certain traffic was extraordinary traffic, and certain expenses incurred in repairing certain main roads were extraordinary expenses within section 23 of the Highways and Locomotives (Amendment) Act, 1878. The respondents were the contractors for the erection of a lunatic asylum for the Dorset County Council under a contract between themselves and the visiting committee of the Dorset County Lunatic Asylum for a sum of £52,000, and by the contract the respondents agreed to keep harmless the visiting committee from all claims in respect of damage done to (*inter alia*) main roads by reason of extraordinary traffic in connexion with the erection of the asylum. The respondents entered into a contract with one John Trenchard for the hauling of the materials required for the erection of the asylum along the main roads from the railway station to the site of the new building. Trenchard was to supply carts and horses as and when required by the respondents, and to provide skilled workmen, and to unload the materials from the railway trucks and to haul them to such place on the works as should be pointed out to him by the respondents, receiving from the respondents such assistance as should be necessary, and was only to use such roads to the asylum premises as should be pointed out to him. Further, Trenchard was not to employ any person whom the respondents should require him not to employ, and no cart or traction engine was to be employed which the respondents or their foreman should certify to be improper for the service. Further, Trenchard was to indemnify the respondents against all claims made in respect of any damage done to (*inter alia*) any main road. Trenchard performed the hauling in accordance with the contract, and damage was thereby caused to the main roads. The damage done by the excessive weights and extraordinary traffic amounted to £231 *ls.* 3*d.* The respondents were summoned by the appellants, the county council, who were the authority liable to repair the main roads, before justices to recover the sum of £231 *ls.* 3*d.*, when the justices were of opinion that the respondents, although they had entered into a contract with Trenchard, were the persons by whose orders the said excessive weights and extraordinary traffic were conducted over the before-mentioned main roads, and they ordered the respondents to pay to the appellants the sum of £231 *ls.* 3*d.*, but stated this case for the opinion of the Court. The Divisional Court quashed the order of the justices. The Dorset County Council appealed.

Mr. Joseph Walton, Q.C., and Mr. Clavell Salter appeared for the Dorset County Council; Mr. C. A. Russell, Q.C., and Mr. H. E. Duke *contra*.

The Court dismissed the appeal.

LORD JUSTICE A. L. SMITH said that the Divisional Court had held that Pethick was not liable to pay to the County Council of Dorset the amount of the expenses incurred in repairing damage caused by extraordinary traffic on certain main roads. Pethick entered into a contract with the local authority to build a lunatic asylum, and he had to bring the necessary materials to the site of the asylum. He accordingly entered into a contract with Trenchard, a cartage contractor, to carry goods from two railway stations to the site. It was clear that Pethick gave no order to Trenchard other than was to be found in that contract. Therefore, if that contract did not constitute an order within the meaning of section 23 of the

Highways and Locomotives Act, 1878, Pethick could not be made liable under that section. Trenchard having cut up the road and damaged it in carrying out his cartage contract, the county authority sought to make him liable under the section, but he became bankrupt. The county council now turned round and sought to make Pethick liable under the section. The section provided that the expenses of repairing damage caused by extraordinary traffic might be recovered from the person by whose order such extraordinary traffic had been conducted. There had been a great amount of litigation on that section, and there were numerous authorities, which showed a considerable conflict of opinion; but the House of Lords had put a construction upon the section, which was binding on this Court, in the case of "*Kent County Council v. Lord Gerard*" ([1897] A.C., 633). It was there clearly pointed out that the person who was made liable by the section was not the person by whom or at whose instance the extraordinary traffic was conducted, but the person by whose order it was conducted. Unless it was shown that the traffic was conducted by the order of the person who was sought to be made liable, such person was not brought within the purview of the Act. Now, by whose order had this extraordinary traffic been conducted? He had no doubt that it had been conducted by the order of Trenchard and that he might have been made liable. But it was argued that even if that were so Pethick had ordered it to be conducted. There was no other order than the written contract between Pethick and Trenchard, and by that contract Trenchard undertook to supply the necessary vehicles and horses, and traction engines, if requisite, to haul the building materials along which roads he liked to the site of the asylum. It was said that power was reserved to Pethick under the contract to say what carts should be used. He was not satisfied that that was the meaning of the contract; but, even if it were so, if he merely had the power to give orders as to what carts should be used, but did not give such orders, he was not within the Act. Reliance was also laid on the clause providing that no cart or engine should be used which Pethick might think improper for the service. In his opinion those words referred to the fitness of any cart or engine for the work, and did not refer to the contingency of the roads being cut up. On the ground that no order had been shown to have been given within the meaning of the section, he thought that the judgment of the Divisional Court must be affirmed.

LORD JUSTICE HIGBY was of the same opinion. It was necessary for the county authority to show that the extraordinary traffic had been conducted by the order of Pethick. The House of Lords had laid it down that it was not sufficient to show that the traffic had been conducted at the instance of the person sought to be made liable, or for his benefit. He thought that the control which the contract gave Pethick over the work to be done by Trenchard was much less than was suggested in argument. And the question was not whether orders might have been given by Pethick, but whether they were given.

LORD JUSTICE VAUGHAN WILLIAMS agreed, but he desired to base his judgment on this—that the case did not state sufficient to fix Pethick with liability. There was nothing to indicate how much of the damage was caused by excessive weight of particular parcels, or what was the nature of the extraordinary traffic in question. If it had been shown that the damage had been caused entirely by the total amount of the traffic carried, as distinguished from excessive weight of particular parcels, he should unhesitatingly say that the extraordinary traffic had been conducted by the order of Pethick. He thought that that would clearly follow from the case of "*Kent County Council v. Vidler*"

(1895] 1 Q.B., 448). But the facts of the case did not permit him to say that the extraordinary traffic which had caused the damage consisted solely and entirely of the total amount of the traffic. On this ground he thought that Pethick could not be held to be responsible.

[Solicitors—H. S. Clutton, agent for Andrews, Son, and Huxtable, Dorchester, for the appellants; Robins, Hay, Waters, and Hay, agents for E. A. Ffooks, Sherborne, for the respondents.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.JJ.) } July 28:
SYER V. ALDER.*

Contract—Agreement—Construction—Sale of house.

Held, reversing the decision of Channell, J. (*ante*, p. 180), that the contract was conditional.

This was an appeal by the defendant from the judgment of Mr. Justice Channell (reported *ante*, p. 180). The action was brought to recover damages for breach of an agreement that the defendant would sell to the plaintiff Nos. 1 and 2, Milton-villas, Southend, for £1,500. The contract was as follows:—"I, Andrew Alder, agree to sell, and I, John Syer, agree to buy, Nos. 1 and 2, Milton-villas, South Church-road, Southend, at the price of £1,500. Contract to be delivered within 14 days or deposit to be returned. Contract to contain the usual covenants." The plaintiff paid to the defendant a deposit of £20, which the defendant returned to him within the 14 days, saying that he had decided not to sell the houses. The plaintiff refused to accept the deposit and brought this action. The defendant contended that under the contract he had an option of declaring the bargain off within the 14 days. The learned Judge held that the contract was not conditional, but absolute, and gave judgment for the plaintiff for £100 damages.

Mr. Chester Jones appeared for the defendant; Mr. Witt, Q.C., and Mr. P. T. Blackwell appeared for the plaintiff.

The COURT allowed the appeal and entered judgment for the defendant.

LORD JUSTICE A. L. SMITH said that, in his opinion, under the contract the vendor had 14 days within which to deliver the contract or to return the deposit. It seemed to him that he might do one of those two things. The vendor here chose to return the deposit. His Lordship could not think that the contract was an absolute one, but it gave the vendor the option to return the deposit within 14 days, and if he did so the contract was to be at an end.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—C. O. Newman, for the plaintiff; Pocock, for the defendant.]

Chan. Div. } 1898.
(Romer, J.) } July 28.

CARDIGAN V. CURZON-HOWE.*

Tenant for life—Compensation under Railway Clauses Act—Apportionment between tenant for life and remainderman.

In this case, a sum of money having been paid by a railway company to the trustees of settled land under

section 78 of the Railway Clauses Act as compensation for not working coal mines so as to injure the railway line, the question arose as to the mode of apportioning the sum between the tenant for life and remaindermen. It appeared that the coal was comprised in a lease, under which the tenant for life was entitled to dead rent and royalties. The lessee had received separate compensation, and the evidence showed that the coal under the railway could be worked out in the remaining two years of the lease.

Mr. Neville, Q.C., and Mr. Fossett Lock; Mr. Lovett, Q.C., and Mr. Dighton Pollock; and Mr. Farwell, Q.C., and Mr. Stallard were counsel for the parties.

MR. JUSTICE ROMER said that the compensation money should not be treated as payable to the tenant for life as a lump sum. On the other hand, he was entitled to more than the mere interest on the money. The principle of apportionment was to treat the money as rent accruing *de die in diem* to the tenant for life for the unexpired residue of the lease or for a less period if the coal would have been worked out in a less period. The money would accordingly be payable as income over that period.

An agreed order was made upon this footing.

Q.B. Div. } 1898.
(Mathew, J.) } July 29.

BOLTON V. LONDON EXHIBITIONS (LIMITED) AND WINNERS (LIMITED).*

Copyright—Infringement—Photograph—Reproduction on posters.

In this action Mr. Crump, Q.C., and Mr. G. W. Ricketts appeared for the plaintiff; and Mr. T. E. Scrutton for the defendants.

The plaintiff is a photographic artist, and brought his action for an injunction, penalties, and damages on account of the reproduction on the posters of the Earl's-court Exhibition of a photograph of a lion called "Prince," of which he possessed the copyright. He alleged that, with the exception of the tail, the lion was reproduced line for line. "Prince" had certain peculiarities, especially up-standing hair on his forehead. The attitude in which he was photographed also was unusual, and plaintiff had to watch for three days before catching him in it. The sale of the photograph fell off greatly after the poster had been published.

For the defence the artist who drew the original sketch denied that he had used plaintiff's photograph in doing so. The details were left out, and, in order that the lithographer might supply them, the artist sent him a book published by George Newnes, and entitled, "All About Animals," belonging to his wife, and bought for the children. From this the details of the lion were filled in. The lion in the book was the plaintiff's lion, but it was shown that these photographs were partly published for the use of artists who required details of animals. On complaint being made, the portion of the poster was withdrawn.

MR. SCRUTTON contended that the posters were not copies within the meaning of 25 and 26 Vict., c. 68, section 6, as interpreted by the cases of "Dicka v. Brooks" (15 Ch. Div., 22), and "Hanfstaengl v. Newnes" ([1894] 3 Ch., 100). Moreover, as regards the London Exhibitions (Limited) they had simply ordered the poster, and told the lithographer to do his best, but not asked that this particular lion should be copied; and he contended that this could not be called "causing or procuring" a copy to be made within the

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

†Reported by R. B. SCHOMBURG, Esq., Barrister-at-Law.

*Reported by H. G. SNOWDEN, Esq., Barrister-at-Law.

meaning of the section. At any rate, the £5 paid into Court was sufficient. There was no evidence of the numbers sold before the poster appeared, and two years before the photograph had been permitted to be produced and scattered broadcast by George Newnes in a sixpenny publication. The posters were only exhibited for ten days.

Mr. CRUMP, in reply, cited "*Turner v. Robinson*" (10 Ir. Ch., 510).

His LORDSHIP held that there had been a reproduction of the photograph within the meaning of the Act. A work of art had been "vulgarized" unlawfully, and he awarded as penalty the sum of £50 with costs against Weiners (Limited), but judgment, without costs, for the London Exhibitions (Limited), on the ground that they did not authorize the reproduction, though they should have been more careful in the matter.

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } July 30.

REYNOLDS V. HOLLOWAY.*

Master and Servant—Master's liability to servant
—Employers' Liability Act, 1880, sec. 1, subs. 3,
Negligence of person in superintendence—Con-
formity to orders.

This was an appeal from the judgment of a Divisional Court (Mr. Justice Day and Mr. Justice Lawrence). The action was brought by the widow of a deceased workman under Lord Campbell's Act and the Employers' Liability Act, 1880, to recover damages for the death of her husband. The defendant was a builder, and the deceased man was a ganger, and at the time of the accident was in the defendant's employment and was acting under the orders of a working foreman named Cropley. Cropley told the deceased man to pull down a small house with his men. The house consisted of two floors, there being a passage and a room on each floor, and the partition between the passages and the rooms being a matchboard partition. The deceased man began first to take down the partition, when the joists supporting the ceiling came down with the roof and killed him. The action was founded on section 1, subsection 3, of the Employers' Liability Act, 1880, the allegation being that the injury was caused by the negligence of a person (Cropley) in the service of the employer, to whose orders or directions the deceased man was bound to and did conform, and the injury resulted from his having so conformed. The negligence alleged on the part of Cropley was that he ought to have examined the house before ordering the deceased man to pull it down, especially as the deceased man had no experience in pulling down houses. There was some evidence that Cropley told the deceased man to preserve the partition. The action was tried at the Greenwich County Court, when the jury found a verdict for the plaintiff for £120 damages. The Divisional Court held that there was no evidence to go to the jury and entered judgment for the defendant. The plaintiff, by leave, appealed.

Mr. Rentoul, Q.C., and Mr. F. Watt appeared for the plaintiff.

Mr. JELF, Q.C., and Mr. H. LYNN, for the defendant, contended that under section 1, subsection 3, of the Employers' Act, 1880, there must be an order to do a certain thing in a particular way, and that in obeying that order the accident happened. There was no evidence that Cropley told the deceased man to pull down the house by first pulling down the partition, and there was no evidence that the deceased man met with

his death by conforming to the order which Cropley gave him. He referred to "*Hooper v. Holme and King*" (13 *The Times* L.R., 6).

The COURT allowed the appeal.

LORD JUSTICE A. L. SMITH said that had it not been for the judgment of the Divisional Court he would have thought this a very clear case. Mr. Justice Day seemed to have approached the case from a wrong point of view, because he began his judgment by saying that in his opinion the verdict was wrong. The Court had nothing to say to the question whether the verdict was right or wrong. The only question for the Court was whether there was any evidence to support the cause of action alleged. The cause of action relied upon here was under section 1, subsection 3 of the Employers' Liability Act, 1880. There was evidence that Cropley was a person to whose orders or directions the deceased man was bound to conform. There was also evidence that Cropley gave the deceased man a negligent order, because evidence was given that before giving the order to pull down the house Cropley should have examined the house and seen how the joists were fixed in the walls and supported, and that Cropley had not examined the house. The plaintiff must, however, go further and show that the deceased man did conform to the negligent order, and that his death was caused by his having so conformed. The evidence was that the deceased man was only a ganger who knew nothing about pulling down houses. Therefore the order was given to the deceased man to pull down a house when the deceased man did not know how to do it. His death was, in his opinion, caused by his conforming to the order. In his opinion, though it was not necessary to go so far as this, there was some evidence that Cropley told the deceased man to save the partition, and that was the reason why the deceased man went into the house first in order to get out the partition. The verdict and judgment must therefore be restored.

LORD JUSTICE RIGBY concurred. In "*Hooper v. Holme and King*" there was no order at all given to the deceased man to go into the dangerous place where he was killed, and so he might have chosen a safe place for mixing the cement. It was sought in that case to show an implied order from the fact that the foreman of the gang, named Cross, was mixing cement in a dangerous place, but that inference was rejected. That case raised no question of law at all, but turned upon its own special facts, which would probably never occur again in any other case, and the same might be said of the present case.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—F. Scott, for the plaintiff; Watson, Sons, and Room, for the defendant.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Macnaghten, Morris, and Shand.) } Aug. 1.

MAY AND HART V. ANGELL.*

Stock Exchange—Purchase of shares—Participation in a "pool"—Liability.

Decision of the Court of Appeal (13 *The Times* L.R., 568) reversed.

This was an appeal from an order of the Court of Appeal (Lord Esher and Lord Justice Rigby, from whom Lord Justice A. L. Smith dissented), dated August 5, 1897 (13 *The Times* L.R., 568), which reversed a decision of Mr. Justice Day of May 12, 1897. The appeal involved the effect to be given to complicated transactions of what are described as "pooling" and "sub-pooling" in Klerksdorp Pro-

*Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

proprietary shares. The appellants are stockbrokers and members of the Stock Exchange, and the respondent a merchant carrying on business in the City of London. The appellants on October 20, 1896, brought an action against Mr. Angeli to recover £12,430, of which £11,924 was for moneys which they alleged they had become liable to pay on the respondent's behalf and at his request in respect of 5,000 of these shares. The Klerksdorp Proprietary Mines had been formed before November, 1895, with a capital of £600,000 in as many shares for the purchase, acquisition, and development of certain mining and other properties in South Africa. About November, 1895, an association or partnership known as the K. Syndicate was formed for the purchase of 100,000 of the shares at £2 a share from Messrs. Symons and Moses, the original vendors to the company. These shares were to be dealt with under a pooling arrangement. The appellants had acted as brokers in the sale to the syndicate; but did not, as they said, subsequently act as brokers to the syndicate or to the pool. Out of this pool, another of 50,000, subsequently increased to 60,000, was formed. On June 13, according to the appellants' way of putting it, the respondent came to Mr. Henry Benjamin Hart, one of the appellants, to obtain for himself a participation in the pool. Mr. Hart then saw Mr. Symons and said he wanted 5,000 shares in the pool for a friend, and was referred by Mr. Symons to Messrs. Pollak and Co. Mr. Hart then made an arrangement with the latter firm to take 15,000 shares—5,000 for a friend (that was the respondent) and 10,000 for himself and other clients. On June 16 the appellants sent to the respondent a duplicate or copy of a contract note in the following form:—

"Duplicate.

"Warford-court, Throgmorton-street, E.C.,
London, June 16, 1896.

"Bought by order of A. Angeli, Esq.,
London, 5,000 Klerksdorp Proprietary
shares at 2½ = £12,500 0 0
with call of 5,000 at 2½ for August
account + 6d. brokerage (if called all
shares to be pooled).

Stamp	}	125 1 0
Commission }		
		£12,625 1 0

"MAY AND HART, Brokers.

"For account end July, 1896.

"Subject to the rules and customs of the London Stock Exchange."

In September, 1896, the appellants were called upon by Pollak and Co. to take up the balance of the 15,000 shares and pay for them; but the respondent refused to take the remainder of the 5,000—of which 303 had been sold—and repudiated the contract. He contended that the appellants had not, as a fact, entered into any such contract on his behalf, but instead of buying 5,000 shares for him as his brokers had bought for themselves either 15,000 shares out of the 60,000 posted or a fourth share in the pooling combination. The Master of the Rolls held that all that the appellants were authorized to do was to procure a seller of the 5,000 shares to the respondent—such seller and the respondent being the contracting parties—and that they were not entitled to buy for themselves a larger number of shares and out of that number to become themselves sellers to the respondent of 5,000 shares. The appellants had, therefore, not carried out the instructions of Mr. Angeli, and were not entitled to recover. The arguments were heard on July 5, 7, and 8 last, when their Lordships reserved judgment.

Sir Edward Clarke, Q.C., Sir R. T. Reid, Q.C., and Mr. Rufus Isaacs, Q.C., appeared for the appel-

lants; Mr. Carson, Q.C., and Mr. G. Spencer Bower for the respondent.

THE LORD CHANCELLOR, in moving that the decision appealed from be reversed and that of Mr. Justice Day restored, said,—When once the facts of this case are properly understood I think there can be no doubt of the legal result. The plaintiffs were authorized by the defendant to act for him in a transaction the real nature of which seems to me to be absolutely different from the ordinary case of a buying of shares through a broker, and I think the only difficulty that has arisen in this case has been due to the fact that the speculation consisted in the buying and selling of shares. The profits to be obtained from the speculation were by the buying of shares at a low price and selling them at a higher one; or if the speculation was a losing one by the selling price of the shares falling below that at which they were bought. And it appears to have been assumed that because the transaction was one in which the buying and selling of shares formed part of what was to be done, therefore the persons engaged in it were necessarily customer and broker, and the legal relations of the parties regarded as if the whole nature of the contract between them consisted in procuring shares to be vested in the vendor through the medium of an ordinary broker transaction. It appears to me that this is an entire mistake. I have no doubt, and do not think it is susceptible of doubt, that when there is only the relation of broker and customer the broker cannot satisfy the terms of his employment by selling his own goods to the customer who is employing him as broker; and apart from the special circumstances of the case "*Robinson v. Mollet*" (L.R., 7 H.L., 802; 44 L.J., C.P., 362) establishes no more. The special circumstances of that case had relation, so far as the contention in it was concerned, to the peculiarities of a particular business and which was supposed to take the case out of the ordinary rule. But no one doubted, as I think no one can doubt, the ordinary rule to be what I have stated, and, if Angeli's employment of the plaintiffs was simply to purchase shares for him, I should entertain no doubt that the plaintiffs would fail. But I am of opinion that there was no such employment at all. The mere purchase of shares would not have procured for Angeli what he wanted, and indeed Angeli never contemplated getting shares at all. What he did want he has explained both in his oral evidence and in his letters. [His Lordship then quoted from the correspondence and dealt with the facts, and concluded as follows.] The truth is that, if the real nature of the transaction had been distinctly proved at the trial, I do not think any doubt could have arisen. But I think the facts were somewhat too compendiously proved before the learned Judge. It is, however, only just to say that this probably partly arose from the understanding which all were under at the trial, that the transaction was perfectly well understood, and that the controversy seemed really to resolve itself into a determination of the absolutely untenable defences which the defendant set up in his pleadings, all of which were disproved. Mr. Angeli certainly did not pretend that he did not know what a pool was nor what were the arrangements by which the syndicate was to act for the co-adventurers forming it, and if he had done so he certainly would have been as little believed in that as he was in respect of the defences that he did set up. In the result it appears to me that the plaintiffs have established their case and that they are entitled to the verdict which they obtained before Mr. Justice Day. I therefore move your Lordships that the judgment of the Court of Appeal be reversed, that judgment be entered for the plaintiffs for the amount claimed, and that the respondent do pay to the appellants the costs both here and below.

LORD MACNAGHTEN.—The question in this case to my mind is a question of fact and not a question of law at all. It seems that in 1895, or perhaps earlier, a company called the Klerksdorp Proprietary Mines (Limited) was formed with limited liability under the laws of the South African Republic. Ostensibly its object was to develop some mining property existing or supposed to exist somewhere within the territories of that State. Its operations in fact, so far as appears, were confined to the London Stock Exchange. The nominal capital of the company was either £500,000 or £800,000—it is not clear which—divided into shares of £1 each. The whole issue was controlled by a syndicate whose agents and plenipotentiaries in London were Messrs. Symons and Moses, diamond merchants, in Warnford-court, Throgmorton-street, acting in concert with other persons in the background. In November, 1895, Symons and Moses formed a “pool,” as it is called, of 100,000 shares placed at £2 per share. Pools, it seems, have their managers and their brokers. The managers of this pool, which may be called Pool No. 1, are stated in the evidence to have been Symons and Moses, and “Palmer and Brooks,” or more probably Palmer and Bruch, who seem to have been for some purposes London agents of the company. The brokers of Pool No. 1 were the appellants, May and Hart. It seems to have been a successful venture, at least on paper, for apparently before June, 1896, Messrs. May and Hart, in conjunction with Messrs. Hollibone, had sold, or rather contracted to sell, all the shares in Pool No. 1 at an average price of £2 9s. per share. The pool, however, remained open till November, 1896, because Messrs. May and Hart “had not got all their money in.” The shares were not payable, said Mr. Hart, until August, 1896. In the meantime, early in June, 1896, a second pool was formed to deal with 50,000 shares, part of the 100,000 shares comprised in Pool No. 1. These 50,000 shares had been bought or taken by Pollak and Co. at £2 10s. per share. Pollak and Co. were the managers of Pool No. 2, and interested in it on behalf of a number of people, clients or customers of theirs. These 50,000 shares and other shares of the company, amounting at least to 10,000 more, were then in the hands of Symons and Moses, and apparently as yet unissued. Messrs. May and Hart were not in the secret of Pool No. 2. They knew nothing about it at the time. That was the position of affairs when the first scene of the drama, which has ended in this litigation, opened in June, 1896. On Saturday, June 13, 1896, at about half-past 1 in the afternoon, Angeli, the respondent, called upon Hart at his office in Warnford-court. Angeli was an Italian gentleman who seems to have dabbled on the Stock Exchange pretty extensively through Messrs. May and Hart, and to have been not unversed in the practices and jargon of the stock market. Angeli wanted Hart to get him a participation in the pool for 50,000 shares, which he said Pollak was managing. Hart told him he knew nothing about it. After some further conversation, Hart said to Angeli, “If you tell me how many shares you want from Symons and Moses, if I can get you shares, I will ascertain all about it. How many shares do you want?” Angeli said, “I want you to buy for me 5,000, but you must understand I want them at the same price at which Pollak and Co. have placed them,” that is, as Hart goes on to explain, at the price Pollak had taken them. Hart went at once to Symons—whose offices were upstairs in the same buildings. Symons said he could not do anything; Pollak and Co. had bought 50,000; he had promised he would not sell any more without their consent; he must first see Pollak and Co. Later in the same afternoon Symons saw Marsden, who was “Pollak and Co.” Symons

was anxious to oblige Hart in consequence of his connexion with Pool No. 1 and so it was arranged that Pollak and Co. should give up 5,000 shares, and that Symons should bring in 10,000 more so as to increase the pool to 60,000 shares, and thus make room for Hart and his friends. By this time Angeli had gone away for the day, saying he would call on Monday to see what Hart had done. Then Symons saw Hart again and told him what he had done, and Hart agreed to take 5,000 shares for his “friend downstairs”—that was Angeli, who had, it seems, an office, or the use of a room, below—5,000 for himself, and 5,000 for other friends of his. That completed the pool, bringing it up to 60,000. Up to that time, of course, there was nothing to bind Angeli. Angeli had commissioned Hart to get for him 5,000 shares in a pool of 50,000. Hart had agreed with Symons to take for Angeli 5,000 shares in a pool of 60,000, which was a very different thing. Angeli saw Hart again on Monday, the 15th. Hart, in his examination, was not very clear whether the meeting took place on the Monday or the Tuesday, nor was his recollection very distinct as to what passed at the interview. It is, however, quite plain, from a letter written by Angeli to Hart on Tuesday, the 16th, that the final arrangement between Angeli and Hart was made on the Monday, and it is also plain from a letter which Angeli wrote on June 17 to one Manlio, a friend of his, to whom he gave part of his interest in the pool, that Hart must have told him that the pool was increased to 60,000 shares. Angeli, in his evidence, in giving an account of the interview at which the final arrangement was made, says that Hart told him it was very difficult to get shares, but that “he would give him an interest in 5,000 shares.” Angeli repeated the statement in cross-examination. The first question put to him in cross-examination was this:—“As I understand, you tell me that on a day which may be Monday or Tuesday (never mind the day for the moment) Mr. Hart told you he would give you an interest in 5,000 shares. I took down the language you used; is that correct?” The answer was “Yes.” And, again, in writing to Manlio on September 28, 1896, Angeli refers to Hart as “the broker who gave me the participation in the Klerksdorp Proprietary.” Now, it seems to me that this language, which Angeli advisedly used in his examination, and repeated in his correspondence, describes accurately enough what took place. Hart had secured from Symons 5,000 shares in the pool for Angeli. Angeli was not bound to take them, for the pool was not the same pool as that in which he had commissioned Hart to obtain a participation for him. Hart told him of the alteration in the pool and offered him the shares; and he accepted them. The next thing that took place was that on June 16 Pollak and Co. wrote to May and Hart a letter headed “Klerksdorp Proprietary Syndicate,” in which they said, “We beg to confirm that you have an interest of 15,000 shares in the syndicate formed by us to buy 60,000 of the above shares at 2½ for the end of July.” And on the same day May and Hart sent Angeli a contract note which bound them to fulfil their contract with him. So far as material, the contract note was as follows:—“Bought by order of A. Angeli, Esq., London, 5,000 Klerksdorp Proprietary shares at 2½=12,500.0.0.” Pool No. 2 turned out a disastrous speculation. The duration of the pool was extended more than once, but Pollak and Co. could only get rid of a very few shares. There was no hope of any improvement, so the pool was closed, and Pollak and Co. called upon May and Hart to take up the shares for which they were liable, and May and Hart in turn called upon Angeli to take up the shares for which he was liable to them. Thereupon Angeli promptly repudiated the whole transaction on the ground that he had been

induced to enter into it by misrepresentation. By the rules of the Stock Exchange May and Hart were compelled to take up the shares purchased for Angeli. After giving credit for Angeli's proportion of the shares sold on account of the pool the balance came to 4,697 shares; and with that quantity May and Hart were accordingly fixed. May and Hart then brought this action against Angeli for money paid on his behalf. Angeli in his pleadings set up four distinct grounds of defence. He alleged that he had been induced to enter into the transaction by misrepresentation. That defence was proved to be untrue. He alleged that the contract note was not stamped. That too was untrue. He alleged that May and Hart had not paid or become liable to pay anything in respect of the shares in question. That was also untrue. His other ground of defence was that he, May, and Hart were parties to an illegal and indictable conspiracy to rig the market. That defence was disproved and abandoned. And so all the grounds of defence that were set up in the pleadings failed completely. But the learned counsel for Angeli in cross-examining Hart laid the foundation for yet another ground of defence. Out of some expressions which fell from Hart in the course of a skilful cross-examination taken in connexion with Pollak and Co.'s letter of June 16, 1896, and the contract note of the same date, the learned counsel for Angeli constructed the theory that Hart was employed by Angeli as his broker in the ordinary way to buy 5,000 shares in the company, that in fact he bought 15,000 shares from Pollak and Co., and then sold 5,000 of those shares to Angeli. On this it was argued that he failed in his duty as broker, in that he sold his own shares to his principal, and omitted to establish privity of contract between his principal and Pollak and Co. In the Court of Appeal Lord Esher and Lord Justice Rigby accepted this version of the story and dismissed the action, treating the case as governed by "Robinson v. Mollett." "Pollak," says Lord Justice Rigby, "was the real man who had the dealings in the shares." "As far as I can make out," he adds, "Symons had nothing to do with it, only so far as he might influence Pollak. But Pollak was the man to sell. . . . Pollak's evidence shows plainly that he knew nothing about Angeli in the transaction at all, and, therefore, what may have been said to Symons does not appear to me in any way to vary the contract that was actually made between the manager of the syndicate and plaintiff, professing to act, as he now says, on behalf of the defendant," and then the Lord Justice comes to the conclusion that the plaintiff altogether misunderstood his position as broker, and did not perform the mandate of his principal. Now, I must say that that appears to me to be a complete misapprehension of the facts. Pollak and Co. had no shares to sell to persons wanting admission to the pool. The 15,000 shares, if and when they came to be taken up, would come out of Symons's hands, and Symons certainly was made aware of Angeli's interest in them. If they were passed to Pollak or through Pollak 5,000 would come ear-marked as Angeli's shares. And therefore, if it was necessary to establish privity of contract between Angeli, the purchaser, and the seller, that privity of contract was established at the outset. In my opinion it was wholly immaterial that Pollak and Co. were not made acquainted at the inception of the transaction with the respective rights and interests of the persons interested in the 15,000 shares. I think Hart did the best he could. He could not execute the original mandate. Angeli was told what Symons and Pollak had arranged, and accepted the position Hart obtained for him. The reconstructed pool—the pool that was completed on June 16—was, in fact, a combination of two interests. Pollak kept 45,000

shares. The other 15,000 shares, which represented May and Hart's interest, came from Symons. As regards those shares Symons, to use the Lord Justice's expression, was "the real man." Pollak had nothing to do with any of those shares after he had given up 5,000 of his 50,000, beyond acting as manager of the pool into which all the 60,000 shares were thrown. Mr. Justice Day said that he "believed implicitly every word that had been stated by Mr. Hart with reference to this transaction." And I agree with him in thinking that Mr. Hart carried out the transaction, at least so far as his principal was concerned, with the utmost propriety in every detail, and, therefore, I think that the judgment under appeal should be reversed, and the judgment of Mr. Justice Day restored, with costs both here and below.

LORD MORRIS and LORD SHAND read judgments to the same effect.

[Solicitors—Michael Abrahams and Co.; Ingle, Holmes, and Sons.]

House of Lords (Lord Halsbury, L.C., } 1898.
Lords Macnaghten, Morris, and Shand) } Aug. 2.

VYNER V. NORTH-EASTERN RAILWAY COMPANY.*

River—Maintenance and repair of banks—Liability for—Railway company—Construction of Act.

Decision of the Court of Appeal (13 *The Times* L.R., 368) reversed.

Their Lordships gave judgment in this appeal, the arguments in which were heard on June 28 and 30 and July 1 last. It was from an order of the Court of Appeal (Lords Justices Lindley, Rigby, and A. L. Smith), dated April 14, 1897, made in an action commenced in the Chancery Division of the High Court of Justice on December 6, 1893, in which the appellant was plaintiff and the respondents were defendants, discharging a judgment of Mr. Justice Romer, dated February 2, 1897. The appellant is the owner of an estate known as the Newby-hall Estate, in the county of York, and in the action he sued the respondents for not having maintained and kept in repair about eight miles of the banks of the River Ure, which flows through the estate. The questions mainly turned upon the effect of certain private Acts of Parliament which are referred to in the judgments. The case is reported in 13 *The Times* L.R., 368.

Mr. Lawson Walton, Q.C., Mr. Astbury, Q.C., and Mr. T. T. Methold were counsel for the appellant; Mr. Asquith, Q.C., Mr. Swinfen Eady, Q.C., and Mr. William Baker for the respondents.

The LORD CHANCELLOR.—In this case the proprietor of an estate through which the River Ure runs complains that the defendant company have neglected the obligation which it is alleged they are under to keep and maintain the banks of the River Ure in good and sufficient repair and from time to time to strengthen and support them, and that the respondents have by their neglect allowed the appellant's lands to be damaged thereby. It will be clearer to treat the case as though the action had been brought against the body originally authorized to deal with the water of the River Ure, inasmuch as there is a separate point insisted upon—that the present respondents have not inherited the obligation of that original body—a point therefore which must be separately dealt with. The obligation is said to arise under an Act of Parliament of the year 1767 (as amended and altered by an Act of 1820), which was an Act for making the River Ure

*Reported by J. EYRE THOMPSON, Esq., Barrister-at-Law.

navigable for a certain portion of its course, within which portion the appellant's lands are situated. A considerable amount of argument has been devoted to a consideration of the earlier Act, and I do not say that a consideration of the earlier Act is irrelevant, because it undoubtedly points the meaning of the later Act of 1920 from which the obligation, if it exists at all, must be derived. But it certainly cannot be used for the purpose of qualifying or cutting down the obligation created by the statute which repeals the earlier one. Now, the cause of action in this case is alleged to be the neglect of the commissioners incorporated by the Act to maintain the banks of the river Ure so far as it passes through the plaintiff's lands in such a state as to avoid damage to the lands. And I observe that in the judgment of the Court of Appeal delivered by Lord Justice A. L. Smith, his Lordship says that "no complaint is made as to there having been any overflowing of the river over its banks and its overflowing and damaging the adjacent lands." If by the words overflowing its banks is meant to imply that the banks are assumed to be in their natural condition, and that the water has not come over what in that condition of things might be described as the top of the banks, his Lordship is probably right. But if he meant that the adjacent lands are not injured by water escaping from the River Ure into the adjacent lands, it would be manifestly contrary to the evidence in this case. The allegation which seems to have been proved is that a considerable quantity of the land which was dry land is now submerged and that the evil appears to be increasing as time goes on. It appears to be thought unreasonable that the Legislature should impose upon the Navigation Corporation the obligation to keep and maintain the banks which the Lord Justice seems to assume ought to remain the obligation of the riparian proprietor. But I think the learned Judge overlooks the fact that the river has not been allowed to remain in its natural condition. Where a corporation or any authority is empowered so far to take the dominion of the river side as to make towing paths over it, cuts into it, drains from it, and the like, there appears to me to be nothing unreasonable in the Legislature casting upon the new body an obligation to maintain the banks in such a condition as to inflict no damage on the adjacent land. But, in truth, the question is not what it is reasonable for the Legislature to do, but what it has actually done, and that must be ascertained from the language of the Legislature itself. Now the section upon which the obligation in question is said to rest is in these words:—"And be it further enacted that the said company shall, and they are hereby required from time to time, and at all times, to maintain and keep the banks of the said River Ure and cuts or canals in good and sufficient repair; and from time to time to strengthen and support the same, when necessary, for containing all the waters of the said River Ure, so that the adjacent lands and grounds may not be subjected to be overflowed or damaged by water except in cases of flood and during the continuance thereof." However this section may be read I think it does create an obligation sufficient for the plaintiff's case here. The banks have not been maintained or repaired so as to prevent the waters of the River Ure from overflowing and damaging by water the lands adjacent to the bank. I cannot limit or qualify the language used so as to make the obligation less because the cause of the decay of the banks has been what has been called the "erosion" of them by the natural course of the river. The Legislature was not dealing with a river in its natural channel, and apart altogether from the injurious action of the cloughs, or the injurious use of them, the section enforces the obligation to maintain the banks, at all

events, so that "the adjacent lands and grounds may not be subjected to be overflowed or damaged by water." And besides this there is an absolute obligation on the undertakers "to support and strengthen the banks when necessary for containing all the waters of the said River Ure." Why am I to insert into this section, which, according to its plain grammatical meaning, is an absolute obligation, some words which shall make it only an obligation to manage their navigation works without negligence? It seems to me that when the Legislature gave the extensive powers which they did give over the banks of this river—a river no longer in its natural state—they did intend to make an absolute obligation to keep the adjoining land from injury as far as they might be made subject to be overflowed by water. If that is the correct view of the section, then it is immaterial to consider whether the banks were undermined or prostrated by the water gradually overtopping the highest point to which the banks reached. If it were otherwise I certainly should regard as unsatisfactory that the evidence does not, at all events, sufficiently discriminate between the different rivers in respect of which evidence was given in relation to the soil through which the rivers pass. Rivers might pass through clay soil for centuries without doing any damage; while through soil of a different character a very short time might affect the banks very seriously. But, as I have said, this consideration appears to me immaterial in view of the obligation which, I think, is made imperative on the Navigation Corporation. The construction of the section is really the whole difference between Mr. Justice Romer and Lord Justice A. L. Smith; and I am unable to agree with the Lord Justice. He appears to me to introduce words into the section which are not there, and to place upon the words that are there a meaning which they cannot bear unless some words are introduced. I therefore think that the view of Mr. Justice Romer is to be preferred. Upon the question which, as I have said, I would treat separately, I do not think it can be gravely argued that the Legislature, in allowing the Navigation Corporation to sell its undertaking *talum qualem*, would have allowed the right to be purchased without the corresponding duties, and the rights purchased were undoubtedly purchased as they were, and burdened accordingly with those duties which were inseparably incident to their duties. I ought to add that, in continuing the section upon which that case turns, I have diligently omitted to consider the words except in times of flood, and I have done so because no one has suggested that the injuries here complained of were done by a flood. The progress of the injury has been actually witnessed, and therefore I have not thought it right to confuse the question by introducing a discussion of an exception to the obligation which is irrelevant to the matter in hand. I am satisfied that Mr. Justice Romer's judgment is right, and I therefore move that it be restored, and that the respondents do pay to the appellant the costs both here and below.

LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred.

[Solicitors—Emmett and Co., for the appellant; Williamson, Hill, and Co., for the respondent.]

Court of Appeal (Lindley, M.R.,] 1898.
Clitty and Collins, L.J.J.) } Aug. 2.

IN RE GRINDEY—CLEWS V. GRINDEY.*

Trustee—Breach of trust—Liability—Relief under
Judicial Trustees Act, 1896, granted.

This appeal raised a question of considerable im-

*Reported by H. B. HEMMING, Esq., Barrister-at-Law.

portance to trustees—viz., as to the circumstances which will justify the Court in acting under the powers conferred by sect. 3 (1) of the Judicial Trustees Act, 1896, in relieving an honest trustee against the consequences of a breach of trust. Clause 1, sec. 3, provides as follows:—"If it appears to the Court that a trustee, whether appointed under this Act or not, is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from past liability for the same." The action was brought by beneficiaries under the will of Sampson Grindey for a declaration that the defendants, the trustees and executors of the will, were guilty of a breach of trust in neglecting to call in a sum of £166 due to the testator's estate upon a promissory note, and for an order compelling them to make good the amount to the estate. The testator made his will on April 9, 1892, and thereby gave to the defendants all his real and personal estate upon trust to maintain the same and every part thereof in the like mode of investment as the same should be at his decease until his son, the defendant Sampson Grindey, should attain the age of 24. The testator died on September 23, 1892, and the defendant Sampson Grindey attained the age of 24 in the year 1895. Part of the testator's estate consisted of the sum of £166 due from T. Fernihough upon a promissory note payable on demand. The promissory note was dated May 15, 1890, and bore interest at 5 per cent. The interest was paid to the testator until the date of his death, and at that time Fernihough was supposed to be a person in good credit. The defendants took no steps to call in the promissory note until nearly two years after the testator's death, and in the meantime, in May, 1894, Fernihough died insolvent, and a dividend of only 2s. 6d. in the pound was recovered against his estate. The plaintiffs claimed to make the defendants liable for the loss, and contended that the defendants had been guilty of a breach of trust in not calling in the debt within a year from the testator's death. The action was tried before Mr. Justice Kekewich in January last. The learned Judge held that according to the true construction of the will and in the events which had happened, and having regard to the provisions of section 3 of the Judicial Trustees Act, 1896, the defendants ought not to be liable for leaving outstanding the sum due on the promissory note. The plaintiffs appealed.

Mr. Warrington, Q.C., and Mr. J. M. Stone were for the plaintiffs; and Mr. Renshaw, Q.C., and Mr. Ingle Joyce were for the defendants.

The Court dismissed the appeal.

The MASTER of the ROLLS said that the plaintiffs' case was that the defendants were liable to make good the loss which had occurred by reason of their omission to call in the promissory note. That might be so apart from the Act of 1896; but in this case the defendants were embarrassed by having for their guide a very curiously formed will. Looking at the terms of that will, his Lordship did not think that a business man would be to blame in supposing that it was not the intention of the testator that this debt should be called in; and if that was a reasonable view to take of the construction, then, whether it was absolutely right or absolutely wrong, the defendants would not be liable, having regard to the terms of the Act. Considering the smallness of the amount at stake, it could not be said that the trustees acted unreasonably in not asking the Court for directions, as the cost of

applying to the Court would exhaust a considerable proportion of the whole sum. The will contained no specific direction to get in the debts, but it contained a trust to maintain the estate and every part thereof in the like mode of investment as the same should be at the testator's decease. How was that to be applied to a part of the assets which was not invested in any proper sense of the term? It was clear that the testator was using the word investment in a very loose sense, and his Lordship was not prepared to say that the testator did not intend this promissory note to be included as an "investment." It was not a proper conclusion to hold, in the face of that will, that the trustees were bound as reasonable men to get in the promissory note. By the combined effect of the will and the Act of Parliament he thought that the learned Judge was right in saying that the defendants ought to be relieved from the loss of this money.

LORD JUSTICE CHITTY concurred. In his opinion, although section 3 was not very easy to construe, its general object was to relieve honest trustees who had acted reasonably, which meant "reasonably as trustees," and in construing this section regard ought to be had to the nature of the will itself and the difficulty in which the trustees might be placed by it. Upon the terms of this will ordinary business men might reasonably come to the conclusion, having regard to the course pursued by the testator himself in leaving the money outstanding for two years before his death, that this asset was intended to be maintained in the same position in which it was at his death until the period arrived when it was necessary to have the money in hand for distribution.

LORD JUSTICE COLLINS concurred.

[Solicitors—Hudson, Matthews, and Co., for J. Bamford, Son, and Wilson, Ashbourne; Rowcliffes, Rawle, and Co., for Holland and Rigby, Ashbourne.]

Q.B. Div. (Wright and }
Kennedy, J.J.) }

1898.
Aug. 2.

IN RE STEVENS.*

Bankruptcy—Discharge—Refusal—Special reasons for granting—Bankruptcy Act, 1890, sec. 8.

This was an appeal by the Board of Trade from the decision of the learned Judge of the County Court at Birmingham, and raised an important question under section 8 of the Bankruptcy Act, 1890. That section provides that on an application by the bankrupt to the Court for his discharge the report of the Official Receiver as to the bankrupt's conduct and affairs shall be *prima facie* evidence of the statements therein contained, and that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, "unless for special reasons the Court otherwise determines, and shall, on proof of any of the facts hereinafter mentioned," either (*inter alia*) refuse the discharge or suspend the discharge for a period of not less than two years. In the present case the bankrupt's application for his discharge came before the County Court in April last, and it appeared from the report of the Official Receiver that the bankrupt had been prosecuted for offences under the Debtors Act, 1869, and had been convicted and sentenced to imprisonment, and that he had also committed certain of the offences mentioned in the subsections to section 2 of the Bankruptcy Act, 1890. The learned County Court Judge held that there

*Reported by H. L. FRASER, Esq., Barrister-at-Law.

were special reasons (without stating them) for granting the bankrupt his discharge, but suspended it for two years. The Board of Trade appealed on the ground that no special reasons were shown for granting the discharge.

Mr. Muir Mackenzie appeared for the Board of Trade; Mr. F. Cooper Willis appeared for the bankrupt.

MR. JUSTICE WRIGHT said,—The learned Judge refers in his judgment to the report of the Official Receiver, which states that the bankrupt had been convicted of misdemeanours under the Debtors Act, 1869, and had committed certain offences mentioned in section 8 of the Bankruptcy Act, 1890; and *prima facie*, having regard to the language of section 8, the Court had no power to grant the bankrupt his discharge. That enactment, however, is qualified by the words “unless for special reasons the Court otherwise determines.” I think that in working out that section the Court should specify the special reasons on which the discharge, which otherwise could not be obtained, is granted. The learned Judge seems to have been influenced by the recommendation to mercy made by the jury at the trial of the bankrupt for the offences under the Debtors Act, 1869. It seems to me, however, that that is not a special reason for granting the bankrupt's discharge. It is not for the jury in such a case to determine what is a special reason for the purposes of a discharge in bankruptcy. In my judgment the learned Judge has not specified in his judgment any special reason for granting the bankrupt's discharge. I therefore come to the conclusion that the learned Judge, in exercising his discretion under the section, has gone beyond what the Act empowered him to do, and that, in strictness, the discharge should be refused. But we have power to vary the order of the Court below and to make such order as we think right if the parties consent, and we understand that the Board of Trade do not object, and that the bankrupt is willing we should do so. We cannot overlook the gravity of the case, and therefore we think the right order will be to vary the order of the Court below by granting the discharge on the bankrupt's consenting to judgment being entered against him for £2,000, and to suspend the discharge for two years.

MR. JUSTICE KENNEDY concurred.

[Solicitors—W. Murton; M. Moses.]

Judicial Committee of the Privy Council } 1898.
(Lords Hobhouse, Macnaghten, and } Aug. 3.
Morris, and Sir Henry Strong)

THE PERPETUAL EXECUTORS' AND TRUSTEES' ASSOCIATION OF AUSTRALIA (LIMITED) V. MARGARET ELIZABETH SWAN AND OTHERS.*

Privy Council Appeals—Victoria—Trustee—Unauthorized investments—Deposit at interest with bank—Liability.

This was an appeal from a judgment of the Supreme Court of Victoria of July 30, 1897, and from a judgment of Mr. Justice Holroyd of August 31, 1897.

Mr. Cozens-Hardy, Q.C., Mr. Haldane, Q.C., and Mr. C. H. Sargent were counsel for the appellants; Mr. Swinfen Eady, Q.C., and Mr. Danckwerts for the respondents.

LORD MACNAGHTEN, in delivering their Lordships' judgment, said in their Lordships' opinion this was a very plain case and a very bold appeal. The appel-

lants were “a trustee company”—that was to say, a company incorporated by statute and authorized by its special Act to undertake the duties of executors, administrators, and trustees for pecuniary reward. The powers and obligations of trustee companies depended in each case on the special Act and on certain provisions of the Trustee Act, 1890. The sole question for adjudication on this appeal was whether, according to the law in force in the colony of Victoria, the placing of trust moneys on deposit at interest with banks fulfilling certain conditions was or was not an authorized investment in the case of trustee companies. At the time when the events occurred which gave rise to that litigation investments in real or Government securities were the only authorized investments for trust moneys in the hands of ordinary trustees. In December, 1890, the appellants were employed to administer the estate of one George Swan, who had died intestate in the previous October, leaving a widow and six children, some of whom were infants. The personal estate to be got in was under £5,000. The debts amounted to a trifle under £100. Within four months the appellants had completed their labours all but the distribution of the net assets, and on April 14, 1891, they credited themselves with a commission of over £200 by way of remuneration for their services. Instead of paying the widow and the adult next-of-kin and paying into Court or setting apart and investing the shares of the infants, as it was their duty to do, the appellants kept in their own hands undivided and uninvested the clear balance of the estate. The widow, who did not seem to have been fully aware of her rights, begged the appellants to invest at their earliest convenience and to the best advantage the moneys they had in hand, and to get them securely placed. After four applications she received a reply from the manager that the directors were exceedingly anxious to get the money invested in suitable securities as early as possible, but that “securities of the character acceptable to the directors were very difficult to obtain at present.” From that letter it might perhaps be inferred either that the directors of the company—two of whom were also on the board of the City of Melbourne Bank—considered investments on deposit receipts unsuitable or else that they had not then discovered the extent of the powers of trustee companies for which they were now contending. The manager stated at the trial that Mrs. Swan told him that as the company could not find securities on mortgage she wished the money placed on deposit in the English, Scottish, and Australian Chartered Bank, and that subsequently they placed £2,100 in that bank and £2,000 in the City of Melbourne Bank at 5 per cent. for 12 months. The deposits were renewed for further periods. Ultimately both banks failed. The children of the intestate now called upon the appellants to make good the loss. At the instance of the appellants the widow was made a co-defendant. Besides urging that if they had done anything amiss they ought to be indemnified by the widow, who had so led them astray, the appellants contended that their action was justified by section 384 of the Companies Act, 1890, under which the deposits complained of were authorized investments. Mr. Justice Holroyd reserved that point for the full Court, who decided it adversely to the appellants, and thereupon the learned Judge declared that the deposits were breaches of trust on the part of the appellants which they were liable to make good. But he held that the widow could not complain of the deposit to the English, Scottish, and Australian Chartered Bank, which she had herself recommended, and that she must look to the reconstructed bank for the share of the moneys. The appellants now appealed from those judgments. The argument on their behalf was rested on the pro-

*Reported by W. J. SOULSBY, Esq., Barrister-at-Law.

visions of the Trustee Act, 1890. Section 383 imposed on trustee companies the same duties and obligations as those to which any individual acting in a similar capacity would be subject. Section 384, after requiring a trustee company to keep separate accounts of the estates under its control, enacted that any director, member, or officer of a trustee company who knowingly and wilfully appropriated or dealt with any property of which such company had control, or knowingly and wilfully lent or otherwise dealt with any moneys received by such company otherwise than in accordance with that part of the Act of 1890, should be guilty of a misdemeanour. Then followed a proviso that, notwithstanding anything in that section contained, any trustee company might deposit any moneys of which it had control with any banking company or corporation fulfilling certain conditions (which admittedly were fulfilled in the case of these banks), but no deposit was to be made of more than £20,000 on behalf of any one estate of which it had control. What was it that the proviso authorized? There was not a word about investment or interest from beginning to end. The section, in their Lordships' opinion, did not enlarge the powers of investment possessed by trustee companies in common with trustees. It did not authorize them to deposit trust moneys with a bank in any case in which an individual acting in a similar capacity would not be justified in employing a banker. It was a restrictive as well as an enabling clause. While it relieved the directors and officers of a trustee company from the apprehension of criminal liability if the deposit was properly made, it required that deposits should only be made with banks of a certain class, and that no deposit in the case of any one estate should exceed a certain limit. The framers of the Act knew perfectly well the difference between depositing money with a bank and investing moneys on security. The very next section drew the distinction, for it authorized trustee companies to deposit their own funds with a bank of deposit or to invest them on certain specified securities. The learned counsel for the appellants were asked why trustee companies should have conferred upon them larger powers of investment than ordinary trustees. The answer was that it was the policy of the Legislature to favour trustee companies. No doubt if those companies had wider powers of investment than other trustees the privilege might serve to attract custom, but it would be a singular way of showing them special favour to allow them to do with impunity that which would be a breach of trust if done by ordinary trustees. If such had been the intention of the Legislature one would certainly have expected to find the intention declared in plain and unambiguous language. Section 384 was certainly not happily expressed, but in their Lordships' opinion it did not afford any grounds for the contention of the appellants. In ordinary circumstances it would not be necessary or proper to say anything more. But, inasmuch as a judgment unsuccessfully challenged on appeal might possibly be taken as a precedent in other cases, their Lordships thought it right to add that in their opinion the judgment under review fell short of what the justice of the case required. Their Lordships were unable to see what jurisdiction the learned Judge had under the circumstances to make a decree between the appellants and the widow, who were co-defendants. Assuming the jurisdiction to exist, their Lordships were unable to discover any ground for depriving the widow of her full rights. Their Lordships would humbly advise her Majesty that the appeal must be dismissed. The appellants would pay the costs of the appeal.

[Solicitors—St. Barbe, Sladen, and Wing, for the appellants; Blyth, Dutton, Hartley, and Blyth, for the respondents.]

Judicial Committee of the Privy Council
(Lords Hobhouse, Macnaghten, Morris,
and Sir Henry Strong)

1898.
Aug. 3.

ENGLAND V. WEBB.*

Privy Council Appeals—Victoria—Revenue—Income-tax—Exemptions—Money lent by Scottish Institution on security of land in Victoria.

This was an appeal from a judgment of the Supreme Court of Victoria of September 20, 1897, confirming a decision of his Honour Judge Casey in the Melbourne County Court.

Mr. Crackanthorpe, Q.C., Mr. Butcher, Q.C., and Mr. R. L. Blackburn (of the Scotch Bar) appeared for the appellant; Mr. Haldane, Q.C., Mr. Bray, Q.C., and Mr. Rowlatt for the respondent.

LORD HOBHOUSE, in delivering their Lordships' considered judgment, said the appellant was the officer and representative of the Scottish Provident Institution, which claimed to be exempt from income-tax. The respondent was the Commissioner of Taxes. The income in respect of which tax was claimed proceeded from money lent on the security of land in Victoria. The appellant company had no other property in the colony nor did it carry on business there. Its head office is in Edinburgh. The question turned entirely on the construction of the Income Tax Act, 1895, and its application to the business of the company. The tax was imposed by section 5 on all income derived by any person from the produce of property within Victoria. Section 7 enacted that there should be exempt from income-tax all income derived or received by persons distributed under 12 heads. The appellant claimed to fall under head (e)—“All trusts, societies, associations, institutions, and public bodies not carrying on any trade or not being engaged in any trade for the purposes of gain to be divided among the shareholders or members thereof.” By the definition clause “trade” included every profession, vocation, trade, business, calling, employment, and occupation. The Supreme Court held that the company carried on business for the purpose of gain within head (e) so far as its operations outside Victoria were concerned, though it merely lent money on mortgage in Victoria, and that it was not exempted. The appeal was from that decision. The company was started under a deed of constitution registered in the Books of Council and Session on June 8, 1837. Its objects as there laid down were:—“(1) To form a common fund on which provisions by way of capital sums and annuities should be chargeable upon the failure of lives and upon survivorships by means of contributions corresponding to the value of such provisions to be paid by or on behalf of the persons becoming entitled thereto; (2) that whatever surplus might eventually arise upon such contributions should be reserved for the benefit of and be equitably apportioned among the persons, or the representatives or nominees of the persons, from whose contributions such surplus shall have arisen.” Article 27 of the deed provided that septennial accounts should be taken and that the surpluses which were then found to have arisen on the common fund should be available to the members by additions to the sums payable on their policies. From that benefit, however, certain classes of policies were excluded. In terms of the deed no person could effect any form of assurance with the company without becoming *ipso facto* a member. That was an ordinary type of mutual insurance company, on which footing it appeared that the business was conducted for several years. In 1848 the company was incorporated by Act of Parliament, and its business was put on a new footing. It became “entitled to carry on the

*Reported by W. J. SOULBY, Esq., Barrister-at-Law.

business of effecting assurances on lives and survivorships, purchase and sale of annuities and reversions, granting endowments, receiving money for investment and accommodation, and in general for carrying on all the business which now is or may come to be connected with a life assurance society in all the various branches thereof." From that time to this the business of the company had been that which was indicated in the Act of 1848. It was the ordinary business of a life assurance society, and in addition that of a society for the purchase and sale of annuities and reversions. In 1848 the company became one of those which carried on business with strangers for gain to the company as a whole. It had granted assurances to persons who were not its members, and though it was urged that that kind of business had only been done with other insurance companies, and by way of guarantee, it was done, and on terms calculated for profit. It had also trafficked to some extent in reversions. That was carrying on business for gain, and the gain was to be divided among the members of the company. It was urged that the additional business of a general kind was very small; and compared with the magnitude of the other transactions it was so; but it was not unsubstantial, and it was enough to prevent the company from bringing itself within the terms of head (e). It should also be noticed that the next head of exemption (f) was expressed as follows:—"Any mutual life assurance company whose head or principal office or principal place of business is in Australia." Certainly the inference to be drawn from that exemption was that a mutual insurance company which, like the present appellant, had not any place of business in Australia was not to be exempt. It was right to be cautious in laying stress on an inference of that sort. But it was at least not improbable that the framers of the Income-tax Act might have looked upon all companies whose business it was to make money bargains for the benefit of their members as being companies which carried on business for gain to their members; and the way which they had dealt with mutual insurance companies under head (f) lent countenance to the supposition that they did so think. Another point of much more importance was raised in the course of the argument and discussed at the Bar, though it did not seem to have been raised in the Court below; and that was whether the trusts, &c., mentioned in head (e) could mean trusts, &c., not operating in Victoria. It seemed very strange that the Victorian Parliament should desire to forgo income-tax in favour of a Scotch institution which had no connexion with Victoria except in its character of a property owner there. If a party of friends in England employed a common agent in Victoria to put out the money of each on mortgage, each would be taxed. If then they associated themselves for the purpose of doing so, was it intended that they should escape tax? And yet they would be an association simply for investment, and not trading for gain. Moreover, there were other heads of exemption framed without regard to locality. Head (c) exempted "All bodies formed solely for the purposes of religion." Head (d) "All registered friendly societies, provident societies, building societies, and trade unions." Head (h) "Any mining company." It could hardly be that the Parliament of Victoria had such great regard for social and industrial combinations and efforts all over the world that it should offer to the Jesuits' Society in Rome, to the Amalgamated Engineers, and the Athenæum Club in England, and to a Witwatersrand company in Africa exemption from income-tax if they chose to invest their funds in Victorian land, or in mortgages upon it, or, it would seem, in the purchase of Government stock. It would require a much clearer expression than could be found in the general words of

those heads of exemption to induce their Lordships to infer any such intentions on the part of the Victorian Legislature. It seemed to them much more reasonable to suppose that in framing heads (c), (d), and (h) the Legislature was speaking of bodies acting in or for Victoria, and the same reason applied to head (e). Their Lordships, therefore, came to the same conclusion as the Court below. They would humbly advise her Majesty to dismiss the appeal, and the appellant must pay the costs.

[Solicitors—F. H. Goldney, for the appellant; Freshfields and Williams, for the respondent.]

Judicial Committee of the Privy Council
(Lords Hobhouse, Macnaghten, and Morris, and Sir Henry Strong) } 1898.
Aug 3.

SMYTH V. THE QUEEN.*

Privy Council Appeals—Victoria—Civil servant—
Superannuation allowance—Crown prosecutor.

This was an appeal from a judgment of the Supreme Court of Victoria of October 25, 1897.

Mr. Herbert Cowell appeared for the appellant; Mr. Haldane, Q.C., and Mr. Rowlatt for the respondent.

The case was recently argued before a Board consisting of Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Henry Strong, when judgment was reserved.

LORD MORRIS, in delivering their Lordships' judgment, said the appellant, Mr. C. A. Smyth, appealed from a judgment of the Supreme Court of Victoria, which answered against him the question reserved at the trial of the action. The suit was by petition of right. The appellant claimed to be entitled to superannuation allowance as the holder of an office in the public service from which he was superannuated, he having passed the age of 65. He had been appointed "Crown Prosecutor" on April 7, 1861, for certain district Courts of the colony. The appointment was as follows:—"Whereas all treasons, felonies, misdemeanours, and offences compoundable in any circuit Court in the colony of Victoria must be prosecuted in the name of her Majesty's Attorney-General or Solicitor-General in the said colony or of such other person as the Governor of the said colony may appoint. Know ye, therefore, that I, the Governor aforesaid, do by these presents appoint that at the circuit Courts to be holden at Sandhurst, Maryborough, and Castlemaine all such treasons, felonies, misdemeanours, and offences as aforesaid shall be prosecuted in the name of Charles Alexander Smyth, Esquire, barrister-at-law." The appellant was subsequently appointed to an additional circuit. The salary given to the office was £600 a year. The appellant having declined to accept certain new conditions and duties proposed to be attached to his office, his tenure was, by letter of the Attorney-General of January 17, 1895, terminated, and an Order of Council was made formally terminating his appointment. It appeared that in 1890 the appellant had proposed to resign in consequence of ill-health on a retiring allowance, which was acceded to by the then Attorney-General, and £386 13s. 6d. was placed on the Estimates for such retiring allowance; but the appellant's health became restored and he continued in his office. On his removal in 1895 the appellant again applied for his superannuation allowance, but the application was refused, the Attorney-General having given an opinion that appellant was not entitled to any pension. The appellant consequently instituted the present proceedings. At the trial Sir H. Wrixon, a former

*Reported by W. J. SOULESBY, Esq., Barrister-at-Law.
81—2

Attorney-General, was examined, and gave evidence as to the duties of the appellant's office of "Crown prosecutor." It was found as a fact by the learned Judge that the statements of the duties of appellant's office were correctly stated in the petition of right. It was proved and was conceded that there was a separate and distinct class of officer known as "prosecuting barristers," whose duties were simply to prosecute as advocates in the particular cases in which they might be employed. The case entirely turned on the construction of the Public Service Act, 1890—viz., whether the appellant came within Clause 107, and if he did, was he excepted by the excluding Clause 3? Section 107 said all persons classified or unclassified holding offices in any department of the public service at the time of the Public Service Act, 1883, should still be entitled to superannuation or retiring allowance, compensation or gratuity to be computed under the provisions of Act No. 160. Section 3 said except where otherwise expressly provided nothing in the Act should apply to any prosecuting barrister, and in the interpretation clause it was provided that the expression "officer" "shall mean and include all persons employed in any capacity in the public service." Their Lordships were of opinion that the Crown prosecutors, such as the appellant, paid yearly would come within and be included in the terms of section 107—an opinion which was entertained by the Supreme Court also. The question therefore was reduced to the construction of Clause 3—viz., were Crown prosecutors excluded by the terms of that clause? They were not named in it, but it was contended that the words "prosecuting barristers" included and was meant to refer to "Crown prosecutors." Their Lordships could not accede to such a construction. The learned Judge who gave the judgment of the Supreme Court intimated that there were two well-recognized classes of functionaries whose titles were not used in common, but on the contrary were described in official Acts and documents with separate references, and whose duties were dissimilar except in one respect, the duties of the Crown prosecutor being of a much higher nature and employed at a salary, the point of similarity being that while the whole duty of a prosecuting barrister was to act as an advocate on getting a brief, it was one of the duties of a Crown prosecutor to appear in a case in which he had prosecuted. Why, then, should an exclusion by name of a well-known class be held to be an exclusion of an equally well-known and distinct class whose duties were so dissimilar? The learned Judge in the Supreme Court seemed to have substantially decided on the ground that it could not be reasonably supposed the Legislature intended by the use of the words "prosecuting barristers" to refer to the class "prosecuting barristers" because they could not come within the other provisions of the Act. There might be some difficulty in assigning a reason why the class "prosecuting barristers" under such circumstances were excluded by name—whether *ex majore cautela* or otherwise. That difficulty, however, appeared to their Lordships to afford no ground for holding that the words were to be applied to another and distinct class of officers—viz., "Crown prosecutors." The learned Judge was of opinion it was the class of Crown prosecutors that was aimed at in Clause 3, and not the class named. If such surmise was to be entertained it was sufficient to say the aim had not been attained—*quod voluit quod dixit*. Their Lordships could not adopt such a rule of construction as the Supreme Court had adopted in the present case. One distinct well-known class of official was stated to be excluded in plain unmistakable language. Why should such exclusion—in consequence of its inapplicability to the class named

—be transferred to another class not named? Their Lordships were of opinion that the fact that the appellant held his office during pleasure could not affect the question of superannuation. His term of office was determined by the will of the Crown. That did not affect his right to superannuation allowance for the term he held office. Their Lordships would humbly advise her Majesty that the judgment of the Supreme Court ought to be reversed and that in lieu thereof the appellant be declared entitled to superannuation allowance. The appellant would also be entitled to his costs in the Court of the colony and of this appeal.

[Solicitors—Baker and Nairne, for the appellants; Freshfields and Williams, for the respondents.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } Aug. 3.

THE RHYMNEY STEAMSHIP COMPANY (LIMITED) V. THE
IBERIAN IRON ORE COMPANY (LIMITED)—THE FOREST
STEAMSHIP COMPANY (LIMITED) V. SAME.*

Ship—Charterparty—Construction—Demurrage—
"Working day of 24 hours"—Meaning of.

Decision of Bigham, J. (*ante*, p. 473), affirmed
(Rigby, L.J., dissenting).

This was an appeal from a judgment of Mr. Justice Bigham, reported *ante*, p. 473. The question in each of the two cases, which were tried together, was as to the construction of a certain clause in a charterparty. In each case the action was brought to recover demurrage. The charterparty was one by which the plaintiffs undertook with the defendants to provide ships for the carriage of 50,000 tons of iron ore from Seville, in Spain, to ports in the United Kingdom and elsewhere over a period of 12 months. It was drawn on an ordinary printed charterparty form used for single voyages, alterations being introduced in writing for the purpose of adapting the form to the particular contract in question. Disputes arose as to the meaning of the provisions as to demurrage. Those provisions were as follows:—"Charterers or their agents to be allowed 350 tons per working day of 24 hours, weather permitting (Sundays and holidays excepted), for loading and discharging, same to be reversible and to be averaged voyage by voyage to avoid demurrage, and to count from 6 a.m. of the day following the day when steamer is reported at the Custom-house, unless she be reported before noon, in which case time to count from notice of readiness and in every respect ready to load or discharge respectively and in free pratique. Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." The plaintiffs contended that these words meant that the defendants were to perform the loading or discharging at the rate of 350 tons per working day, such days to be made up of periods of 24 hours reckoned from the hour when the vessel commenced to load or discharge. The defendants, on the other hand, said that the words meant that 24 working hours were to be allowed for loading or discharging each 350 tons. Mr. Justice Bigham gave judgment in favour of the defendants. The plaintiffs appealed.

Mr. Montague Lush appeared for the plaintiffs in the second case; Mr. J. E. Banks for the plaintiffs in the first case; and Mr. Joseph Walton, Q.C., and Mr. Rufus Isaacs, Q.C., for the defendants.

The Court, having taken time to consider, delivered

*Reported by F. G. RUCKER, Esq., Barrister-at-Law.

judgment dismissing the appeal, Lord Justice Rigby dissenting.

LORD JUSTICE A. L. SMITH read the following judgment:—These are actions by shipowners against charterers for demurrage, and raise a short point as to the construction of a clause in a charterparty though it is of considerable importance to the parties, as it involves in one case alone the question of what time charterers are to have for loading and unloading 50,000 tons of iron ore in and out of certain steamships of the plaintiffs, and it is said there are other charterparties couched in similar terms. The clause which gives rise to the dispute is as follows:—“Charterers or their agents to be allowed 350 tons per working day of 24 hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . and to count from 6 a.m. of the day following the day when the steamer is reported, unless she be reported before noon, in which case time to count from notice of readiness . . . Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used.” Lay days mean the time for loading or unloading as the case may be. The question is, do the words, “Charterers to be allowed 350 tons per working day of 24 hours,” mean that the charterers are to have 24 working hours for loading or discharging each 350 tons of ore, or do they mean, as the plaintiffs, the shipowners, contend, that the charterers are only to have a working day for each 350 tons, no matter of what number of hours such working day may happen to consist, at the port of loading and at the various ports of discharge. The number of hours which constitute a working day vary at the different ports. Now, in the first place, the plaintiffs’ contention appears to me to give the go-by to the words which presumably were inserted for some purpose in the charter—viz., “of 24 hours”—and reads the charterparty as if those words were not there. Why were those words inserted? It seems to me for the express purpose of giving to the charterers a fixed period of 24 working hours wherein to load or unload each 350 tons of ore, no matter what number of hours might constitute a working day at the port of loading or the ports of discharge. What is the sense of inserting “of 24 hours” if not for this? If the plaintiffs’ reading of the charterparty be correct, the words should simply have been “350 tons per working day,” which, as Lord Esher pointed out in “The Katy” ([1895] P.D., 63), in which case the phrase was “running days,” meant days in their ordinary sense. But a “working day of 24 hours” is not the same as “a working day,” and in this charterparty it seems to me that the parties have agreed to a conventional day of 24 hours in which the work is to be done. The real question is whether in this clause the word “day” is to give way to the words “of 24 hours” or the words “of 24 hours” are to be discarded. It is suggested by the plaintiffs’ counsel that the words “of 24 hours” were inserted because of the decision in “The Katy,” which, as before stated, was that running days meant whole days, days in their ordinary sense, and that the 12th clause in the charterparty in that case, stipulating that in certain events lay days were to count from 48 hours after the ship’s arrival at a safe anchorage, did not alter the meaning of running days. Why this decision should have prompted the insertion of the words “of 24 hours” after the words “working days” I do not apprehend, and I do not attribute any weight to the suggestion, and it is the only one the learned counsel for the plaintiffs have made for the insertion of the words “of 24 hours.” The plaintiffs’ contention is that the working days mentioned in the charter mean periods of 24 hours

reckoned from the time when the ship commences to load or unload, as the case may be—i.e., of continuous periods of 24 hours, no matter how many hours of the 24 can, in fact, be worked in. The clause in question, as before stated, is “350 tons per working day of 24 hours, weather permitting, steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used.” These last words, “unless used,” are in writing and not in print, and, in my judgment, refer to the time if used during night, Sundays, and holidays, and are to me very significant. As to the effect to be given to written words over printed words in a charterparty, see what was said by Mr. Justice Crompton in “Gumm v. Tyrie” (4 B. and S., 707). By this clause, if the steamer does not use time at night or on Sundays or holidays, though she might be required to do so, this time is not to be counted in the 24 hours for each 350 tons of ore, but if she is so required and does use time accordingly this time is to be counted in the 24 hours. What, then, becomes of the plaintiffs’ contention that the true construction of the charterparty is that a working day of 24 hours means continuous periods of consecutive hours from the commencement of the loading or discharge of the ship, as the case may be? Moreover, the words “weather permitting” are inserted for the benefit of the charterers, not of the shipowners. Suppose during half of the second or any other working day for unloading, say, at Cardiff (where the working day is a day of eight hours and 40 minutes, we are told), weather did not permit unloading, or did not permit unloading for the whole of the day, what then? Is the true construction of this charter that the charterers are only to have four hours in the 24 hours or no hours at all to unload 350 tons of ore and not the 24 hours expressly mentioned in the charter? This, I think, cannot be and is not the meaning of the charter, and I agree with what my brother Bigham has held, and I think that the appeal should be dismissed with costs.

LORD JUSTICE RIGBY read the following judgment:—I have the misfortune of differing from my learned brethren. In my opinion strong *prima facie* presumption arises against the construction of the charterparty contended for by the defendants and adopted by Mr. Justice Bigham when we observe that in reckoning the time allowed to the charterers for loading or discharging, which is one working day of 24 hours for every 350 tons of cargo, that construction entirely sets aside, as in my judgment it does, the “working day” as there used, and converts what I may for convenience call the conventional unit for the measure of time into 24 working hours, just as if working days had not been mentioned. This may be supported by a necessary implication arising from the rest of the contract, but nothing less than a necessary implication can, in my judgment, justify such violence being done to the language. I quite agree that you may from the terms of a contract show that the parties to it have dealt with a word or phrase like “day” or “working,” or any word or phrase that has in ordinary language one or more significations, in such a way as to show that some other meaning ought to be attached to it, but in doing so and attaching a conventional meaning care should be taken not to depart more from the ordinary meaning, or one of the ordinary meanings, of the word or phrase than is necessary. Now, I do not think that I am doing injustice to the defendants’ contention when I say that it logically involves this proposition—that you are, when loading or discharging has been going on, only to take the actual number of hours during which work has been done, add them together until the total number amounts to 24, and you have then the time allowed for the loading or discharging of the first 350 tons, and so on with reference to each

succeeding 350 tons. I am, of course, aware that the contention is qualified by reading the charterparty as if it contained by implication a proviso that a working day means a day of the usual number of hours for which men work at the port of loading or discharging, as the case may be. But I can see no possible ground for such a contention. What, then, would be the effect of such a proviso in the passage "per working day of 24 hours, &c." ? Whatever the meaning may be of working day, it cannot have two distinct meanings in one and the same passage. This passage would, however, run "per working day of 12 hours or eight hours, as the case may be, which is also to be of 24 hours." The result is to me quite unintelligible. When I address myself to the construction of the document, I must in the first place say that I cannot accept the statement of Mr. Justice Bigham, that all days in an ordinary or commercial as distinguished from an astronomical sense are days of 24 hours. Notoriously the 24 hours are commonly spoken and thought of as made up of day and night, and day does not usually import day and night. I cannot therefore agree with his conclusion that the words "of 24 hours" are not introduced to explain the word "day"; it seems to me that that is their obvious and only function. I do not myself find much difficulty in ascertaining the meaning of a working day of 24 hours. I can best explain my meaning by taking a concrete case. Suppose a vessel, whose cargo is five times 350 tons, to be reported after 12 o'clock on Monday. The time for loading is to count from 6 a.m. on Tuesday, and *prima facie* the first day of 24 hours will expire at 6 a.m. on Wednesday, and the whole time for loading or discharging the entire cargo will expire on Saturday at 6 p.m. If the vessel is reported before noon on the Monday the time will begin to count from the giving of notice of readiness, say, 12 o'clock noon, and will run in like manner until 12 noon on the Saturday. So far no notice has been taken of exceptions, but if the weather is such as to hinder loading or discharging during, say, six hours of the time, that six hours must be excluded, and the expiration of the time will be postponed by the six hours. So, if one or more of the days counted in the time be a holiday or a Sunday, the effect is to exclude that or those days and so postpone the expiration of the time by an additional day or days. So far not the slightest difficulty arises in carrying out literally the directions of the charterparty. This construction does not involve the assumption that the working time is to be made up of consecutive hours, but only that any breach of continuity must be rested on plain words. Unquestionably a difficulty, and, so far as I can see, the only difficulty, is introduced by the words "steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used." But so far from this being a perfectly clear sentence of so plainly obligatory a meaning as to entitle it to dominate and control other passages not in themselves open to doubt, it appears to me to be the most obscure passage in the whole document. Further, I would at the outset point out that the largest possible construction that can be given to this clause will not lead to the interpretation of working day contended for by the defendants. Let it be granted that the *prima facie* grammatical construction of that sentence is that the words "such time" refer to the more remote antecedent "night" as well as to the proximate antecedent "Sundays and holidays." I should hesitate still to admit that there is a logical necessity for so applying it when the result would be to produce such an absurdity as "nights not to count as lay days." To make tolerable sense of this we must change the words into something like "nights shall not be counted in the computation of lay days." But, unless under compulsion of necessity, we have

no authority for this alteration. If the sentence stood alone I should prefer to do a little violence to the formal grammar by confirming the words "such time" to the proximate antecedent in order to make good sense, rather than by a blind obedience to grammar to make nonsense out of the sentence. But not only is the objection to a formal grammatical construction an obvious one on the sentence itself, but it becomes, I think, much stronger when considered in reference to other parts of the document. The adoption of it involves greater difficulties than the rejection. First of all, how would this construction stand with reference to the interpretation of working day as equivalent to the day during which men usually work at the port? It cannot be suggested, I should think, that at any port men work as a usual thing during the night, so that the exclusion of night from the computation of the working day would be altogether meaningless. Then comes the difficulty of determining the meaning of night, if any other meaning can be suggested than the most ordinary one of the time between sunset and sunrise. If that be adopted the word "night" would in our own latitudes vary from somewhere about 7½ hours at the summer solstice to about 17 hours at the winter solstice. If the meaning be that the night hours alone are to be deducted, there would have to be kept a record of the length of the nights throughout the whole time when the vessel may be loading or unloading. I suppose that by no straining of the language can "night" be made in this document to mean all the 24 hours except what is the usual working time at the port. If it could, then at Cardiff, where we are told work generally begins at 6 a.m. and terminates between 2 and 3 p.m., all the hours in summer between, say, 3 p.m. and 6 a.m. the next morning must be counted as night. And yet no other construction would give a satisfactory measure conforming to the supposed usual "working day," for there would be no provision as to not counting the hours of daylight outside the "usual" working day. Another difficulty seems to me to arise on the defendants' construction with reference to the case already stated of a ship whose time for loading begins at 12 o'clock noon, say, at Cardiff, on a Monday in midwinter. What is the first day which gives only about four hours of daylight to be counted as? There is no difficulty on the plaintiffs' contention; the first working day of 24 hours would expire at 12 noon on the next day, Tuesday. On the defendants' contention it need not expire until somewhere about 10 o'clock on the Thursday, although the weather might be fine throughout and no holiday might intervene. The defendants' hypothesis results in a great complication depending upon seasons and places. The plaintiffs give a simple rule applicable to all cases alike. The one depends, as it seems to me, upon a doubtful construction of a most difficult clause; the other upon what, I venture to think, is the plain meaning of the whole contract outside that clause, and consistent with what I think the preferable construction of the clause itself. For myself I think that the plaintiffs' contention should be accepted, and the appeal allowed.

LORD JUSTICE VAUGHAN WILLIAMS read a judgment in which he arrived at the same conclusion as Lord Justice A. L. Smith.

Q.B. Div. }
(Hawkins, J.) }

1893.
Aug. 3.

VICKERY V. THE GREAT EASTERN RAILWAY COMPANY.*
Master and Servant—Railway company—Insurance fund—Accident resulting in death of employé while committing a breach of duty.

*Reported by B. HARNER, Esq., Barrister-at-Law.

This was an action, in the nature of a test case, which raised an interesting point upon the construction to be placed upon the rules regulating a scheme under the defendant company's General Powers Act, 1878, for the establishment of an accident allowance fund for the officers and servants of the company. The plaintiff is the widow of a spring smith, who for 36 years previous to the accident which caused his death had been employed in the workshops of the defendant company at Norwich Thorpe Station. The deceased was insured in the accident allowance fund. Section 46 of the Act of 1878 (*supra*) provided that the fund was established for the payment of allowances on account of accidents happening to officers and servants of the company in the discharge of their duty; and that a committee nominated by the directors should prepare a scheme for regulating the fund. The scheme provided as follows:—“(1.) The fund is established for the purpose of enabling the company's servants of all grades, who are exposed to the risk of accidents in the discharge of their duties, to insure their lives against such accidents, and to obtain a temporary weekly allowance while incapacitated from employment in consequence of any injury received in the discharge of their duties. (2.) The allowances to be paid out of the fund shall be as follows:—(a) In case of the death of an insurer from any accident in the discharge of duties in the company's service. . . there shall be paid to the representative of the insurer, if such insurer was, at the time of the accident, of the first class, the sum of £130.” The deceased met with his death on December 23, 1896, at 5 45 a.m., in the following circumstances:—It was the duty of every workman in the defendant company's shops at Norwich Thorpe Station before commencing work to obtain a check or ticket, which had to be obtained before 6 a.m. The check office was near the “loco” shops and engine works and was approached by two footpaths provided by the company—one along the towing path and another commenced by a gate opening from the Carron-road. By either of those accesses the check office could be reached by any workman desiring to reach it from his home outside the premises without any risk or danger from having to cross the numerous lines of railways in and about the station yard. At the entrance to the towing path and at each of the gates leading to the footways, and in a conspicuous place, were posted up notices in legible words, with a hand pointing to the footpath as follows:—“Entrance to ‘loco’ shops by path across the meadow, any person crossing the lines of rails will do so at their own risk.” Notwithstanding the notices, many of the workmen, including the deceased, disregarded the notices, and for their own convenience, to avoid longer routes, crossed the company's lines in the goods and shunting yards. The deceased, while crossing the lines to get to the check office, was knocked down by an engine and died from the effects of his injuries. A claim was made upon the company by his widow for £130, being the amount she would be entitled to out of the accident allowance fund. The company resisted the action upon the ground that the accident which caused the death of the deceased did not occur in the discharge of his duty in the company's service; that he was crossing the company's lines of railway before his work had commenced at a dangerous and forbidden spot in disobedience to the company's orders and in breach of his duty. The case was tried before the learned Judge without a jury at the last Norwich Assizes, when judgment was reserved.

MR. JUSTICE HAWKINS, in delivering a considered judgment, after reviewing the facts of the case, said he was of opinion that the defence of the company must prevail. The deceased had no duty to discharge in the company's service before he had

obtained his ticket, which he had not done when the accident occurred. He was simply on his way to the office to procure it as a condition precedent to his being employed. He should be very sorry to decide the case solely upon that ground, and he felt sure that if the deceased had been on his journey to the office along one of the ways pointed out by the notice boards, and while so journeying had met with his death, the directors and all interested in the fund would have been very unwilling to insist upon such a defence. The deceased was trespassing on the lines he was forbidden to traverse. He was not discharging any duty imposed upon him by the company; on the contrary, he was acting in disregard of his duty and in wilful disobedience to the orders and injunctions of the company which he was bound to observe. It signified nothing to his mind that many other workmen had acted in the like way. It was suggested that such disregard of the notices had been sanctioned by the company, but he found no evidence to lead him to such a conclusion. It would give rise to great confusion in the relations which ought to exist between masters and servants if the latter were allowed to be under an impression that frequent disobedience to the orders of their employers could alone operate as nullification of them. It was immaterial that no mention was made in the scheme that disobedience to the orders would have any effect upon the insurance. The company had a right to regulate and did regulate for themselves the duties of those employed to serve them, independently altogether of the scheme. Upon full consideration of the case he was of opinion that the defendants were entitled to his judgment.

Judgment for the defendants with costs.

Defendants' counsel stated that he would not ask for costs.

MR. JUSTICE HAWKINS said perhaps the railway company might consider as a matter of good nature whether they would make any contribution to the widow out of the fund. He only suggested that as a matter of good feeling and not by way of compulsion.

Defendants' counsel said that no doubt his Lordship's suggestion would be considered by his clients.

Mr. Ernest Wild appeared for the plaintiff; Mr. F. H. Coller for the defendants.

[Solicitors—Sadd and Bracey, for the plaintiff; Edward Moore, for the defendants.]

Q.B. Div.
(Bigham, J.) }

1898.
Aug. 3.

PARR'S BANK (LIMITED) V. THOMAS ASHBY AND CO.*
Bank—Country cheque—Failure to return—Rules of Bankers' Clearing-house—Liability.

This case, raised a question of considerable importance with regard to the liability of country banks for failure to return by return of post, in accordance with the Clearing-house rules, a cheque which they did not intend to pay. The action was brought to recover £307 for money had and received by the defendants for the use of the plaintiffs. The facts were as follows:—The plaintiff bank has a head office in the City of London and many branches, amongst others a branch in Kensington, which is treated for the purpose of the question raised in this action as a “country bank.” The defendants are bankers at Staines, their London agents being Williams, Deacon, and Co. One Tom Frost, in September, 1897, formed his business into a limited liability company under the name of Tom Frost and Co. (Limited). In October, 1897, the defendants took two debentures over the whole assets of the company, to secure an overdraft. On October 30, 1897, Tom Frost paid into the Kensington branch of the plaintiff

*Reported by R. H. BALLOCH, Esq., Barrister-at-Law.

bank, where he had an account, a cheque for £307 drawn by Tom Frost and Co. (Limited) upon the defendant bank and payable to the order of Tom Frost and Co. (Limited). This cheque was then, in accordance with the usual practice, stamped with the name of the plaintiff bank and sent by them to their head office in London. On Monday, November 1, 1897, in accordance with the usual practice, this cheque was handed by the plaintiffs' clerk at the Clearing-house at noon (which is the time for clearing country cheques) to the clerk of Williams, Deacon, and Co., and was by them sent on along with other cheques to the defendants, with a form to the effect that Williams, Deacon, and Co. enclosed country clearing cheques value £2,825 13s. 11d. for favour of payment, and requesting them to return by first post the slip at foot after inserting the amount to be debited in account. The slip mentioned was filled up by the defendants and returned on November 2. By the slip the defendants requested Williams, Deacon, and Co. to debit their account with an amount which included the cheque for £307. By the rules made by the Bankers' Clearing-house, published in June, 1893, it is provided as follows:—(1) A clearing to be held in the middle of each day for the interchange among the London bankers of cheques on their correspondents in the country placed in their hands for collection. . . . (3) Country bankers wishing to avail themselves of this clearing to remit their country cheques to their own London agent, to stamp across them their own name and address, and that of their London agent. (4) Any country bank not intending to pay a cheque sent to it for collection to return it direct to the country or branch bank, if any, whose name and address is across it. The defendants did not send back the cheque for £307 to the plaintiffs' Kensington branch on November 2, 1897, but held it during that day for reasons of their own. On November 3, 1897, at 10 50 a.m., before the country clearing, Williams, Deacon, and Co. received a telegram from the defendants asking them to "pay yesterday's country clearing £307 less than advised; cheque returned to Parr's, Kensington." The cheque, as above stated, was not in fact returned to Parr's Kensington branch. At 3 30 p.m. the defendants, after certain negotiations, made up their minds not to pay the cheque, and at 4 5 p.m. on the same day it was returned to Parr's Bank at Kensington with a notice that it would not be paid. At the country clearing at noon on November 3, 1897, the plaintiffs' clerk, having received the defendants' telegram, handed to the clerk to Williams, Deacon, and Co. a note requesting them to debit the plaintiffs for cheque returned to Kensington by the Staines bank and to credit Williams, Deacon, and Co. with the sum of £307. On November 3, 1897, the plaintiffs' Kensington branch honoured an acceptance of Tom Frost payable at that branch for £65. The Kensington manager stated in evidence that he would not have honoured the draft if the cheque had been returned on that morning.

A number of witnesses were called by the defendants with the object of proving that country managers did not in practice act upon the non-return of a country cheque, and would not, on the faith of such cheques not having been returned, allow their customers to draw upon their accounts. They stated that country managers would assume in the circumstances that such a cheque had been paid.

Mr. JOSEPH WALTON, Q.C. (Mr. Marshall Hall, Q.C., with him), for the plaintiffs, contended that there had been a payment by the defendants of the cheque for £307; secondly, that as to the £65 paid to Frost on November 3, 1897, the defendants were estopped.

Mr. BRAY, Q.C. (Mr. J. E. Banks with him), for the defendants, argued that there was no payment as to £307, and no estoppel as to £65.

His LORDSHIP, in giving judgment, said that although the cheque for £307 was placed to the credit of Frost on October 30, 1897, at the plaintiffs' Kensington branch, it was not so placed to his credit as to entitle him to draw against it. When the cheque for £307 was sent to the defendants it was their duty to fill up the slip and inform Williams, Deacon, and Co. whether they intended to honour that cheque. On November 2, 1897, they filled up a slip intimating that they intended to pay the cheque, and returned it to Williams, Deacon, and Co. On the morning of November 3, 1897, the defendants changed their minds and sent a telegram informing Williams, Deacon, and Co. that they did not intend to pay the cheque. That telegram was an intimation to Williams, Deacon, and Co. that they were to inform the plaintiffs' clerk at the Clearing-house at noon on that day that the cheque for £307 would not be paid and was not to be passed to the defendants' debit. That telegram added that the cheque for the £307 had been or, perhaps, would be returned to the plaintiffs' Kensington branch. If the defendants did not intend to pay that cheque they ought to have returned it in the ordinary course of business, and under rule 3 of the Clearing-house rules, to Parr's Bank at Kensington. In the opinion of the learned Judge it was the duty of the defendants to have sent that cheque back to the plaintiffs' Kensington branch by return of post—that is to say, on November 2, 1897—with an intimation that it would not be paid. The defendants had a printed form at their bank for the very purpose. The defendants did not fulfil that duty. They spent November 2 with Mr. Frost trying to see if they could get from him sufficient funds to meet the cheque. Meantime, they allowed the cheque to be dishonoured at the country Clearing-house, but took no steps to inform Parr's Bank at Kensington. The consequence was that on the morning when the cheque should have come back the Kensington branch treated it as though it were paid, and in his (the learned Judge's) opinion they were justified in so doing, and met an acceptance of Frost's for £65, which, in his opinion, they would not have done if they had known that the cheque had been dishonoured. The learned Judge found, as a fact, that the practice was for one country bank which received a cheque from another country bank which it did not intend to pay to return the cheque by return of post to the bank into which it had been paid. The defendants had not observed that practice, and they must have known what the result would be. The plaintiffs had acted on the faith of the representation made by the defendants when they met Frost's draft for £65. There was a representation that the cheque for £307 was a paid cheque and a representation that would lead the plaintiffs to act upon it. They had acted upon it. There must be judgment for the plaintiffs for £65, the defendants to have the benefit of any proof which the plaintiffs might have against the estate of Frost's.

[Solicitors—Alfred Bright, for the plaintiffs; Soames, Edwards, and Co.]

Q.B. Div. } (Bigham, J.) }	1898. Aug. 8.
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STUART AND STEAMSHIP ALLEGHANY OF LONDON (LIMITED) v. THE MERCHANTS' MARINE INSURANCE COMPANY (LIMITED).*

Insurance—Marine—Total loss—Notice of abandonment—Liability of underwriters for damage

by collision owing to improper buoying and lighting of the wreck.

Judgment was delivered in this case, which was heard before his Lordship on July 29 and August 1. The case raised an important question as to the liability of underwriters upon the hull of a sunken vessel after notice of abandonment for damage done by reason of the improper lighting and buoying of the vessel. The facts of the case are fully stated in the judgment of the learned Judge.

Mr. Carver, Q.C., and Mr. Lewis Noad appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Butler Aspinall for the defendants.

HIS LORDSHIP read the following judgment:—This is an action brought to recover damages for the breach of an alleged contract of indemnity. The question is whether in the circumstances of the case the contract to indemnify exists. The plaintiffs were the owners of a steamer called the *Alleghany*, and the defendants were the underwriters of the steamer against total loss. The policy, which is dated March 4, 1894, contained a collision clause, by which defendants undertook to hold the plaintiffs harmless (to the extent of three-fourths) against any damages which the plaintiffs might have to pay by reason of their vessel coming into collision with any other vessel. It contained also the ordinary sue and labour clause. The circumstances, shortly stated, are as follows:—On October 1, 1894, the *Alleghany* came into collision with a vessel called the *Caucase* in the Delaware river, and sank in a position which rendered her dangerous to craft navigating that river. The plaintiffs at once gave to the defendants a notice of abandonment, which the defendants in the usual course refused to accept. Thereupon the plaintiffs and defendants agreed, without prejudice to their respective rights, whatever they might be, to take joint action to *salvo* the property; and the captain engaged the services of a tug to watch the wreck for the double purpose of protecting it from further damage and of warning passing ships of the danger which it presented. This tug did its work so badly that on October 29, 1894, a steamer called the *Siberian*, belonging to the Allan Line, fouled the wreck, causing damage to the wreck and herself sustaining very serious injury. Thereupon an action was brought at the instance of the defendants, but in the name of the plaintiffs, against the owners of the *Siberian*, in which the allegation was that the fault lay entirely with the *Siberian*. In that action the *Siberian* counterclaimed, alleging that the casualty was due entirely to the negligence of the tug which had been employed to watch and to warn passing shipping. The action found its way to the House of Lords, where it was finally decided that the fault lay entirely with the tug, and judgment was given against the plaintiffs (who are the plaintiffs in the present action) on the *Siberian's* counterclaim for £7,963 15s. 3d. damages and £2,053 19s. 3d. costs. The defendants and the other underwriters on the *Alleghany* have paid three-fourths of this sum, by way of satisfaction of their liability under the collision clause. They have further paid a total loss on the *Alleghany* and all suing and labelling expenses, and they have thus undoubtedly paid all claims directly arising on the policy of insurance. The plaintiffs, however, contend that at the time when the cause of action arose on which the *Siberian's* counterclaim was based, the tug was in the service of the underwriters, and not of the plaintiffs, and that, therefore, the underwriters ought to indemnify them against the whole of the damages and costs incurred by the plaintiffs on the *Siberian's* counterclaim, and not merely against three-fourths of the amount. It is now admitted by the

defendants, though it was for a long time denied, that on October 1, 1894, when she sank in the Delaware river, the *Alleghany* became at once a constructive total loss. I think the defendants' liability depends on the question whether, as between themselves and the owners of the *Alleghany*, the underwriters had or must be taken to have made themselves responsible for the proper watching of the wreck. When the *Alleghany* went down on October 1, 1894, it was impossible to ascertain whether she had become a total loss or not, and as the underwriters' liability depends on that question (for as I have said the policy was against total loss only), no one could say who was interested in the wreck. If the vessel was a total loss the plaintiffs had ceased to be interested in her, and the salvage, if it did not become the property of the underwriters, could at all events be claimed by no one else; whereas, on the other hand, if the vessel was not a total loss, the underwriters were in no way concerned with her. Thereupon, a correspondence began between the parties and their representatives. I do not propose to examine it in detail; it is sufficient for me to say that in my opinion it resulted in an agreement by which both parties undertook to work in salving and watching the submerged vessel on the terms that the work should be done on account of whom it might eventually turn out to concern. The policy itself contained a provision that no acts of the insurer or insured in recovering, saving, or preserving the property insured should be considered as a waiver or acceptance of abandonment, and both shipowner and underwriters were anxious to do nothing which might alter their position. A contract, dated October 6, 1894, was made with an American salvage company for raising the wreck and a tug was engaged to watch it. This was done in the name of the master, but really on account of whom it might ultimately turn out to concern. The plaintiffs and the defendants at the same time sent out their respective marine surveyors to look after their interests, and these gentlemen acted together throughout. Matters were in this position when the collision with the *Siberian* took place, a collision admittedly due entirely to the careless way in which the wreck had been watched and marked, in my opinion, solely in the interest of the underwriters. It was not known at the time whether the *Alleghany* was a total loss or not, but it is now admitted that she was then a total loss, so that no one had any interest in the wreck except the underwriters. It is said that the captain in engaging the tug was acting under the suing and labelling clause in the policy, and that, if he was unfortunate enough to engage careless men that is his lookout and not the underwriters'. But, even if he was so acting, in my opinion he was the agent of the underwriters and not of the shipowners. It was for the former that he was trying to *salvo* the property and not for the latter, who in fact had no interest in it. But the truth is that the whole work was being done on terms, as between shipowner and underwriters, that it should be on account of whom it might turn out to concern, and subsequent events—viz., the subsequent ascertainment of the fact that at the time in question the vessel was a total loss, have shown that the only persons concerned were the underwriters. This, I think, is conclusive of the case and fixes the liability on the defendants. What subsequently took place was this. The underwriters determined to sue the *Siberian* for the damage done to their wreck and they applied for and obtained the consent of the plaintiffs to use the plaintiffs' name for that purpose. They then commenced an action, in the plaintiffs' name, in the English Courts. The plaintiffs had nothing at all to do with that action. It was conducted throughout by the underwriters' solicitors and at the underwriters' cost, and it was brought for their sole benefit. Very soon the under-

writers discovered that it was not worth prosecuting, but by the time they had made this discovery the Siberian's counter-claim had got upon the record, and that the underwriters could only get rid of by dropping all further proceedings and paying their own costs. This course, unfortunately, they refused to adopt and the counterclaim was consequently tried with the result already stated. The defendants contend that, in any event, each underwriter is liable only for a proportion of the claim, to be measured according to the amount underwritten by him. But this is not an action on the policy; this is an action for an indemnity arising out of the fact that the plaintiffs have been called upon and compelled to pay damages and costs for which the underwriters were in truth, though not in form, jointly liable to the owners of the Siberian. The underwriters are jointly liable to make good the loss which the plaintiffs have sustained, and there must be judgment accordingly.

[Solicitors—W. A. Crump, for the plaintiffs: Waltons, Johnson, Bubb, and Wharton, for the defendants.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J.) } Aug. 4.
FIELDEN V. MAYOR, &C., OF MORLEY.*

Local Government—Water supply—Local authority—Statutory powers—Outfalls—Construction of Acts.

This was an appeal from a decision of Mr. Justice Byrne's dismissing the action with costs. This related to the rights and duties of the defendant corporation as the water authority of their district under the Morley Corporation Water Act, 1890. The defendant corporation, in pursuance of the Act, have constructed a catch-water conduit over moorland belonging to the plaintiff, and at one point on the plaintiff's land have made a weir or by-wash, which allows water rising in time of storm above a certain level in the conduit to overflow and pass down a natural gully over the plaintiff's land, which in time of storm forms the channel of a hillside torrent. The plaintiff asserted that, inasmuch as this by-wash was not indicated in the plans deposited by the corporation when they applied for their Act, it is not a work authorized by it, and further that, inasmuch as by section 18 of their Act they are bound to keep the catchwaters, conduits, and lines of pipes for conveying water through the plaintiff's estate "water-tight," by having a by-wash they are contravening the enactment. The plaintiff claimed an injunction and damages. The defendants asserted, on the other hand, that the by-wash was an incidental work authorized in general words by the 8th section of their Act of Parliament, which defines the authorized works belonging to the class of incidental works to be constructed at the points found desirable in the course of construction of the works specifically authorized and described in deposited plans, and further that the total amount of water sent down the gully in time of storm did not exceed what would have passed had the waterworks not been made, and therefore no damage was caused to the plaintiff. Mr. Justice Byrne dismissed the action, with costs, giving costs as between solicitor and client, considering himself bound to do so under the Public Authorities Protection Act, 1893, and the recent decision of Mr. Justice Romer in "The North Metropolitan Tramways Company v. London County Council" ([1894] 2 Ch. 145; 14 The Times L.R., 414).

Mr. Fletcher Moulton, Q.C., and Mr. O. Leigh Clare were for the plaintiff in support of the appeal; Mr.

Eve, Q.C., and Mr. R. J. Parker for the respondent corporation.

The MASTER of the ROLLS gave the judgment of the Court dismissing the appeal, confirming the finding of the Court below on the facts and finding that no more water ever passed down the gully than would have passed had the conduit and works not been made. His Lordship continued:—Now comes the question of law—Was the corporation entitled to make the outfall in question? This question involves two others, viz. (1) Was the corporation entitled to make the outfall under their general powers? (2) If they were, are they deprived of that power by section 18, which specially protects the plaintiff? The general power to make outfalls is conferred by section 6 of the special Act and by section 12 of the Waterworks Consolidation Act, 1847, which is incorporated by section 2 of the special Act. Section 6 of the special Act states that, subject to the provisions of this Act—i.e., subject to section 18 and also to the incorporated provisions of the general Acts mentioned in section 2—the defendants may construct the aqueduct in question and all necessary and proper outfalls connected with it. But there is a limit put to this power by section 6 and section 12 of the Waterworks Clauses Consolidation Act, 1847. Section 6 requires that land and streams taken under the compulsory powers must be purchased and paid for, and that compensation must be made for such lands and for lands injuriously affected by the construction and maintenance of the authorized works, and section 12 requires that in the exercise of their statutory powers the corporation shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. Then section 2 incorporates the Lands Clauses Consolidation Act and also section 140 of the Railway Clauses Consolidation Act, which provide the machinery for ascertaining and obtaining such compensation. It was contended by Mr. Clare that apart from section 18, to which we will refer presently, the outfall or by-wash was not authorized by section 6 because it was not necessary and proper within the meaning of that section. He contended that the storm water poured by the gully into the aqueduct could be got rid of without injury to the plaintiff by means of the culvert communicating with the stream at the bottom of the hills. This contention is based not only on section 6 of the special Act, but on section 12 of the Waterworks Clauses Act, 1847, which we have already referred to. If the contention were correct in fact there might have been ground for interference, as in "Coats v. Clarence Railway Company" (1 R. and M., 181) and other cases of that class. But, in our opinion, the evidence as to this does not show that the culvert without the by-wash would be nearly so efficacious or proper in an engineering sense as the culvert with the by-wash, and we are unable to adopt the view contended for. In other words, we are of opinion that the outfall or by-wash is authorized by section 6 if not prohibited by section 18. It follows that it is not the province of the Court to interfere with the outfall or by-wash on the ground that it should have been differently constructed or have been in some other place. It has been long settled that it is not the province of the Court to dictate how works authorized by Parliament shall be carried out, although it is the duty of the Court to see that Parliamentary powers are not exceeded. The two classes of cases are not always easy to distinguish, as may be seen from "Herrou v. Rathmines, &c., Commissioners" (1892, A.C., 498), which related to the construction of a reservoir. But the principle on which the Court acts is well settled. Provided the defendants have not exceeded their powers, the particular mode of

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

exercising them is left to those to whom the powers are entrusted (see per Lord Macnaghten, "*Herron v. Rathmines, &c., Commissioners*," 1892, A.C., 527-530, and "*A. G. v. Metropolitan Railway Company*," 1884, 1 Q.B., 384, supp. 390-391). It was urged that the defendants could not under their general powers make an outfall where necessary and proper from their point of view, and flood, say, a street or house or garden, making compensation for the injury done. We are not prepared to say they could do so. The principle of "*Coats v. Clarence Railway Company*" might apply to such a case. It is sufficient, however, to say we have no such case to deal with. It may well be that if there had been danger of such injury as suggested the language of the special Act would have guarded against it. The special Act before us must be taken to have been framed with reference to the works to be constructed and to the nature of the land on which they were to be made (see, per Lord Halsbury, 1892, A.C., 502, "*Herron v. Rathmines Commissioners*"). Having regard to the character of the land and to the existence upon it of a natural channel for storm water, the use which the defendants have made of that channel is, in our opinion, authorized by the general powers conferred upon the defendants. The fact that water from the east of the outfall passes down as well as water from the gully does not render it improper to have the outfall. What water passes down is of no consequence provided no damage is done to the plaintiff, and if damage is done his remedy is for compensation and not by injunction unless the outfall itself is an unauthorized work. This brings us to the second question—viz., What is the effect of section 18 upon section 6? The plaintiff's counsel strongly contended that section 18 prohibited any outfall being made upon the plaintiff's land. This would be a strange result considering that the aqueduct crosses no land but his. The plaintiff's contention on this part of his case is based entirely on the use of the word "watertight" in section 18 (b). But this word has to be applied to what the corporation is empowered to make—i.e., aqueducts or conduits with all necessary and proper outfalls and conveniences; and to hold that the power to make proper outfalls on the plaintiff's lands is excluded by the use of the word watertight in section 18 (b) is to put a strained construction on that word for which we can find no sufficient justification. Full effect is given to the word watertight by confining its application to those parts of the works which, from an engineering point of view, ought to be watertight. Section 18 cannot reasonably be interpreted as prohibiting what section 6 authorizes. But section 18 has a very important operation favourable to the plaintiff. It imposes conditions on the construction and continued use of the works authorized by section 6. One condition is that if any damage is done at any time by the flow of water from the defendants' works on to the plaintiff's land such damage shall be made good from time to time as it arises. This gives the plaintiff more extensive rights than he would otherwise have had. If, when the plaintiff was bargaining for the insertion of section 18, he intended to stipulate that there should be no outfall on his land he should have expressed his intention in different language. The language used is inappropriate for such a purpose, and in our judgment conveys no such meaning. It appears to us, as it did to Mr. Justice Byrne, that authority to make proper outfalls at suitable places anywhere within the lines of deviation is given by section 6; and that section 18 does not prohibit what is there permitted. After mentioning a temporary obstruction complained of, his Lordship continued:—The truth, however, is that the plaintiff has never suffered, and is not likely to suffer, any damage what-

ever by the defendants' works. They have done him no injury whatever. They send no more water on to his land than came on it before their works existed. He has taken and insisted on an erroneous view of his rights based upon an extravagant interpretation of the word watertight in section 18 (b) of the Act which governs the case. The appeal must be dismissed with costs.

Mr. O. LEIGH CLARE asked that the order of Mr. Justice Byrne might be varied by reducing the costs from solicitor and client costs to party and party costs. He contended that the decision of Mr. Justice Byrne was wrong on this point for three reasons—in the first place, because the Act on which the decision was based did not apply, as was contended, to proceedings for an injunction; secondly, that the defendants were sued as a water authority and were not sued as a public authority within the meaning of the Act; and lastly, that Mr. Justice Romer, whose decision Mr. Justice Byrne followed, was not right in holding that the Court had no discretion under the Act.

The MASTER of the ROLLS said that this was an exceedingly important question, which till this stage of the appeal they had not fully appreciated. They would give their decision, after having consulted with their brethren, at a future date.

[Solicitors—Firth and Co., for the plaintiffs; Sharpe, Parker, Pritchards, and Barham.]

Chan. Div. }
(North, J.) }

1898,
Aug. 4.

JORDISON V. THE SUTTON, SOUTHCOATES, AND DRY
POOL GAS CO.*

Nuisance—What amounts to—Exercise of
statutory powers—Gas company—Interference
with light and air—Injunction.

Judgment was delivered in this action, which was tried before his Lordship in February last. The nature of the case was stated in *The Times* of February 14 and 16 last. His Lordship then decided some issues of fact and reserved his decision upon some important points of law relating to the liability of a corporation in respect of acts done by them in the exercise of their statutory powers. Mr. Jordison, the plaintiff, is the owner of some 24 cottages in Hull adjoining the premises of the defendant gas company. In July, 1896, the gas company began by their contractors, Messrs. Holmes and King, who are also defendants, to excavate for the purpose of constructing a sunk gasholder tank in which to receive and seal with water a very large telescopic gasholder, intended to rise when fully inflated to over 100ft. above the ground level. The circular trench which the contractors made to build the enclosing well of the tank was only a few feet from the back wall of the nearest cottage. The trench was carried down to a depth of about 37ft., and the work had to be carried through a variety of strata, one of which, designated "running silt," was particularly difficult to deal with. This stratum was about 6ft. thick, and was immediately followed by a thin layer of soft clay, below that being a firm basis of impermeable gault clay. The plaintiff alleged that cracks on his land and in his cottages had occurred in consequence of subsidence caused by the withdrawal of water and sand in suspension from the running silt bed; and he further alleged that the contractors had not adopted the best known methods of damming back the water and silt during the operation of constructing the tank; in other words

*Reported by W. L. CABELL, Esq., Barrister-at-Law.

that there had been negligence. One question between the parties was whether, on the construction of the company's special Acts, coupled with the incorporated gas clauses Acts, the case was within the decision of "The Metropolitan Asylums Board v. Hill" (6 Ap. Ca., 193), in which it was held by the House of Lords that the Asylums Board could be restrained from erecting a smallpox hospital on land bought for the purpose in a residential neighbourhood, or the subsequent decision of the House of Lords in "The London and Brighton Railway Company v. Truman" (11 Ap. Ca., 45), in which it was held that the railway company were entitled to use land, bought under power to purchase additional land by voluntary agreement, for cattle sidings and yards, to the annoyance of the inhabitants of a residential district at Croydon. As to the removal of water and silt, the defendant company contended that they had a common law right to remove water, even if in doing so they abstracted matter in solution; and that any damage caused to their neighbours' property thereby was not actionable. It was also contended, as a matter of fact, that the subsidence which took place was due entirely to the abstraction of water alone and no appreciable subsoil had been abstracted. The defendant company also contended that they had statutory powers for public purposes coupled with a duty to supply gas which could only be fulfilled by the construction of the gasholder, and that, apart from the question of negligence in doing the work, they were entitled to interfere, to the extent to which they had interfered and proposed to interfere, with the rights which the plaintiff would otherwise have had. On February 15 his Lordship delivered judgment on the issues of fact, reserving for consideration the points of law necessary to be decided on those findings. He held that the gasholder, when erected and inflated to the proposed height of over 100ft., must interfere with access of light to the cottages, but that he could not say that the method of doing the work was improper. He held that the plan adopted had been skillfully carried into execution, and that the subsidence was due not merely to the abstraction of underground water, but also to the abstraction of silt held in suspension in the water abstracted.

Mr. Upjohn, Q.C., and Mr. Dighton Pollock were for the plaintiff; Mr. Haldane, Q.C., the Hon. E. C. Macnaghten, Q.C., and Mr. Boome were for the gas company; Mr. Rawlins, Q.C., and Mr. Bardswell were for the contractors.

Mr. JUSTICE NORTH said that he had already held that the defendants, the contractors, had not been negligent, though the means which they employed to prevent the escape of the "running silt" turned out to be insufficient, and the plaintiff's buildings were seriously damaged. His Lordship was clearly of opinion that there had been considerable damage to the plaintiff's property by reason of the withdrawal of support from his houses by the acts of the defendants; and that, if the completion of the gasholder as proposed were permitted, the light would also be materially diminished. The right of the plaintiff to have his land and buildings supported by the adjoining land was clear, and his right to access of light was equally clear, unless those rights could be displaced by some equally clear right on the part of the defendants. The question was whether the defendants had any legal justification for what they had done and were doing. The defendants' first proposition was that the construction of the trench and the erection of the gasholder were acts for which the company had statutory powers, with a statutory duty to exercise them, and that those powers could not be released, and no easement could be acquired in derogation of them. His Lordship thought that there

was one conclusive answer to the principal argument of the defendants, that their Acts conferred on them an absolute right and duty to do the acts complained of upon this very site. This proposition was, in his Lordship's opinion, wholly unfounded. The company's Acts did, indeed, authorize the erection of a gasholder at this place, but there was no obligation upon the company to place it upon this exact site, or to make it of such a height or size as they had chosen to do. While the Act defined the land upon which the works might be done, if the company could buy it, it did not anywhere prescribe what the works were to be, nor require anything to be done which must necessarily injure the plaintiff. To make out their case the company must show that they could not, without interference with the plaintiff's rights, do something which they were bound to do. In that they had wholly failed. If the gasholder had been somewhat smaller, or somewhat further from the plaintiff's land, there was no reason for supposing that it would have interfered with his right to light or to support. And, beyond all this, it was a mistake to say that an absolute power to do such things as were complained of could be found in the Acts. Such rights or powers as were conferred upon the defendant company, so far from being absolute or unqualified, as asserted by counsel, were very strictly limited and guarded. Section 29 of the Gas Works Clauses Act, 1845, provided that nothing therein, or in the special Act contained, should prevent the undertakers from being liable to an indictment for a nuisance, or to any other legal proceeding to which they might be liable in consequence of making or supplying gas. And section 9 of the Gas Works Clauses Act, 1871, enacted that "nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance, in the event of any nuisance being caused by them." And in his Lordship's opinion the interference with the plaintiff's support and light was a nuisance. In the "Smallpox Hospital case" Mr. Baron Pollock said (at p. 443), "A statute which justified the defendants in creating a nuisance to neighbours would seem by parity of reasoning to justify the diminution of light or air; and this though the statute contained no provisions for compensating those who might be injured by its operation"; and, paraphrasing that so as to apply it to the present case, his Lordship held that the Acts which forbade the gas company to create a nuisance to a neighbour also forbade the taking away of his light or of the support to his land, especially when the Acts contained no provision for compensating those injured by their operation. His Lordship accordingly held that the case was governed by the class of decisions of which "The Metropolitan Asylums Board v. Hill" is an example, and not by the class of decisions as to railway companies of which "The London and Brighton Railway Company v. Truman" is an instance. His Lordship then dealt with some other arguments which had been presented on behalf of the defendant company. He then dealt with the case of the contractors, as to whom it had been contended that they could only be liable for negligence, and that there could be no negligence without neglect of duty, and that they owed no duty to the plaintiff. His Lordship failed to follow this argument. They were the persons who by their workmen made the excavation upon the company's land, the result of which was wrongfully to remove part of the plaintiff's soil, and thereby to cause the land above it to slip and subside, and so damage the buildings thereon. If this did not give a cause of action his Lordship did not know what did. Nor did it matter how much care they took in what they did, if that care did not suffice to prevent the injury. If no amount

of care could have prevented it, the act ought not to have been done at all. His Lordship accordingly granted an injunction, but it was not to prevent the company from raising their gasholder on its north side to the height of 68ft. from the surface of the ground. As to the interference with the support of the plaintiff's land no injunction was now required, for there had been no further subsidence. The plaintiff was entitled to damages for the injury which had been done, and his Lordship assessed the amount himself (as he had been requested to do) at £340. This did not include any damage for interference with light, nor any sum in respect of damages which might arise hereafter in consequence of any future subsidence which would give a new and separate cause of action. The injunction would issue against the company, and the damages would be awarded against all the defendants. There would be judgment against the company for the plaintiff's costs of the action, and against the other defendants for so much of the plaintiff's costs as related to interference with support, and its consequences.

[Solicitors—Bell, Brodriok, and Gray; Collyer-Bristow and Co.; Jaques and Co.]

Court of Appeal (Lindley, M.B., } 1898.
Chitty and Collins, L.J.J.) Aug. 5.

IN RE A DEBTOR—EX PARTE THE PETITIONING CREDITORS.*

Bankruptcy—Petition—Right to present—
Domicil of debtor—"Ordinarily resided . . . in
England"—Bankruptcy Act, 1883, sec. 6 (1) (d).

This was an appeal against the dismissal by Mr. Registrar Giffard of a bankruptcy petition on the ground that the debtor had not within a year before the date of the presentation of the petition ordinarily resided in England as required by section 6 (1) (d) of the Bankruptcy Act, 1883. The petition was presented on May 20, 1898, by judgment creditors for £1,500, and the act of bankruptcy alleged was non-compliance with the bankruptcy notice founded on that judgment. It appeared that in the early part of the present year the debtor had brought an action in this country against a company in which he was interested, and that an application had been made against him by the defendants for security for costs on the ground that he was not resident within the jurisdiction. In answer to that application the debtor, on March 15, swore an affidavit in which he deposed that for the last six years he had carried on an English business in London at various addresses, which he had every intention of continuing, and had for the greater part of that time resided in England, only visiting Paris periodically; and that he was then residing at 16, Upper Bedford-place, Russell-square, where he intended to remain permanently. The petitioning creditors relied strongly upon this affidavit, and they adduced evidence showing that the debtor stayed at the Charing-cross Hotel for a fortnight in August, 1897; that he came again on October 19, and stayed till December 18; that he came again on January 11, 1898, and stayed till March 4; that, though he was not much there during the latter part of the time, he paid for his bed room whether he was there or not; that on January 19, 1898, he took a bed room at a boarding house, No. 16, Upper Bedford-place, and stayed there till the date of the bankruptcy petition, with occasional absences abroad amounting to about a third of the whole time. The debtor on his cross-examination before the Registrar stated that for the last six years he was more in Paris

than in London and that he did not read the affidavit of March 15 before swearing it. He deposed further that his wife and family were living in Pau on his property; that he carried on business at Paris at an office, part of which he retained for his own use; and that his presence in London was in consequence of the action which he had brought in this country. Upon this evidence the Registrar came to the conclusion that there had been no sufficient residence in England during the prescribed period to give the Court jurisdiction to entertain the petition, which he dismissed accordingly. The petitioning creditors appealed.

Mr. Butcher, Q.C., and Mr. E. F. Spence were for the petitioning creditors; Mr. Mattinson, Q.C., and Mr. G. F. Hart were for the debtor.

The following cases were cited:—"In re Hequard" (24 Q.B.D., 71), "In re Norris" (5 Morrell Bkcy. Cas., III.), "In re Erskine" (10 The Times L.R., 32), and "In re Nordenfelt" ([1895] 1 Q.B., 151).

The COURT allowed the appeal.

The MASTER of the ROLLS was of opinion that any doubt which might exist upon the evidence apart from the affidavit of March 15 was removed by the affidavit itself. The question to be determined under section 6 of the Bankruptcy Act was whether the debtor had "within a year before the date of the presentation of the petition ordinarily resided in England." The year to be considered began in May, 1897, and ended in May, 1898. All that the section required was that within that period this debtor should have ordinarily resided in England. It said nothing as to how long, nor as to what period in the year, nor as to the residence being in one place. The evidence showed that the debtor was very much in England from October, 1897, till May, 1898, and in his Lordship's opinion he might properly be said to be residing in London during that time, sometimes at an hotel and sometimes at a boarding-house, though he was away at times in Paris and elsewhere. Still, if that were all, he was not prepared to say that the case would not be rather near the line, but all doubt was removed by the affidavit. He could not accept the debtor's statement that he never read the affidavit. To allow a man to swear an affidavit and then say that he never read it would be to throw serious aspersions upon the character of the solicitor who prepared the affidavit, and also upon the commissioner who administered the oath. The appeal should be allowed and the petition referred back to the Registrar to be heard upon the merits; costs of the appeal to be the petitioning creditors' in any event.

LORD JUSTICE CHITTY concurred. The debtor's explanation as to the affidavit involved a very serious charge against the solicitor, who was not called as a witness. A solicitor would commit a most grievous breach of duty if he framed an affidavit in such a matter as this and told his client to swear it without reading it. That was one of the grounds upon which a solicitor had been struck off the rolls some time ago. The practice of not reading affidavits would be most effectively stopped by holding the deponents bound by the statements contained in them.

LORD JUSTICE COLLINS concurred.

[Solicitors—Capel-Cure and Ball; Watson and Watson.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) Aug. 5.

WEST LONDON SYNDICATE (LIMITED) v. COMMISSIONERS OF INLAND REVENUE.*

Revenue—Stamp duty—*Ad valorem* duty—Amount

payable—Conveyance on sale—Agreement for sale—Leasehold interest in licensed house—Goodwill—Stamp Act, 1891, sec. 59 (1).

Decision of Divisional Court (*ante*, p. 145, and [1898] 1 Q.B., 226) reversed (Vaughan Williams, L.J., dissenting).

This was an appeal from the judgment of a Divisional Court (Mr. Justice Grantham and Mr. Justice Channell), reported *ante*, p. 145; (1898) 1 Q.B., 226, upon a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891 (54 and 55 Vict., cap. 30). On January 4, 1897, an instrument was presented on behalf of the West London Syndicate (Limited) to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable. The instrument was dated March 19, 1895, and was an agreement under seal for the sale by Percy Thorne to the syndicate of, first, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor at Fischer's Hotel, 11, Clifford-street, New Bond-street, and the benefit of the licences and contracts and privileges of the vendor; secondly, the lease of the hotel, subject to the yearly rent of £964; thirdly, the household furniture, fixtures, and fittings; fourthly, the stock-in-trade and also cash in hand and book-debts. The consideration for the sale was the payment by the syndicate of the business debts of the vendor, amounting to £1,335 8s. 4d., and the sum of £4,250, of which sum £1,462 16s. 3d. was for furniture, stock-in-trade, and cash. Clause 6 of the agreement was this:—"The leasehold premises hereby agreed to be sold being only assignable with the consent of the landlords from whom the same are held, the vendor shall use his best endeavours to obtain the requisite consent for the assignment thereof to the syndicate or their assigns, and in the event of such consent not being obtained the vendor shall at the option of the syndicate execute a declaration of trust of the said leasehold premises in its favour." The Commissioners were informed by the solicitor to the syndicate that the debts were £1,335 8s. 4d., and that, therefore, the purchase consideration was £5,585 8s. 4d., including for lease and goodwill £4,085 8s. 4d., and that it was quite impossible to sever the goodwill from the lease itself because the goodwill was considered to be of no value, as it could not exist apart from the lease, but that without a covenant restricting the vendor from carrying on business the lease would be of less value by £400. The Commissioners called for the production of any assignment of the leasehold premises which might have been executed, and a declaration of trust, bearing date March 21, 1895, by which the equitable interest in the leasehold premises became vested in the syndicate, was produced. The Commissioners invited the solicitor for the syndicate to present the declaration of trust for adjudication, so that the question of the proper stamp duty payable upon that deed might be considered and assessed by them in conjunction with any assessment to be made upon the instrument, but he declined to accede to this invitation, and stated that the amount of duty to be paid upon the declaration of trust was not then in question. The Commissioners, having regard to the provisions in sections 5 and 15 of the Stamp Act, 1891, were of opinion that, inasmuch as neither the sum of £4,085 8s. 4d. nor any other part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises so as to make that instrument chargeable according to its terms with *ad valorem* duty as a conveyance on sale, the whole

consideration, except the sum of £1,462 16s. 3d. apportioned by clause 2 of the agreement as the consideration for the furniture, stock-in-trade, and cash, was to be regarded as applicable to the other property sold under the agreement. The Commissioners were, therefore, of opinion that the agreement was chargeable under section 59 (1) of the Stamp Act, 1891, with *ad valorem* conveyance duty on the said sum of £5,585 8s. 4d., less the sum of £1,462 16s. 3d. apportioned as aforesaid, making the net sum of £4,122 12s. 1d. The Commissioners accordingly assessed the *ad valorem* stamp duty of £20 15s. upon the agreement, being the *ad valorem* duty of 5s. for every £50 of the sum of £4,122 12s. 1d., payable under the head "Conveyance or transfer on sale" in the first schedule to the Stamp Act, 1891, and they also assessed the fixed duty of 10s. in respect of the agreement for the sale of the said leasehold premises, furniture, stock-in-trade, and cash. The instrument has since been stamped in accordance with the assessment. The syndicate, being dissatisfied with the assessment so far as it related to the amount of the *ad valorem* duty, required the Commissioners to state a case. The questions for the opinion of the Court were—(1) Whether the instrument was chargeable with the *ad valorem* duty of £20 15s., in accordance with the assessment of the Commissioners; (2) if not, with what amount of *ad valorem* duty the instrument was chargeable. By section 59 (1) of the Stamp Act, 1891, "Any contract or agreement made in England or Ireland under seal or under hand only . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property, excepting lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock or marketable securities, or any ship or vessel . . . shall be charged with the same *ad valorem* duty to be paid by the purchaser as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold." The Divisional Court held—(1) that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of section 59 (1); (2) that it was not an agreement for the sale of any estate or interest in any property except lands, as regards the goodwill, within the meaning of section 59 (1), inasmuch as the goodwill of a publichouse could not be severed from the enjoyment of the land; and (3) that the *ad valorem* duty was payable in respect of the book debts only. The Commissioners appealed.

Mr. A. T. Lawrence, Q.C., Mr. Spearman, and Mr. W. R. Smith appeared for the syndicate; the Attorney-General (Sir Richard Webster, Q.C.) and Mr. Danckwerts for the Commissioners.

The COURT, having taken time to consider, delivered judgment allowing the appeal, Lord Justice Vaughan Williams dissenting.

LORD JUSTICE A. L. SMITH read a judgment in the course of which he said that it was common ground that section 59 of the Stamp Act, 1891, was passed to saddle with stamp duty at the earliest possible moment contracts and agreements which came within the section, so that the Crown should not have to wait for its duty until a more formal document might be executed, and if not executed be deprived of the duty altogether, which was found to be the case under the provisions of the older Stamp Act, 1870. Taking the instrument of March 19, 1895, by itself, did the option given by clause 6 to the purchasers (the syndicate) to take a declaration of trust, if so minded, instead of a conveyance of a legal interest constitute a contract or agreement for the sale of an equitable estate or interest in any property whatsoever? It would be seen that, apart

from this option, the document was a contract to convey a legal and not an equitable interest. The purchasers were under no obligation to take a declaration of trust. They had not contracted that they would do so, and to constitute a contract or agreement within the meaning of section 59 there must, in his opinion, be correlative obligations on each side—on the one to sell, and on the other to purchase; and as there was in this case no obligation upon the side of the purchasers to take a declaration of trust, for they might or might not do so, just as they pleased, in his judgment the instrument of March 19, 1895, was not a contract or agreement for the sale of any equitable interest whatever within the section. It was argued for the Crown that, as at the time the instrument was taken to the Commissioners the purchasers had taken a declaration of trust, this fact converted the instrument into a contract or agreement for the sale of an equitable interest; but in his opinion that was not so, for the question was what the instrument was when it was signed. He agreed with Mr. Justice Channell upon this, and this point taken by the Crown could not be maintained. Lord Justice Rigby drew the inference outside the document, that the intention of the parties was to merely take an equitable interest, but he (Lord Justice A. L. Smith) would rather not found his judgment upon this. The second question was whether the goodwill which was agreed to be sold and purchased by the instrument was a sale of property other than land. That goodwill was property within the meaning of the Stamp Act was clear (see “*Potter v. Commissioners of Inland Revenue*,” 10 Ex., 147). It was also clear that goodwill was not land. Goodwill, therefore, *prima facie* came within the express terms of section 59 as being property other than land. But it was argued for the syndicate that Sir George Jessel, M.R., in “*In re Kitchen, ex parte Punnett*” (16 Ch.D., 226) held that upon the sale of a publichouse the goodwill of the publichouse passed with the house, for the goodwill was the mere habit of the customers resorting to the house. It was said that goodwill in the present case was therefore nothing but the enhancement of the value of the premises agreed to be sold, and could not be, and was not, property apart from such premises. He did not agree with this, for, in his opinion, goodwill was as capable of being sold as a separate entity for what it was worth as was the tenant's interest in the lease. It might be that by the terms of a lease each must be sold, if at all, to the same person, but that did not prevent them from being sold as separate and distinct entities, and if so sold goodwill was property and not land. In the present case, by the instrument of March 19, 1895, the parties had expressly, as he thought, sold the goodwill, licences, and contracts relating thereto separate and apart from the lease and other entities contracted to be sold. If the intention of the parties was the governing factor, the parties had declared their intention to that effect upon the face of the instrument. The goodwill was contracted to be sold separately by the vendor, and if so it clearly was not land. It could not be truly said that the goodwill in this case was merely an enhancement of the value of the land and nothing more, and was sold as part and parcel of the lease so as to be land. In his opinion the Crown was right in saying that in this case the goodwill was property other than land, and he saw no reason to think that the value assessed by the Commissioners thereon was not correct. In his judgment the Crown succeeded upon the appeal, which must be allowed, and the Crown must have the costs here and below.

LORD JUSTICE RIGBY read an elaborate judgment, agreeing with the result arrived at by Lord Justice A. L. Smith.

LORD JUSTICE VAUGHAN WILLIAMS dissented. He read a judgment in which he said that he agreed with the judgment of the Divisional Court, and he adopted entirely the reasons given by Mr. Justice Channell. In his opinion the instrument in question was not a contract or agreement for the sale of any equitable estate or interest in any property whatsoever. It was a contract for the sale of a legal interest, and the option given to the purchasers, which they were not bound to exercise, to call for a declaration of trust in the event of the landlord's consent to a legal assignment not being obtained, did not convert the instrument into a contract for the sale of an equitable estate or interest. The purchasers, in the event of the vendor failing to obtain the landlord's assent, could have treated the contract to purchase as at an end. It was, in his opinion, impossible to draw the inference that the intention between the parties was that the vendor could have compelled the purchasers to accept a declaration of trust as a performance of the contract contained in the instrument. As regards the next question, whether the instrument was a contract or agreement for the sale of any estate or interest in any property excepting lands, tenements, or hereditaments, this depended upon whether the goodwill, which was by a separate clause included in that which was agreed to be sold and purchased by this instrument, was sold and purchased as land, that was, as something enhancing the value of the land and inseparable from it, or whether it was sold and purchased as property other than land. There could be no doubt that goodwill might be so inseparably connected with land—e.g., with a particular house, as to pass under a conveyance of land (see “*Lindley on Partnership*,” sixth edition, p. 441). In the present case the goodwill of the hotel was included in the lease, and by the terms of the lease the business could not be removed from the house demised without the landlord's consent. The goodwill was made inseparable by the terms of the lease. The goodwill did not belong to the vendor so that he could sell it apart from the lease. It was part of the reversion of the landlord. Moreover, the goodwill of a leasehold publichouse had generally been treated as part of the demised premises “*In re Kitchen, ex parte Punnett*.” That case showed that goodwill might, for the purpose of conveyance, be separated from realty, and if so separated it would be liable to duty as property; yet if it was not so separated it would be treated, on a sale of the premises where the business was carried on, as something enhancing the value of the realty, and, *pro tanto*, augmenting the duty on a conveyance of the place where the business was carried on. His Lordship then referred to “*Commissioners of Inland Revenue v. Angus*” (23 Q.B.D., 579); “*Potter v. Commissioners of Inland Revenue*”; “*Cooper v. Metropolitan Board of Works*” (25 Ch.D., 472). In his opinion one ought not to treat a contract for the sale of the goodwill of a business carried on in a leasehold hotel under a lease which made the business inseparable from the demised premises, where the sale included an assignment of the lease, as a contract for the sale of the goodwill separate from the leasehold premises, unless one could find in the contract a clear intention to separate the goodwill from the leasehold premises and to treat it otherwise than as something attached to the leasehold hotel enhancing its value. In the present case, in his opinion, it was not the intention of the parties to sell the goodwill as something separate from the hotel. The purchasers could not deal with or enjoy the goodwill separately from the hotel. The vendor had no power to sever the business from the hotel. There were no separate prices in the contract for the hotel and the goodwill. He could

find no fact in the present case from which one could infer an intention to deal with the goodwill separately from the hotel.

[Solicitors—A. E. Griffiths, for the syndicate ; Solicitor for Inland Revenue, for the Crown.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) } Aug. 6.

KEMP V. CHRISTMAS AND ANOTHER.*

Pound Breach—2 Will. and Mary, c. 5, sec. 4—
Treble damages—Non-suit—New trial ordered.

An action for treble damages under 2 Will. and Mary, c. 5, sec. 4, is maintainable without proof of special damage.

This was an application by the plaintiff for a new trial of an action tried before Mr. Justice Ridley and a common jury, reported in *The Times* of June 21. The action was brought to recover damages from the defendants, Christmas and Bray, for wrongfully entering the plaintiff's land and premises and removing therefrom certain horses, carriages, and other property, upon which the plaintiff had distrained in respect of arrears of rent due to him from the tenant of part of the premises. The plaintiff claimed treble damages under the Act of 2 Will. and Mary, c. 5, section 4, which enacts that, in the case of "any pound breach or rescous of goods or chattels distrained for rent," the person grieved thereby may bring a special action upon the case to recover treble damages from the offender. The defendant Christmas alone appeared. By his defence he denied that he had broken or entered the plaintiff's premises, and pleaded that the distress had been abandoned by the plaintiff, and, further, that, if a pound breach or rescous had been committed, the plaintiff was not a person grieved by the same. The plaintiff's case was that he was the lessee and landlord of the Essex Arms Hotel at Watford, and as he did not require the stabling connected with the hotel he sublet it for £80 a year to a Mr. Hutton, a livery stable keeper, by an agreement made on September 22, 1897. It was a term of this agreement that the rent was to be paid in advance—£40 on September 29 and £40 on March 25. The rent was not paid, and on October 11 the plaintiff put in a distress. There were at the time two horses in the stable and a landau and some other carriages in the coachhouse. Mr. Hutton was served with a notice of the distress. On October 13 the defendants removed the horses, and they were subsequently found at Pinner in the possession of the defendant Bray. The carriages were also taken away. The rent distrained for being £40, the plaintiff claimed to be entitled, under 2 Will. and Mary, c. 5, section 4, to recover three times that amount and damages for the actual trespass. The plaintiff had brought an action in the Mayor's Court against the bailiffs for negligence in removing their man from possession and allowing the things to be taken, and in that action he had recovered the sum of £40 as damages. Mr. Justice Ridley was of opinion that the plaintiff had failed in the present case to show that he had suffered any damage, and he directed the jury to find a verdict for the defendants. The plaintiff now applied for a new trial on the ground that the learned Judge had practically nonsuited him, and that the case ought to have been left to the jury. An offence had been committed against the statute, and the plaintiff thereupon became entitled immediately to the benefit of the remedy provided by the statute ; and that right was not affected by the fact that he

subsequently recovered a sum of money in another action. Whenever a tort was committed, the person against whom it was committed was entitled to some damages, even though they might be small. Here the jury ought to have been asked what amount of damages they thought the plaintiff had suffered, and told that they might award him treble those damages. It was also pointed out that in "*Jones v. Jones*" (22 Q.B.D., 425) it was held that an action for pound breach under this section was a penal action ; and it was argued that on that ground the treble damages were enforceable, notwithstanding the fact of the plaintiff having received a sum of money from some other quarter by way of compensation.

Mr. G. M. Cohen appeared for the plaintiff ; Mr. English Harrison, Q.C., and Mr. W. Tudor Howell for the defendant Christmas.

On the conclusion of the arguments, which were heard a fortnight ago, Lord Justice A. L. Smith said the Court would take time to consider their judgment. Mr. Cohen then said that the plaintiff, being merely willing to establish his right, would be content to accept any small sum which the Court might name to be trebled. Mr. Tudor Howell said that, in his client's absence, he was not in a position to agree to this offer. Lord Justice A. L. Smith said the defendant would do well to consider the offer.

The Court delivered judgment directing a new trial.

LORD JUSTICE A. L. SMITH read the following judgment :—This is an application by the plaintiff to set aside a verdict and judgment entered for the defendants, and for a new trial, upon the ground that the learned Judge misdirected the jury in telling them, as he did, to find a verdict for the defendants. From what was stated at the Bar we had hoped that the parties would have been able to come to a settlement in this case, but as they have not we must now give judgment. The action is brought against the defendants under 2 Will. and Mary, c. 5, sec. 4, for pound breach. This section enacts that on any pound breach or rescous of goods distrained for rent, the person grieved thereby shall in a special action upon the case recover treble damages and costs against the offender. By 5 and 6 Vict., c. 97, that part of this section which relates to treble costs is repealed, but that relating to treble damages is still left in force. It was proved that upon October 11, 1897, the plaintiff by his bailiffs distrained upon his tenant, Hutton, for £40 rent then due and in arrear, and certain horses and carriages were thereupon taken and impounded by the plaintiff's bailiffs as a distress for this rent. Evidence was given that upon October 13, 1897, whilst this distress was impounded, the defendants broke and entered the pound and rescued the goods distrained. The learned Judge has held that by reason of what the plaintiff did after this pound breach by the defendants, he had no cause of action when he issued his writ upon January 8, 1898, and the learned Judge directed a verdict and judgment for the defendants, the result of which is that the plaintiff has had to pay the costs of the defendants, which alone come, we are told, to some £90 in amount. Now, what the plaintiff did after this pound breach by the defendants was to sue his bailiffs in the Mayor's Court for negligence in allowing the horses and carriages distrained and impounded to be taken away by the defendants, and in that action he recovered damages against his bailiffs to the amount of £40, which I have no doubt were estimated upon the footing of the rent lost to the plaintiff by reason of the horses and carriages distrained, which were of at least that value, having been negligently allowed by the bailiffs to be taken away by the defendants. Having recovered this £40, the plaintiff then sued the defendants under section 4 of 2 Will. and Mary, c. 5, and

* Reported by F. G. RUCKER, Esq., Barrister-at-Law.

for pound breach. Although the plaintiff gave evidence before the Judge and jury of a pound breach by the defendants without justification, the learned Judge nevertheless stopped the case, and directed a verdict for the defendants, because the plaintiff, in his action in the Mayor's Court, had recovered £40 against his bailiffs, which was one of the items he was seeking to treble and recover in the present action. In my judgment the plaintiff had a clear right not to have his pound invaded by the defendants and could sue them for having invaded that right, even although he proved no special damage, for he was entitled at any rate to nominal damages, and I cannot see upon what ground judgment could be entered for the defendants. It may be that the learned Judge in the view he took of the plaintiff's damages, assuming such view to be correct, might have directed a verdict for the plaintiff for nominal damages; but he has directed a verdict for the defendants, which is a very different thing, and which, in my judgment, in the circumstances of the case, he could not do. I am therefore of opinion that the plaintiff is entitled to have the verdict and judgment entered for the defendants set aside and a new trial granted, for this Court is not in a position to say for what amount the plaintiff is entitled to judgment, and the plaintiff's motion is only for a new trial. It may be—though I do not decide it—that when the case is tried again, it will appear that the plaintiff had a vested cause of action in him for treble damages against the defendants upon their being guilty of pound breach, and that the loss then occasioned to the plaintiff by reason of the rescue of the goods is the penalty the defendants must pay for unjustifiably breaking the pound and rescuing the goods therein, and that this is the act which constitutes the party grieved within the meaning of the statute, and that this is the date at which for this cause of action the damages are to be assessed, and not the date of the writ, as argued by the defendants. Moreover, what took place at the Mayor's Court is clearly no defence at all to this cause of action, though the £40 recovered therein may go in mitigation of the damages accruing to the plaintiff by reason of the pound breach and rescue of the goods. It seems to me, too, that the plaintiff was cut short by the direction of the learned Judge from showing if he could, as he was seeking to do, that he had sustained damages *ultra* the loss of the goods distrained, which represented his rent, for I see that Mr. Hammond Chambers, for the plaintiff, protested against a verdict and judgment being entered for the defendants before he had called his witnesses. There must be a new trial, and the costs of the first trial will abide the result of the second trial, but the costs of this appeal must be the plaintiff's in any event.

LORD JUSTICE RIGBY delivered judgment to the same effect.

LORD JUSTICE VAUGHAN WILLIAMS concurred.

[Solicitors—Chandler and Rumbolt, for the plaintiff; T. F. Allingham, for the defendant.]

Q.B. Div. (Crown Cases Reserved)
(Lord Russell of Killowen, C.J.,
Hawkins, Mathew, Kennedy,
and Bigham, JJ.)

1898.
Aug. 6.

REG. V. HOBBS.*

Gaming—Lottery—Sweepstake—16 and 17 Vict.,
c. 119.

The occupier of a licensed publichouse got up
and managed a Derby sweepstake among his

customers. *Held*, that he could not be indicted
for an offence under the Betting Act, 1853 (16 and
17 Vict., c. 119).

This was a case stated for the Court of Crown
Cases Reserved by Mr. Justice Hawkins at the Lewes
Summer Assizes. The trial was reported in *The Times*
of July 18.

Mr. R. D. Muir appeared for the defendant; Mr.
H. Ivory for the Crown.

The defendant, Lewis I. Hobbs, was indicted for
that he, being the occupier of a certain house known
by the sign of the Yorkshire Grey, in the London-road,
Hastings, unlawfully did use the said house for the
purpose of money being received by him as and for the
consideration for promises and agreements to pay there-
after money—namely, sums of £45, £20, and £10, and
100 other sums of 5s. each on certain events and of
relating to a horse-race called the Derby Stakes.
Another count charged him with using the bar of the
licensed premises known as the Yorkshire Grey for the
purpose above mentioned. The case stated the facts
thus:—The question raised upon this indictment is
whether the sale of and receipt of the purchase money
for tickets in an ordinary Derby sweepstake by a
licensed victualler in the bar of the licensed house
occupied by him amounts to an offence created by
Statute 16 and 17 Vic., c. 119. The material facts are
few and simple. The defendant, Lewis Irvin Hobbs,
was from April 18 to May 11, both days inclusive, the
licensed occupier of the Yorkshire Grey at St.
Leonards-on-Sea. He had been such occupier for
eight or nine years previously, and during each of those
years a sweepstake similar in all respects to that now
in question had been promoted by him on the approach
of the Derby day. It was a sweepstake to consist of
1,000 subscriptions of 2s. 6d. each, which, assuming
all the subscriptions were made, would raise a sum of
£125, of which 10 per cent., amounting to £12 10s.,
was to be deducted for expenses, leaving a balance of
£112 10s. for distribution among the subscribers in the
following manner:—To the drawer of the first prize—
that is, the winner of the race—£45; second prize—
that is, the second horse—£20; third prize—that is,
the third horse—£10; to the drawers of 100 non-
starters, 5s. each, which would take up £25; and the
remainder was to be divided amongst the runners,
£12 10s., which would make up a total of £112 10s.
A ticket similar to that annexed to the case was, on
payment of 2s. 6d., issued to each subscriber for each
ticket subscribed for by him. These tickets were before
issue bound up in books (similar in form to bank
cheque-books) of 25 tickets each, with counterfoils
attached on which to write the name of the purchaser.
As each ticket was paid for it was detached from its
counterfoil and handed to the purchaser, whose name
and address were written on the counterfoil. The tickets
were distributed, some in the Yorkshire Grey by the
defendant himself, and by his wife and barmaid, who
assisted him in the conduct of the house, and some by
other persons to whom they were entrusted, away from
the premises, one of such books for this year's sweep-
stake, from which six tickets had been sold, having
been found on the person of one Talbot as hereafter
mentioned, the names of other recipients of the
books containing 475 tickets being found entered in a
memorandum-book of the defendant's. A man named
Mawle, a porter, formerly in the service of the
defendant, on April 18 last (having been employed by
the police so to do) went to the Yorkshire Grey and
there purchased a ticket (No. 101) from the defendant's
wife. On April 23 a similar ticket was sold in the
house to a customer. On Sunday, April 24, two

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

tickets were sold by the barmaid in the presence of the defendant, who, in reply to some observations, said, "You can spot (or find) the winner on Sunday as well as any other day." On April 26 five more tickets were sold to customers in the bar, and on April 29 defendant himself sold Mawle another ticket (No. 231), who paid 2s. 6d. for it. The whole of these sales were openly made. There was no drawing for the prizes this present year, because before the time had arrived the Yorkshire Grey was raided by the police, which, of course, stopped further proceedings with the sweepstake. But the drawings for each of the years 1896 and 1897 had been held at Saxon-chambers, a house adjoining but forming no part of the Yorkshire Grey. At such drawing about 20 persons were present. The witness Mawle had been doorkeeper on those occasions, and for his services he was paid by the defendant, who, in fact, paid all the other expenses connected with the sweepstake, including those of this year, and, if the fact be important, I have no reason to think that the 10 per cent. deducted for expenses was an unreasonable amount for that purpose. No other evidence was given or offered of any matter connected with the sweepstake than that I have mentioned. It was not even suggested that the defendant, who took no ticket, was either to receive any part of the money subscribed, except as already mentioned—or to supply or make good any deficiency in the event of all the tickets not being sold, and he gave no guarantee or promise to pay anything to anybody, except to distribute the money actually subscribed among the subscribers according to the terms of the tickets. On May 11 the inspector of police, under a search warrant issued under the Betting House Act, searched the Yorkshire Grey, but in the house found nothing beyond some books of tickets, some of which had been issued and torn from the counterfoils, and a book with names and addresses obviously of persons to whom similar books had been entrusted. A person named George Talbot was in the bar, where he was a daily visitor. It was said by the inspector that he was a betting man, and on search there were found upon him some papers and telegrams (one addressed to him at the Yorkshire Grey), which went strongly to prove that the inspector's description of him was correct. But there was nothing to indicate either that the defendant was concerned in betting or that any bets were ever made in his house. On this state of things Mr. Muir, for the defendant, objected that there was no evidence which could properly be submitted to the jury in support of this indictment, Mr. Horace Avory, for the prosecution, contending to the contrary. For the purpose of this case it was conceded by Mr. Muir that the sweepstake in question was a lottery, and I am strongly inclined to the opinion that it was so, although, as this indictment was only preferred under the Betting House Act, 1853, it is not necessary to pronounce any judgment upon that point. The case then set out the views of the learned Judge, who, with some doubt, left the matter to the jury. The jury convicted, and the learned Judge reserved the point, reserving judgment and allowing the defendant out on bail till the next assizes or till the decision of this Court.

Mr. MUIR referred to the following cases:—"Sagar v. Stoddart" (18 Cox, 165), "Cartill v. Carbolic Smoke Ball Company" ([1892] 2 Q.B., 490), "Caminada v. Hulton" (64 L.T., 572).

Mr. AVORY cited "Allport v. Nutt" ([1845] 1 C.B., 974).

The COURT set aside the conviction.

The LORD CHIEF JUSTICE said that Mr. Justice Hawkins, the learned Judge before whom the case had been tried, had expressed grave doubt whether in law there ought to be a conviction. That doubt was well

founded. Here there was no evidence proper to be left to the jury in support of the two material counts. In order to clear the ground it was well to say that the fact of the defendant being a publican made no difference, and for the purposes of this present decision it was quite irrelevant. The sweepstake was in precisely the same position as if it had taken place at a club or any other society of men. What took place was, in his opinion, a lottery, or if not a lottery it was at any rate not a betting transaction at all. His Lordship then referred to the Betting House Act, 1853 (16 and 17 Vic., c. 119). At the time of the passing of that Act there existed legislation about lotteries, and betting was treated as a different and distinct subject of legislation from lotteries. The first part of the first section of the Betting House Act prohibited a house from being kept or used for the purpose of betting by persons resorting thereto; the second part of that section applied to cases where persons did not resort to a house, but where a house was kept or used for the purpose of any money or valuable thing being received by or on behalf of the owner as or for the consideration for any assurance, undertaking, promise, or agreement to pay money, &c., on any event or contingency of or relating to horse-racing, &c. Was there any evidence on the facts here that this house was used for either of those purposes? Both the first and second part of the section pointed to a contractual relation between the occupier and owner of the house and the client—an engagement in fact that the occupier or owner would pay money to the client in certain contingencies. He thought that that relation did not exist here. The landlord, for the purpose of adding to his popularity and that of his house, had said that he would manage the sweepstake, and after deducting the expenses would distribute the proceeds to the winners. He himself was to receive no profit and took no tickets. The subscription created a common fund, and the defendant only undertook to distribute the money received. He did not undertake to pay money. Further, this was not an undertaking to pay on an event or contingency of a horse race. It was not on that, but on the contingency of the drawing. The drawing might equally well take place after the race as before it. That made it clear it was dependent on the contingency of the drawing. That was sufficient as to the first section. A reference to the other sections of the Act made the impression all the stronger that the Act was applicable only to persons keeping a house for purposes of betting. He referred particularly to section 7, which prohibited any advertisement whereby it should be made to appear that any "house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid." That being so, the case did not fall within the words of the Act, nor, in his opinion, within the category of the evils dealt with by the Act. He would not say, and he wished that to be clearly understood, that no criminal offence had been committed. He thought there had been a lottery, but that was not before the Court on this prosecution.

MR. JUSTICE MATHEW, MR. JUSTICE KENNEDY, and MR. JUSTICE BIGHAM concurred.

MR. JUSTICE HAWKINS in no way dissented from the decision, and wished to add that, in his opinion, the matter ought not to operate in the slightest degree to the prejudice of the defendant with the licensing authorities.

The LORD CHIEF JUSTICE said that no doubt the authorities concerned would give weight to this expression of opinion from the learned Judge who had heard all the facts.

[Solicitors—Davenport Jones and Glenister, Hastings, for the defendant: Geo. Meadows, for the Crown.]

Q.B. Div. }
(Kennedy, J.) }

1898.
Aug. 6.

MARTIN V. LONDON COUNTY COUNCIL.*

Highway—Obstruction by County Council—New streets—Delay—Injury to individual.

When a local authority in carrying out public works under its statutory powers has been guilty of unreasonable delay or obstruction, a person injured thereby can maintain an action only when he can show an injury special to himself as distinct from the public generally.

This case, the trial of which was reported in *The Times* of July 7 last, now came on upon a motion by the defendants for judgment. The motion was heard on July 30 and August 5, and on August 6 his Lordship gave judgment. The action was brought against the County Council for unnecessarily and negligently blocking and obstructing Wellington-street, Deptford, and other thoroughfares leading to that street, in which the plaintiff resided as a leaseholder. It was alleged that in 1897, whilst making a new road cutting Wellington-street diagonally under their statutory powers, the County Council were guilty of unreasonable delay and of obstructing the approaches to the street at more points, in greater degree, and for a longer time than was useful—namely, over six months—with the result that the receipts of the plaintiff in his business fell off to such an extent that he had to give up the premises, and lost his interest therein and the goodwill of his business as a greengrocer after incurring extra expense and labour in getting his goods to his shop and from his shop to his customers. It was asserted that for some months the High-street ends of Watergate-street and Wellington-street were blocked up entirely (save for a narrow gangway), and a board put up marked "No thoroughfare"; that at the other end Wellington-street was blocked up as far as Armada-street and a similar board placed there; that the gangway which had been left for foot passengers was almost impassable owing to piles of sand and rubbish which had been heaped up close to it; and that the whole roadway was needlessly blocked by road-making material. The blocking of the High-street end continued from July, 1897, to January, 1898. The plaintiff's shop did not overlook the blocked part of the roadway, being beyond Armada-street, but he complained that he had been damaged by the blocking of the access from High-street. The workmen on the job were only half the number plaintiff would have expected to see on such work. In March, 1898, he surrendered his lease, which was for 21 years from 1892 and for which he had paid more than £200 by way of premium. In the course of the evidence it was admitted by the plaintiff that before the work was begun he had written complaining of the falling off in his receipts in consequence of the pulling down of houses in his neighbourhood by the County Council, and that his receipts in some weeks in October were higher than they were in July before the road-making was commenced. The learned Judge left to the jury the questions whether there had been unnecessary delay and obstruction, and the amount of the damage to the plaintiff, if any. The jury, being unable to agree, were discharged. The defendants moved that judgment might be entered for them.

Mr. Dickens, Q.C., and Mr. Daldy appeared for the defendants in support of the motion; Mr. Atherley-Jones, Q.C., and Mr. W. M. Thompson for the plaintiff. Mr. ATHERLEY-JONES, Q.C., submitted that the

application would not lie. It was in the nature of an application for a nonsuit which his Lordship refused at the trial.

MR. JUSTICE KENNEDY overruled the objection.

Mr. DICKENS, Q.C., then proceeded to argue that the defendants were entitled to judgment. He submitted that, (1) even assuming the defendants had been guilty of unreasonable delay or obstruction, and damage had resulted to the plaintiff, no action would lie; (2) the plaintiff had not shown any substantial damage attributable solely to these acts; (3) if there were any evidence of such special damage, it was not so particular to the plaintiff as to give him a cause of action. He referred to the London County Council (General Powers) Act, 1891, 54 and 55 Vict., c. cxxv., secs. 4, 12, 22, 23; and the London County Council (Improvements) Act, 1894, 57 and 58 Vict., c. cxxxv., sec. 43. Under those sections the defendants were entitled temporarily to stop up any carriage way or footway which they should think necessary to be stopped up. It was not a question as to whether the defendants had acted reasonably or unreasonably. The question was whether they had acted *bona fide* for the purposes of the Acts, and there was no suggestion that they had acted to the contrary. The highest the case for the plaintiff could be put was that it was a claim for nonfeasance, and that would not lie—*Saunders v. Holborn District Board of Works* ([1895] 1 Q.B., 64), *Winterbottom v. Lord Derby* (L.R., 2 Ex., 816). There was no evidence of damage suffered by the plaintiff different in kind from that of the rest of the public. *Wilkes v. Hangerford Market* (2 Bing. N.C., 281) had been overruled. *Ricket v. Metropolitan Railway Company* (5 B. and S., 156; L.R., 2 E. and I. App., 175) [MR. JUSTICE KENNEDY referred to *Beckett v. Midland Railway Company* (L.R., 3 C.P., 97)], *Fritz v. Hobson* (14 Ch. D., 542), and *Benjamin v. Storr* (L.R., 9 C.P., 400) were distinguishable.

Mr. DALDY submitted that in order to support an action of this kind the damages must be substantial, and there was no such evidence here.

Mr. ATHERLEY-JONES, Q.C., for the plaintiff, submitted that the undertakers of any public works authorized by statute were responsible for injuries peculiar to the person or limited section of persons aggrieved, which injuries had been inflicted by an improper or unreasonable exercise of the powers conferred upon them. In the cases cited for the defendants there was no peculiar injury to the plaintiffs. The test of remoteness of damage in cases like the present was—Was the injury common to the public at large? If a public body exercising statutory powers did work in a careless and improper manner, it was liable to a person who had premises contiguous to the works and who was injured by the improper and careless execution of the works. *Ricket v. Metropolitan Railway Company* was only binding upon the particular facts of that case. *Lyon v. Fishmongers' Company* (1 A.C., 662) was not consistent with the former case. [MR. JUSTICE KENNEDY said that the question was whether the fact that the street was rendered less comfortable to passengers, and that the plaintiff's business had thereby suffered, was sufficiently direct damage.] It was not necessary to allege or prove damage in the present case—*Roe v. Groves* (5 M. and G., 613); *Mayne on Damages*, 1894, 446; *Owners of No. 7 Steam Sand Pump Dredger v. Owners of Steamship Grete Holme* ([1897] A.C., 596).

MR. DALDY replied.

MR. JUSTICE KENNEDY, in giving judgment, said that the question he had to decide was whether any case had been made out by the plaintiff. The defendants were a public authority authorized by Act of Par-

*Reported by J. E. ALDOUS, Esq., Barrister at Law.

liament to carry out improvement works in the district. They were bound to enter on a portion of Wellington-street. By section 12 of the London County Council (General Powers) Act, 1891, a number of powers and duties were prescribed to the defendants, and it was clear that under that section very large powers were given to them. They were a public body who had to carry out important works for the public good, and great discretion was entrusted to them with regard to stopping up particular streets and regulating and stopping traffic. It was at least arguable that, assuming that they did nothing in bad faith and that what was done was for the purposes of improvements, no action would lie for mere delay or for the extent to which the street was blocked. But there must always be the reservation that if they did certain classes of damage to the person or property through negligence or want of reasonable care they might in certain circumstances be held liable. For instance, if in the present case they had carelessly left heaps without lights they would be answerable. But in the present case the complaint was that at a street called Wellington-street, at the other end of the street to that in which the plaintiff's house was, they blocked up more of the road than they need have. It was also said they were two months longer over the work than they ought to have been. The plaintiff said he was prepared to prove that he had suffered damage by reason of the loss of customers through foot passengers being disheartened in going down the street, and that although there was a roundabout way by which they could go to his shop they would not do so. It was not contended that the obstruction continued after the making of, or for other purposes than, the improvements. It was not like the case of "*Wilkes v. Hungerford Market*," where the boarding was afterwards kept up unnecessarily. The plaintiff, who became the leaseholder of the shop after the passing of the Act of 1891, admitted that the most serious injury he suffered was from the destruction of certain premises for the purposes of improvement of a district from which he had previously drawn large custom. The fair result of the cases was that if a private person were injured by works of this description, if they were in the manner, or to the extent, unauthorized or unreasonable, the injured person would have a claim if, and only if, he proved that, by reason of that which was not authorized by the statute, he had been injured specially, directly, and substantially. By specially was meant an injury not merely common to any one living in that neighbourhood. That the injury must be direct was shown by the judgment of Mr. Justice Brett in the case of "*Benjamin v. Storr*." The plaintiff must show an injury special to himself as distinct from the public generally. Was the loss of some custom by the plaintiff a direct injury within the definition? In his opinion it was not. The house itself was in no way obstructed. There was always access to the shop, although by a roundabout way. The house in itself was not rendered less commodious for trading or less healthy for occupation. The injury was not direct in a sense in which the cases had treated it. The case of "*Wilkes v. Hungerford Market*" could no longer be treated as an authority, having regard to the observations of Lord Chelmsford in "*Rickett v. The Metropolitan Railway Company*" and Mr. Justice Willes in "*Beckett v. Midland Railway Company*." The present case was not one under such circumstances as gave a right of action, and there must be judgment for the defendants with costs, except the costs of the special jury.

Judgment accordingly. Execution stayed for three weeks, and if notice of appeal given within that time, then a stay until the hearing of the appeal.

[Solicitors—Griffith and Gardiner, for the plaintiff; W. A. Blaxland, for the defendants.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J.) } Aug. 8.

FIELDEN V. THE MAYOR, &C., OF MORLEY.*

Practice—Costs—Solicitor and client costs—Public Authorities Protection Act, 1893.

In this case, after judgment had been delivered on the 4th inst. dismissing the plaintiff's appeal (reported *ante*, p. 566), the appellant's counsel applied that the order of Mr. Justice Byrne appealed from might be varied by reducing the costs from solicitor and client costs to party and party costs. It was submitted that the decision of Mr. Justice Byrne was wrong on this point for three reasons—first, because the Public Authorities Protection Act, 1893 (56 and 57 Vict., c. 61), on which his decision was based, did not apply, as was contended, to proceedings for an injunction; secondly, that the defendants were sued as a water authority, and were not sued as a public authority within the meaning of the Act; and, lastly, that Mr. Justice Romer, whose decision Mr. Justice Byrne had followed, was not right in holding that the Court had no discretion under the Act. The Act generalizes and amends certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties, and enacts (*inter alia*) that wherever in any action comprised therein "a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client." The question being an exceedingly important one, their Lordships reserved their decision until they had had an opportunity of consulting with their brethren.

The judgment of the Court on this point was delivered by

The MASTER of the ROLLS.—His Lordship said that the Act applied to all actions including what used to be suits in Chancery; it applied to actions for injunctions as well as to actions for damages. A dismissal of an action was equivalent to judgment for the defendant. The Act, however, did not apply to appeals nor to motions. Although the language was wide, the key to the enactment was its design to protect public bodies from expense when unsuccessfully sued in respect of acts done or omitted in the exercise of statutory powers or duties; and the present case, therefore, clearly fell within the enactment. The judgment of Mr. Justice Byrne as to costs would, therefore, stand, and the appeal would simply be dismissed with costs.

Mr. Moulton, Q.C., and Mr. O. Leigh Clare were for the appellant; Mr. Eve, Q.C., and Mr. R. J. Parker were for the respondents.

[Solicitors—Firth and Co., for J. E. Craven, Todmorden; Sharpe, Parker, and Co., for R. B. Hopkins, Morley.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J.) } Aug. 8.

THE SOUTHWARK AND VAUXHALL WATER COMPANY V. THE WANDSWORTH DISTRICT BOARD OF WORKS.*

Metropolis—Streets—Water-pipes and mains—Repair of streets—Disturbance of pipes—Metropolis Local Management Act, 1855, sec. 98.

Decision of Kekewich, J. (*ante*, p. 508), reversed.

This was an appeal by the defendants from a decision of Mr. Justice Kekewich dated the 8th of July last, and reported *ante*, p. 508. The plaintiffs moved before his Lordship for an interim injunction to restrain the defendants from lowering their streets

*Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

and footways wherever the plaintiffs' pipes and mains were laid in any manner which would leave such pipes or mains without a sufficient covering of soil or other material to protect them from injury, whether by the passing of traffic, the effect of frost, or otherwise, unless the defendants should first alter the position of the said pipes and mains by placing them at a depth below the proposed new surface of such streets or footway, not being less than the depth at which the same then were below the present surface of such streets or footways. It appeared that the defendants contemplated lowering some of their footpaths to such an extent as to leave only a few inches of surface above the plaintiffs' mains. This the defendants maintained they were entitled to do, and they contended that if the mains, for their protection from frost or otherwise, had to be lowered to a proportionate depth this should be done by the plaintiffs at their own expense. The case turned on the construction of section 98 of the Metropolis Local Management Act, 1855 (18 and 19 Vict., c. 120), which enacts that:—"It shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively, to be paved or repaired when and as often and in such form and manner and with such materials as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in, into, or through the same to be turned or altered, in such manner as they think proper, and to alter the position of any mains or pipes in or under such street, such alteration to be made subject to the approval of the engineer of the company to which such mains or pipes belong." Mr. Justice Kekewich was of opinion that this was the exact case in which the large power which the Court had in granting an injunction should be exercised, rather than that the Court should wait until the injury was done and leave the plaintiffs to damages. The plaintiffs were therefore, his Lordship considered, entitled to an injunction, though the form of interim injunction asked was too wide. The learned Judge decided that the proper form would be to restrain the defendants from altering the position of the plaintiffs' mains by placing them in a position in which they would be more liable to injury than they were at present. From that decision the defendants now appealed.

Mr. Renshaw, Q.C., and Mr. Lyttelton Chubb were for the appellants; Mr. Warrington, Q.C., and Mr. Gore Browne were for the respondents.

At the conclusion of the arguments on the 28th ult. their Lordships reserved judgment, which was delivered, reversing the decision of Mr. Justice Kekewich and allowing the appeal.

The MASTER of the ROLLS delivered a written judgment, in which, after stating the facts of the case and reading the section above set forth, he said,—This section in terms simply confers a power; its language imposes no duty. The words are, "it shall be lawful," &c. These words may no doubt under certain circumstances impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention. Nothing can be clearer on this point than the judgment of Lord Cairns in "Julius v. Bishop of Oxford" (5 App. Cas., 214, see pp. 223, 224). The defendants have not touched or disturbed the plaintiffs' pipes. They have in no way injured them, and this circumstance distinguishes the case from "The Gas Light and Coke Co. v. Vestry of St. Mary Abbots" (15 Q.B.D., 1), in which the steam-rollers used by the defendants broke the plaintiffs' gas pipes. The same circumstance—viz., the non-interference with the plaintiffs' property—distinguishes this case from "Geddis v. Proprietors of the Baun Reservoir" (3 App.

Cas., 430), where the defendants flooded the plaintiffs' land and said in effect that they could not help it. The answer was that they could help it if they kept a stream into which they poured water free from obstruction by mud, which they could do if they chose. Lord Blackburn's remarks on p. 456, on which the plaintiffs mainly relied, had reference to that state of things, and do not show what the plaintiffs must show—viz., that section 98 imposes a duty on the defendants to lower the plaintiffs' pipes, although the plaintiffs do not want to do so for their own purposes. Underlying the plaintiffs' contention is the assumption that they are entitled to have a certain amount of soil over their pipes. I can find no warrant for this assumption; and as the defendants are clearly empowered by section 98 to remove the soil above the pipes, I see no ground for saying that the additional power conferred upon them of lowering the plaintiffs' pipes imposes the duty of lowering them in order to protect them from injury. The plaintiffs pay nothing for the privilege of laying their pipes down in a public path or road, and they run the risk of having it made higher or lower by the road authorities under their statutory powers. This conclusion is strengthened by section 61 of the Towns Improvement Act, 1847 (10 and 11 Vict., c. 34), which is *in pari materia*, and which empowers the improvement commissioners to raise or lower pipes "if they deem it necessary so to do." No duty to do so is cast upon them. Section 98 of the Metropolitan Management Act, although not quite so clearly worded, has, in my opinion, the same meaning. The appeal motion having by consent been treated as an appeal from a final judgment in the action, the order appealed from must be discharged and judgment be entered for the defendants, with costs here and below, and the costs below must be taxed as between solicitor and client pursuant to 56 and 57 Vict., c. 61, sec. 1. (See "Fielden v. the Mayor, &c., of Morley," *supra*.)

LORD JUSTICE CHITTY, after observing that the case was of importance, as the decision would affect not only water companies, but gas and other like companies who had the like statutory privilege of laying pipes under the public streets in the metropolis, and after commenting on section 98 of the Metropolis Local Management Act, 1855, and referring briefly to the facts of the case, continued as follows:—I am unable to find in the section any express or implied duty cast upon the road authority, when they exercise their power of altering the level of the road, whether by raising or lowering it, to exercise at their own expense their power of altering the position of the pipes for the benefit of the company owning the pipes, much less any duty to place the pipes at a depth below the new surface corresponding with the depth at which they stood below the old surface. I think that no such duty is imposed upon the appellants. The real question is on whom the expense of altering the position of the pipes is to fall. It appears to me that it falls on the company. They are under no statutory obligation as to the particular depth at which their pipes are to be placed from the surface of the road; it is for them to place them at such a depth as will protect the water from freezing. As between the road authority and the company I think that the road authority is paramount. They are entrusted with the powers over the street, not for their own profit as a statutory body, but for the benefit of the public using the street at a highway. The statutory undertaking of the water company is vested in them with a view to their own profit as a company, and for the purpose of affording a supply of water to the consumers of water within their district. Where the road authority alters the level of the street the 98th section does not afford any means of ascertaining the point at which the supposed duty of the road

authority begins in reference to the distance from the surface at which the pipes are to be left, subject only to this qualification—that where the position of the pipes themselves is altered the approval of the company's engineer is required in relation to the position where the pipes are to be relaid. His Lordship, in conclusion, agreed with the Master of the Rolls in his view that the authorities cited were distinguishable.

LORD JUSTICE COLLINS read a judgment to the same effect.

[Solicitors—W. W. Young and Son; Lanfear, Tanner, and Lanfear.]

Q.B. Div. (Lord Russell of Killowen, C.J., Wright and Kennedy, JJ.)

1898.
Aug. 8.

REG. V. HOLE.*

Fugitive Offenders Act, 1881—Bail—Jurisdiction of the Court.

This was an application for bail in a case where an order had been made under the Fugitive Offenders Act for the return of the defendant to the Cape of Good Hope, and in the meantime for his confinement in prison.

Mr. Cooper Willis, Q.C., appeared for the defendant; Mr. Scrutton for the Cape Government and for the prosecutors, the Union Steam Ship Company; Mr. H. Sutton and Mr. Bodkin now represented the Crown.

The case came on on August 2, but was adjourned in order that the Crown might be represented upon the point whether under the Fugitive Offenders Act, 1881 (44 and 45 Vic., c. 69, section 5), there was any power in the Court to grant bail after an order committing the defendant to prison had been made by the magistrate. The matter had been again adjourned in order that the point might be determined at the same time as the following case—"Reg. v. Spilsbury," which raised a similar question. The section is as follows:—

"A fugitive when apprehended shall be brought before a magistrate, who . . . shall hear the case in the same manner and have the same jurisdiction and powers as near as may be (including the power to remand and admit to bail) as if the fugitive were charged with an offence committed within his jurisdiction. If . . . such evidence is produced . . . as raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit . . . to a Secretary of State. When the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of 15 days, and that he has a right to apply for a writ of *habeas corpus* or other like process."

Section 6 provides that upon the expiration of 15 days after the committal or the decision of a Court on an application for *habeas corpus* the Secretary of State may order the fugitive to be returned in custody to the part of her Majesty's dominions from which he is a fugitive, to be there dealt with in due course of law. The facts were stated to be that the defendant was in the employ of the Union Steam Ship Company, and was accused of embezzling £160. He stated before he came over that there were sums which he owed which he would settle upon his return. With that knowledge the directors of the company allowed him to come over

to England and paid his passage. He went to his mother's house, and the next day he was taken up. When before the magistrate he was admitted to bail to the extent of £100 on four occasions between June 27 and July 25, the date of the last hearing. The magistrate made an order to send him back to the Cape. The defendant was quite willing to go at once, but it was found that it was inconvenient to send him at once, and consequently he was to be detained in Holloway until next Saturday. Application for bail was, therefore, made.

Mr. COOPER WILLIS contended that the Court of Queen's Bench had a general jurisdiction to grant bail, and the statute had not taken it away in this case. The jurisdiction therefore existed. Appealing to the discretion of the Court, he urged as grounds for granting bail that the amount alleged to have been embezzled was small, and that the defendant had not attempted to hide himself; moreover, the magistrate had thought it was a proper case for bail no less than four times, and the only reason why he had not granted bail himself was because he thought that he had no power of granting bail when once he had made his order.

Mr. H. SUTTON argued for the Crown. As to the power of the Court to give bail, he did not dispute the general power to give bail when a person had committed a crime in this country, or in the case of any unlawful custody; but, when once a prisoner was committed to prison under section 5, he contended that the power had gone. He did not know of any authority for saying that there was a general power to grant bail in respect of a crime committed outside the jurisdiction. The words in the section, "to await his return," seemed to imply that then bail could not be granted, though up to the time of the magistrate making the order bail could be given. The power of this Court to grant bail was under consideration by the Legislature, as might be seen in section 10, which provided for bail when the case was trivial or the application not made in good faith, and if this Court in every case was to have the power of granting bail it surely would have been expressly provided. He also referred to section 7, which provided as a protection to the fugitive that if he were not conveyed from prison within one month after his committal, the Court, unless sufficient cause were shown to the contrary, might order him to be discharged out of custody. Instancing the difficulties that might arise, he said that if the fugitive refused to deliver himself up and broke his bail, staying at Liverpool or some other place in England, there was no authority to the effect that he could be arrested, though, of course, his recognizances and his sureties would be forfeited. It would not be likely that in ordinary cases the Legislature would be very favourable to absconders from justice. If it was true, as stated, that the defendant was willing to return to the Cape, it was an exceptional case. In such a case, as in a case of illness, some lesser form of custody than confinement in prison might probably be ordered.

Mr. SCRUTTON, on behalf of the Cape Government, which opposed the grant of bail, pointed out that it would be no satisfaction to the Government for the recognizances to be estreated. What they wanted was that the defendant himself should come and take his trial.

The COURT refused the application for bail.

The LORD CHIEF JUSTICE said that in this case, in which an order had been made committing the defendant to prison with a view to his being sent to the Cape to be tried on a charge of felony, it was not necessary to discuss the power of the Court to grant bail, inasmuch as that point was dealt with in their judgment in the next case, "*Reg. v. Spilsbury*" (*infra*), and, even if the Court had the power, they thought

*Reported by H. Russell, Esq., Barrister-at-Law.

that they should not exercise it for two reasons—first, the period was very brief, inasmuch as the defendant would sail on Saturday, August 13; and, secondly, it was right to give weight to the views of the Cape Government, who had opposed the granting of bail. Even if the Court had the power, they would not, in this case, in their discretion, exercise it.

[Solicitors—Bircham and Co., for the prosecution; Wilson, Wallis, and Co., for the defendant; Solicitor for the Treasury, for the Crown.]

Q.B. Div. (Lord Russell of Killowen, C.J., Wright and Kennedy, JJ.) 1898.
Aug. 8.

REG. V. SPILSBURY.*

Fugitive Offenders Act, 1881—Bail—Jurisdiction of the Court.

There is nothing in the Fugitive Offenders Act, 1881, which takes away the inherent power of the Court to grant bail in exercising the jurisdiction conferred by that Act.

This was an application for bail and also for a writ of *habeas corpus* on behalf of Major Spilsbury, against whom the police magistrate at Bow-street had made on August 1 an order directing him to be sent to Tangier to be tried at the Consular Court there on the charge that he, being a British subject, did, on or about January 13, 1898, on the Sus coast, within the territorial waters of the Empire of Morocco, in the steamship Tourmaline, with others to the number of three or four, unlawfully and riotously assemble, and riotously make an assault upon certain soldiers of the Sultan of Morocco by firing on the Sultan's ship Hassanie, and participating in an assault on the boats belonging thereto and at the time manned by such soldiers.

Mr. Cohen, Q.C., and Mr. Ellis Griffith, appeared for the defendant; the Attorney-General, Mr. H. Sutton, and Mr. Bodkin for the Crown.

The same question arose in this case as in "Reg. v. Hole"—namely, whether the Court had power to grant bail after an order had been made under the Fugitive Offenders Act, 1881. Major Spilsbury, a resident of London, at the time of the committal of the alleged offence was engaged by the Globe Venture Syndicate, and went in charge of the Tourmaline to the coast of Sus. To this place the Sultan's warship Hassanie also went, with the object of preventing the Tourmaline carrying on communications with the natives. The Sultan's army also came on the scene and some fighting between the tribes and the soldiers took place. The evidence brought before the magistrate comprised some depositions by the captain of, and other persons on board, the Hassanie, a letter from Major Spilsbury to the syndicate of January 19, 1898, and one witness. A full account appeared in *The Times* of August 2, and the broad facts appear in the judgment of the Court.

Mr. COHEN, for the defendant, urged that the evidence did not support the charge of riot. The defendant was on the Sus coast for the purposes of trade. The hostilities took place between the natives and the Sultan's soldiers. What was feared was that when the defendant should reach Tangier there would be a prosecution against him for the offence of importing arms, in respect of which three of his companions had been convicted already, and not for riot. It seemed as if the charge of riot was laid against him simply for the purpose of getting the order. Major Spilsbury had made an

affidavit that the feeling in Tangier was so strong against him that he was actually in danger of his life. A price had been set on his head and twice had attempts on his life taken place.

The ATTORNEY-GENERAL, interposing, said that there was no intention of trying Major Spilsbury on any other charge than that on which the order was based. The Chief Justice of Gibraltar would preside at the trial.

Mr. COHEN urged that the trial ought to take place at Gibraltar, where a jury might be called. That could not be the case at Tangier.

The ATTORNEY-GENERAL contended that the facts were sufficient to raise a "probable presumption that the defendant had committed the offence." He stated that in March, 1897, Major Spilsbury was informed by her Majesty's Minister at Morocco that his proposed conduct was illegal, and he was warned in respect of the very locality where all this occurred. As to the proposal that the trial should take place at Gibraltar he would wish to put in some affidavits on the subject. It would be dangerous to lay down the principle that bail could be granted after the order had been made. Dealing with the assertion that the defendant would be in danger in Tangier, he pointed out that he would be in English custody all the time till the trial.

The arguments took place on Saturday, August 6, and it was stated by the ATTORNEY-GENERAL that since then communications by telegram had taken place with Sir Arthur Nicholson, her Majesty's Consul-General at Tangier, who had replied that he could not imagine that Major Spilsbury would be in any danger, and that it would be difficult, if not impossible, to secure the attendance of witnesses from Tangier at Gibraltar. For that and other reasons he thought the trial should take place in Tangier before the Chief Justice of Gibraltar.

In the result the COURT refused bail, but ordered that the trial should take place at Gibraltar.

The LORD CHIEF JUSTICE said that this case presented different features to that of "Reg. v. Hole." The charge now was one of riotous assembly and riotous assault on the Sultan of Morocco's soldiers. The Fugitive Offenders Act, 1881, had been made applicable to the Sultan of Morocco's dominions by an Order in Council under section 36 of that Act. It was admitted that the offence charged was one in respect of which the Act authorized an order for the return of a fugitive offender. The main ground on which the application to the Court was based was that the evidence did not afford "a strong or probable presumption that the fugitive committed the offence." Now, it did not appear to him to be desirable, in the interest of the defendant, to enter minutely into the details of the case, but the broad facts were that the defendant was in charge of the Tourmaline, a vessel which was sent to the coast of Morocco by a trading syndicate. At Antwerp the defendant had purchased certain arms. He claimed to have treaties with certain independent tribes. Those tribes, however, were said to be within the jurisdiction of the Sultan. The Tourmaline appeared on the coast—not near any commercial port. Arms and tents of European manufacture were landed. The tribes met the defendant and three of his companions who had landed. The defendant returned to the vessel, leaving the others on shore. Presently there appeared a man-of-war belonging to the Sultan, which prevented access from the shore to the Tourmaline and from the Tourmaline to the shore. Fighting took place on the shore, and certain shots were fired from the Tourmaline. In the letter from the defendant, which was an important piece of evidence, he stated that he ordered his ship to be cleared for action. On these facts there was sufficient to justify the magistrate

*Reported by H. RUSSELL, Esq., Barrister-at-Law.

in making the order. They raised the "strong or probable presumption" mentioned in the section. The question of difficulty that then remained was this. Failing the success of the application to upset the order altogether, could the Court grant the defendant bail? This was apparently the first occasion on which the matter had come up for consideration. How was the matter to be viewed? Was it to be considered from the point of view which the counsel for the Crown put forward—namely, that the defendant had to show under what section of the statute the power was given to the Court. In other words, was the onus on the defendant to prove the existence of the power? He thought not. Apart from any statute the Court had a power to admit to bail. The matter should therefore be approached in this way—did the act expressly or impliedly do away with that power? He then cited a passage from Chitty's Criminal Law, p. 98, describing in wide terms the power of the Court to grant bail. Approaching the subject from the point of view that the power existed, was there anything in the statute to take it away? Nothing expressly did so. That was admitted. Did it do so by implication. If it did there would be the curious result that, though the magistrate might give bail during the whole of the possibly lengthened period of the inquiry and the Court of the country to whom the fugitive was sent might give bail also, yet the High Court could not grant bail when once the order of return was made. Applying the best judgment that he could to the point, he had come to the conclusion that unquestionably the Court had the power to grant bail. Some difficulties had been suggested if bail were granted. Suppose a man on bail refused to deliver himself up, it was said there was no power to arrest him. Even if that were the case, the answer to the objection was that proceedings might be recommenced against him, and a fresh warrant issued on which he might be arrested. This would cause delay, but the difficulty was not insuperable. The learned Chief Justice was of opinion that, though there might be difficulties in working the Act consistently with the power of the Court to grant bail, they were not of a very serious character. It was impossible to suppose that if the Legislature had intended to interfere with the ancient and well-known power of the Court to grant bail that it would have left it to implication only. The power, however, was one to be exercised with extreme care and caution and consideration of all the facts. The charge here was one of misdemeanour, but there was no right to demand bail. The order was a kind of intermediate order, and not like the committal by a magistrate of a prisoner to take his trial at assizes. It was an order preliminary to that. The inquiry before the magistrates only began when the fugitive was returned. Upon the question whether in the exercise of the Court's discretion bail should be granted or not, he had come to the conclusion, not without considerable doubt however, that in this case the Court ought not to grant bail. It would largely depend on the defendant himself how soon he should return. The Secretary of State had a month, it was true; but doubtless if the defendant applied for an early removal it would be granted to him. The only remaining point was whether the trial should take place at Gibraltar instead of Tangier. It was not only within the competence, but also within the duty of the Court, if they saw any reasons which should operate on them judicially for the trial taking place at Gibraltar, to give effect to them. Were there then any such reasons here? The affidavit of the defendant had not been contradicted. It was true that there had not been very much time to do it, but the distinct statement that there was no organized police force in Tangier had been telegraphed out there, and that was not contradicted. It would have been contradicted if wholly

untrue. Then it was said that there would be a difficulty in getting the witnesses to Gibraltar; but the distance was not very great, and, though the Court of her Majesty at Gibraltar had no power to enforce the attendance of foreign witnesses, the Court could not doubt that the Sultan of Morocco, at whose instance the prosecution was, could find means to secure their attendance if he desired them to be present. There were, for instance, the captain of the Hassanie and others who could very well be ordered to appear. It was clear that no jury could be summoned at Tangier. The defendant should have his chance of securing one at Gibraltar. The result was that the application to quash the order failed and that for bail must be refused, but the trial should be held at Gibraltar.

MR. JUSTICE WRIGHT concurred. He would add this—the decision that the Court had power under the Fugitive Offenders Act to grant bail would not apply to the Extradition Acts. In the present case there was no treaty to be considered. The Extradition Act merely provided a mode of carrying out a treaty, and therefore under the Extradition Acts the words of the treaty in each case must be considered.

MR. JUSTICE KENNEDY concurred, though he had had some considerable doubt as to the power to grant bail, owing to the difficulties pointed out. He agreed, however, that the statute had not taken it away.

[Solicitors—Hollams and Co., for the defendant; Solicitor for the Treasury, for the Crown.]

Q.B. Div. (Lord Russell of)
Killowen, C.J.)

1898.
Aug. 9.

JONES AND SONS V. SCULLARD.*

Master and servant—Liability of master to third persons—Hired coachman.

S., the owner of a horse and brougham, hired from a livery-stable keeper a coachman whom he supplied with livery. The coachman's wages were paid by the livery-stable keeper, who was paid by S. for his services. *Held*, that S. was liable for the negligence of the coachman in driving the horse and brougham.

Judgment was delivered in this case, which was tried before his Lordship and a special jury and reported in *The Times* of April 27. The action was brought to recover damages for injuries caused to the stock and premises of the plaintiff, a jeweller carrying on business under the name of Jones and Sons, at 368, Holloway-road, owing to the negligent driving of the defendant's servant. The jury found a verdict for the plaintiff for £350. A legal defence was set up that the man who drove the defendant on the occasion in question was not his servant, having been supplied by a livery-stable keeper, and it was contended that, therefore, the defendant could not be held liable. The case was reserved for further consideration, and argued on April 30.

MR. HAMMOND CHAMBERS, Q.C. (Mr. Woodin with him), for the plaintiff, contended that the test was the ownership, or rather the legal possession, of the horse. If the defendant was in legal possession of the horse then the driver was his servant. He cited "*Langher v. Pointer*" (5 B. and C. 547) (judgment of Littledale, J., p. 556), "*Brady v. Giles*" (1 M. and R. 494), "*Randleston v. Murray*" (8 A. and E. 109), and "*Quarman v. Burnett*" (6 M. and W. 499). The rule of law was that where a man was in possession of property he had to take care that it was so managed as

*Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

not to cause injury to other persons. The defendant was in possession of the horse and was consequently liable to see that it was so managed by the person who drove it as not to cause damage to other persons. He cited, further, "*Rourke v. White Cross Colliery Co.*" (2 C.P.D., 205) and "*Donovan v. Laing*" (1893] 19 B., 629), and argued that if a servant was lent by one person to another for a particular employment he was, for the time being, the servant of the person to whom he was lent. The facts showed that in the present case the driver was under the direction and control of the defendant.

Mr. WITT, Q.C. (Mr. J. Watson Moyses and Mr. E. E. Humphrys with him), for the defendant, contended that the defendant was not responsible for the acts of the driver inasmuch as he did not select him. The driver was, in fact, selected by the livery-stable keeper.

The LORD CHIEF JUSTICE.—There was a selection and approval exercised in continuing to have the same man.

Mr. WITT, Q.C.—There was an absence of disapproval.

The LORD CHIEF JUSTICE, in delivering judgment, said that, although this was only a running-down case, it had caused him considerable trouble and anxiety, and it was to be desired that the case should ultimately go to the Court of Appeal. The facts were these:—The plaintiff was a jeweller. On Jubilee Day a brougham, in the shafts of which was a horse, ran into his shop, causing damage to the window and its contents. The plaintiff at once cast about to see whether he had any remedy. He himself was entirely blameless. He discovered that in the brougham was the defendant and a lady friend; that the brougham belonged to the defendant; that the horse belonged to the defendant; that the harness belonged to the defendant; and that the boots, breeches, waistcoat, and hat worn by the driver had been supplied to him by the defendant; but that the person who was enveloped in all this had been supplied to the defendant by a man with whom he had placed his horse and carriage at livery. The plaintiff thereupon brought an action against the defendant. To this action the defendant replied:—"I am not the person responsible, because the man did not represent me, nor was he my servant, but he was the servant of another." The plaintiff alleged generally that the occurrence was caused by the negligence of those responsible for the brougham, horse, harness, &c., and he gave as particulars of the alleged negligence that the reins were fastened to the cheek of the bit, and not to the bar, the horse being a hard-mouthed horse and a puller, as the defendant and his servant ought to have known by inspection of the horse's mouth, which showed unmistakable signs of hardness caused by pulling; that the curb chain was not sufficiently tightened; that there was no brake on the carriage; and that the horse had recently been brought out of the country, was unused to London streets, and ought not to have been driven in London on such a day as Jubilee Day. The only question left to the jury was whether there was negligence, and they found that there was. The other questions were left to be decided by his Lordship, who was to have liberty to draw such inferences of fact as a jury could do so far as was necessary. The defendant's horse and carriage were liveried with a man named Walker, who was his tenant. The defendant was a publican, and Walker's stables adjoined one of his publichouses. The arrangement between the defendant and Walker began on January 3, 1897. The accident took place on Jubilee Day. On May 10 Loveday began to drive for the defendant and continued to do so up to and including the day of the accident. Loveday was not

selected by the defendant, but the proper inference was that the defendant told Walker that he required a man to drive and that Walker sent Loveday. Though it must be taken that there was no original choice by the defendant of Loveday, it was not unimportant to observe that there was evidence that the defendant showed satisfaction in, and approval of, Loveday. Though he had no power to dismiss Loveday from Walker's employment he could have said to Walker "You must not send me this man any more," and to Loveday, "I dismiss you from the occupation of driving my carriage." He did not, however, do so. About May 4 he ordered Loveday to be supplied at his own charge with a suit of clothes. It should be stated that the defendant paid Walker for Loveday's services, the latter's wages being paid by his employer, Walker. One other date was material. The horse which was driven in the brougham was brought to London from Yorkshire on June 16. Between that day and June 22 it was driven two or three times by Loveday. Those were all the material facts. In support of his particulars the plaintiff called a witness named Bowden, who described the pace at which the horse was going, suggesting that the driver had lost control, and then proceeded to describe the occurrence. Mr. Marcus Stevens, a veterinary surgeon, was called. He also described the pace of the horse and how the driver had lost control. He said, further, that the curb was loose and was not fastened on one side; that the reins were fastened to the cheek of the bit; and that, on examination, he found that the horse had a rank, hard mouth, with tumours growing. He also stated that the brougham had no brake, but then in London it was not always found necessary to have a brake upon a brougham. That was the plaintiff's case and it was met by the defendant by denials of all this evidence. The main contest was as to negligent driving by the driver, but it was impossible to say how far this evidence might, or might not, have affected the minds of the jury. The question now was, Were the circumstances such that it must be inferred that Loveday was the defendant's servant? It was impossible to say that there was not evidence of that to go to the jury. It was clear from the authorities that a man might be, in spite of the Scriptural proposition, in the position of serving two masters. While serving Walker generally, Loveday might still have been in the particular employment of the defendant. But for the leading authorities on the subject, his Lordship would not have felt the perplexity he had felt about this case. But not one of the cases cited was on all fours with it. In no one case did there occur the same conjunction of facts—namely, that the ownership of the horse, carriage, harness, and livery was in the defendant; nor did it come into the consideration of any one of these cases that the horse was one to which the driver had not been previously accustomed, nor that part of the negligence alleged was the manner in which the horse was bitted, looking to the hardness of its mouth. His Lordship then referred at considerable length to "*Laugher v. Pointer*," "*Brady v. Giles*," and "*Quarman v. Burnett*." The latter case, he said, presented great difficulty. Two old ladies hired a carriage and horses from a jobmaster. Whenever they went out in the carriage the same man drove them. This man was dependent for payment upon the tips which the old ladies bestowed on him, which were 5s. for each drive. The old ladies wishing him to present a respectable appearance supplied him with a coat and hat, and as they wished to guard against his using these garments elsewhere they directed him to come into the house and change before and after each drive. On one of these occasions, while the man was in the house changing his coat and hat, the horses

ran away and did damage for which the ladies were sued. One would have thought that, considering the particular occupation in which the man was engaged at the time, the old ladies would have been responsible, but the Court held not. The jury found a verdict for the plaintiff, which was afterwards set aside on the ground that there was not even evidence to go to the jury. That was a strong authority in favour of the defendant. Yet the defendant's case differed from that in a marked degree. Here the horse was the defendant's horse, and it had only recently been acquired by him. Why was the fact that the horse belonged to the defendant material? Because so long as the hirer merely said to the livery-stable keeper "Supply me with an equipage complete for an hour, a day, or a week" he had no kind of control over the driver except in one particular—he could indicate to what point he wished to go. He could not order the man to go fast or slow, for the driver might say, "I am not your servant. I know my master's wishes with regard to the horse, and I will go accordingly." But the case was different where the horse belonged to the hirer. He could say "I am late; drive fast up hill or down." If the man refused to obey he could say to the livery-stable keeper, "I will not have that man any more." Again, in the present case, the horse had just been brought from Yorkshire. There were the peculiarities of the horse to be known and attended to. All those were elements showing what was the position of the driver with regard to the management of that horse and carriage and showing that he was in that particular servant of the defendant. His Lordship then referred to "Rourke v. White Moss Colliery Company," in which it was held that contractors who agreed to do the sinking of a shaft for a colliery company were responsible for the negligence of the engineer of the engine at the mouth of the shaft belonging to the colliery company, such engineer and engine having been placed under the control of the contractors for the purpose of the work only, and to "Donovan v. Laing," the facts in which were similar. His Lordship found it difficult to reconcile these two cases with the other cases referred to. Continuing, he said it was time that a comprehensive and intelligible principle was laid down. If the livery-stable keeper supplied a vehicle for a fixed time the hirer ought in no sense to be responsible, but where the carriage, horse, harness, and livery were the property of the hirer, especially where the horse had peculiarities and the driver had only driven it for a short time, and where the driver had been approved of by the hirer—in all this congregation of circumstances, if the question had been put to the jury, Whose servant was this man?—would they not have said, Not the servant of the livery-stable keeper, but of the hirer? In his Lordship's judgment the defendant was liable either singly or jointly with the driver. He would grant a stay of execution pending an appeal.

Prob., Divorce, and Adm. Div. (The
Right Hon. the President, Sir Francis
Jeune)

LA BOURGOGNE.*

1898.
Aug. 9.

Admiralty—Practice—Writ—Service—Motion to
set aside service—Foreign corporation carrying
on business within the jurisdiction.

This was a motion on behalf of La Compagnie

Générale Transatlantique to set aside the service of a writ on M. Paul Fanet, their agent in England. The plaintiffs were the owners of the sailing ship Cromartyshire and had brought an action against La Compagnie Générale Transatlantique, the owners of the steamship Bourgogne, to recover damages arising out of a collision between their ship and La Bourgogne in the Atlantic on July 4 last. In the collision the Cromartyshire was seriously damaged and La Bourgogne was totally lost and a great many of the passengers and crew were drowned. The plaintiffs served the writ in the action on M. Paul Fanet, the agent of the company at the company's office in Leadenhall-street. The defendants now moved the Court to set aside the service of the writ on the ground that the defendant company was a foreign corporation having its seat in France, and did not carry on business within the jurisdiction of this Court. The motion was heard by the President on July 27, when judgment was reserved.

Mr. Pyke, Q.C., Mr. Walton, Q.C., and Mr. F. Laing appeared for the defendants; Sir Robert Reid, Q.C., Mr. Aspinall, Q.C., and Mr. A. E. Nelson appeared for the plaintiffs.

The PRESIDENT, in delivering the following considered judgment, said,—The question to be decided is whether a good service has been effected under Order 9, rule 8, and that turns on the point whether this company is carrying on business in England as well as in France and perhaps elsewhere. It was not disputed before me that Order 9, rule 8, is applicable in the case of a foreign company which carries on business in this country. The service of the writ was made on a M. Paul Fanet, and I do not think it can be denied that if the company carries on business in England he comes within the list of persons enumerated in the rule, especially having regard to the case of "Newby v. Von Oppen" (7 Q.B., L.R. 293) which was given with reference to identical words in section 16 of the Common Law Procedure Act, 1852. Therefore all I have to decide is whether this French company carries on business in England. In a general and popular sense of the words I think it is unquestionable that it does. The office of the defendants at 36, Leadenhall-street is leasehold, the company being the lessees named in the lease and, as part of an arrangement which they have with M. Fanet, paying the rent. In their official guide the company describe this office as one of their "bureaux," and they advertise that applications for freight and passage may be made to the company's agent—Paul Fanet, 36 and 37, Leadenhall-street. I think this matter turns on rather broader considerations. The company sends its ships to trade between French and English ports, and it is clear that any person who wishes to send goods or take passages by them can go to 36, Leadenhall-street, make a contract for such freight or passage with M. Fanet on behalf of the company, and pay to M. Fanet for the company whatever is due in respect of such contract. In other words the company, in the only way in which it can by the hands of a representative, makes contracts and earns profits in England, and that, I think, presents the fact of a company carrying on business in England as a matter of law and a matter of common sense. His Lordship then discussed the following cases:—"Minor v. London and North-Western Railway Company" (1 C.B., N.S., 325); "Nutter and Co. v. Messageries Maritimes de France" (54 L.J., Q.B. 527); the "Princess Clémentine" ([1897] P. 18); and continuing said,—There were several facts upon which it was argued before me that M. Fanet was in the same position as Messrs. Barr, Moering, and Co. in the case of the "Princess Clémentine." It appears from correspondence between M. Fanet and the French

*Reported by H. STUART MOORE, Esq., Barrister-at-Law.

company that before September, 1895, the company had had "direct agencies" in London and Liverpool, M. Fanet being their agent-general, but that after that date the agency became a "corresponding agency," and that, under new arrangements, while the company paid the rent of the offices, legal expenses, and income-tax chargeable to the company (a turn of the agreement which certainly pointed to the expectation of profits being made by the company in this country), and the cost of advertising and supplying the company's printed forms, M. Fanet provided the other expenses of the office, including the salaries of clerks, and received commission on freights and passages with the *minimum* yearly guarantee of 18,000 francs, which might be drawn monthly. At the office in Leadenhall-street M. Fanet not only acted as agent to the French company, but also for two other companies whose names appeared on brass plates at the office. But to my mind these facts are not sufficient to outweigh the broader considerations which arise in this case—viz., that the office is in law and in fact the office of the company, though M. Fanet may be permitted to carry on other business as well as theirs there, and that the business of the company was carried on there precisely in the same way as if some one undoubtedly an officer of the company and nothing else, was in possession. I am of opinion, therefore, that the business of the French company was carried on at 36 and 37, Leadenhall-street, and that service on M. Fanet was good service on the company under Order 9, rule 8. I do not think it necessary to refer further in detail to authorities as every case must depend upon its own facts, but I will say that the view I take with regard to the defendants is substantially the same view as was taken by Vice-Chancellor Bacon, with regard to the defendants in the case of "Lhoneaux, Limon, and Co. v. Hong-kong and Shanghai Banking Corporation" (33 Ch. D., 446). In that case the defendants had an "agency" in London and were, indeed, forbidden to establish a "branch," but the Vice-Chancellor said "they hire an office, write up their name, and beyond all question stamp upon themselves and their place of business here the assumption that here they are carrying on their business." I think that those words are applicable in the present case, and that, therefore, the motion to set aside the writ or the service of it must be dismissed with costs.

[Solicitors—Lowless, Nelson, and Co., for the plaintiffs; Ince, Colt, and Ince, for the defendants.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J.) Aug. 10.
JOHN V. JOHN.*

Practice—Receiver—Ejectment action—"Just and convenient"—Judicature Act, 1873, sec. 25, subs. 8.

This appeal against a decision of Mr. Justice North raised a question of importance as to the appointment of a receiver in an ejectment action. The plaintiff in this action claims to be entitled to some real estate in Cornwall, as tenant in tail male, by virtue of the will of George John, his great-grandfather, who died in 1847, and some other wills of later date. For the period from 1850 up to his death in January last one George Dennis Trevelyan John, another great-grandson of the testator, was in possession or receipt of the rents of the property. The plaintiff alleges that under the testator's will George Dennis Trevelyan John was only tenant for life of the

property. The defendant, who is the mother of George Dennis Trevelyan John, upon his death entered into receipt of the rents of the property, and induced the tenants to attorn to her. She alleges that under the will of the testator her son was absolutely entitled to the property, and that by his will her son devised it to her. The plaintiff moved for the appointment of a receiver of the rents. Mr. Justice North held that a proper case had been shown for the appointment of a receiver, and made the appointment accordingly. The defendant appealed.

Mr. HALDANE, Q.C., the HON. E. C. MACNAGHTEN, Q.C., and Mr. T. H. CARSON, for the defendant, relied upon the decision of the Court of Appeal in "Foxwell v. Van Grutten" ([1897] 1 Ch., 64) as showing that in such a case a receiver ought not to be appointed.

Mr. Swinfin Eady, Q.C., and Mr. Stock were for the plaintiff.

The COURT dismissed the appeal.

The MASTER of the ROLLS said that he did not think the Court would be introducing any revolutionary practice if they affirmed the decision of Mr. Justice North. The only difficulty arose out of the case of "Foxwell v. Van Grutten." The first thing to be done was to look at section 25, subsection 8, of the Judicature Act of 1873, which empowered the Court to appoint a receiver by interlocutory order "in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The Court had therefore to consider in each case whether it was "just and convenient" to appoint a receiver. The Court must have regard to all the circumstances of the case. The position of the tenants should (among other things) be taken into account, and also the title of the defendant, if he chose to disclose it. His Lordship did not at present believe in the title of this defendant. He might be converted hereafter. And he did believe in the plaintiff's title. In his opinion it was right to appoint a receiver.

LORD JUSTICE CHITTY thought it was "just and convenient" in the circumstances of the present case that a receiver should be appointed. This was the function which the Legislature had cast upon the Court. One element to be considered was the position of the tenants, who were exposed to a double claim. The plaintiff might have a right to distrain upon them for rent. At any rate, the tenants were in jeopardy. But his Lordship did not rest his decision upon that alone. The defendant had shown no title to the property. His Lordship was (as the Master of the Rolls had said) liable to be converted as to this. The defendant was not in actual possession of a mansion house from which she would be turned out by a receiver. She was a person of small means living in furnished rooms. The rents were in jeopardy; the tenants were exposed to risk; and the title of the defendant was very doubtful. On these grounds his Lordship thought that a receiver should be appointed.

LORD JUSTICE COLLINS gave judgment to the same effect.

[Solicitors—Collyer-Bristow, Russell, Hill, and Co.; Coode, Kingdon, and Cotton.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) Aug. 10.
MARBOW V. FLIMBY AND BROUGHTON MOOR COAL AND
FIRE BRICK COMPANY (LIMITED).*

Master and Servant—Master's liability to servant
—Employers' Liability Act, 1880, sec. 8—

*Reported by W. L. CARROLL, Esq., Barrister-at-Law.

*Reported by F. G. BUCKLE, Esq., Barrister-at-Law.

Employers and Workmen Act, 1875, sec. 10—
"Workman," who is.

This was an appeal by the plaintiff from the judgment of a Divisional Court (Mr. Justice Wills and Mr. Justice Kennedy) setting aside the verdict and judgment in the County Court and entering judgment for the defendant. The action was brought by the plaintiff, as administratrix of her late husband, under the Employers' Liability Act, 1880, and Lord Campbell's Act to recover damages for his death. The jury in the County Court found a verdict for the plaintiff for £234 damages, but the Divisional Court entered judgment for the defendants upon the ground that there was no evidence that at the time of the accident the deceased man was in the employment of the defendants, he being in the employment of an independent contractor. The plaintiff appealed. The facts and arguments are fully stated in the judgment hereunder.

Mr. Ruegg, Q.C., and Mr. Henry appeared for the plaintiff; Mr. F. A. Greer appeared for the defendants.

The COURT, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—The question in this appeal is whether there was any evidence to go to the jury that the plaintiff's husband was a workman in the employment of the defendants within the meaning of the Employers' Liability Act, 1880, when he met with the injury which caused his death. The jury, under the directions of the learned County Court Judge, have found for the plaintiff, with damages £234; but my brothers Wills and Kennedy have set that verdict aside, and have held that there was no evidence to support it; and the plaintiff now appeals. The action was brought by the plaintiff, as administratrix of her late husband, in the County Court under the Employers' Liability Act, 1880, coupled with Lord Campbell's Act, to recover damages for the death of her husband. There was added to the plaintiff a claim founded upon common law negligence. The learned County Court Judge informs us that this claim was not abandoned, and whatever rights the plaintiff may have at common law are left untouched by this judgment, and she is to be at liberty to proceed at common law, if so advised. It may be taken as a fact that the plaintiff has given evidence of all the requirements necessary to support an action for damages by a workman against his employer under the Employers' Liability Act with this one exception: it is said, and the Queen's Bench Division has held, that she has given no evidence that her deceased husband was at the time of the accident a workman in the employment of the defendants, and, what is more, that the facts of the case show that he was not such a workman at the time of the accident. By the Employers' Liability Act, 1880 (43 and 44 Vict., c. 42), which is an Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service, it is enacted by section 8 that "the expression 'workman' means . . . any person to whom the Employers and Workmen Act, 1875, applies"; and by section 10 of this latter Act (38 and 39 Vict., c. 30) "the expression 'workman' . . . means any person who, being a labourer, . . . miner, or otherwise engaged in manual labour, . . . has entered into or works under a contract with an employer, whether the contract . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." It seems to me that the words "or works under a contract with an employer" were inserted into

the section to meet the case of a workman who has not contracted directly with an employer, but has been engaged by an agent of the employer to work for the employer—*videlicet*, by a butty man or a ganger—or to meet the case of an apprentice or similar cases. Now the facts are these. In the month of November, 1896, the defendants were desirous of sinking a shaft at their colliery, and they sent out tenders for this work, and upon the 16th of the month they entered into a contract in writing with a man named Evans, who had tendered for the work, and who was what is called a pit-sinker. By this contract Evans undertook to sink No. 1 shaft at the defendants' colliery. He was, as therein is provided, in certain instances to execute some of the works under the orders and supervision of the manager of the mine. By this contract Evans (who throughout is designated as the contractor) was to provide such sinkers, banksmen, &c., as might be necessary, and he undertook to have not less than one chargeman and five others employed at the pit bottom on each shift. Evans had to pay the wages of the men he employed, and the defendants had to pay Evans for the shaft as it progressed the sum of £12 12s. per fathom sunk. Evans, after paying the wages of the men he employed upon this work and after paying for the other matters which he had contracted to supply, made his profit over the job out of what remained of the £12 12s. per fathom after making the payments above mentioned. The deceased man was employed by Evans upon this job as a sinker, and was paid by Evans the sum of 5s. per diem for so working. In these circumstances the question is whether there is any evidence that the deceased man was a workman in the employment of the defendants when he met with the accident he did whilst working as above stated at 5s. per diem for Evans. I do not go through the written contract between Evans and the defendants, clause by clause, for this has already been done by my brother Kennedy. All I would add is that the word "wages" used in clause 8 in no way appears to me to show that Evans was not a contractor with the defendants, as the written contract throughout shows that he was, for this word refers to the wages of the men employed by Evans and not to Evans's wages, as it was argued, for he, as I have said, had to look to his profit and not to wages for his remuneration. I have not the slightest doubt that this contract between Evans and the defendants is a contractor's contract; in other words, that under it Evans contracted as a contractor to sink the shaft for the defendants, and it is to me clear that the deceased man was the workman of the contractor, Evans, who employed him, and not the workman of the defendants, who in fact never employed him, nor was he employed by Evans on the defendants' behalf. I would ask upon the above facts, Who could the deceased man have sued for his wages, Evans or the defendants? There can be but one answer—*viz.*, Evans, and not the defendants, for the simple reason that he was the workman in the employment of Evans, and not of the defendants. It is clear to me that, unless there be evidence *ultra* the written contract to show that the deceased man was a workman in the employment of the defendants, the learned County Court Judge, upon proof of this written contract, ought to have directed judgment for the defendants, for, unless the plaintiff gave evidence that her deceased husband was the workman of the defendants at the time of the accident, her action under the Employers' Liability Act obviously fails. Now what evidence is there outside this contract that Evans engaged the deceased man for and on behalf of the defendants so as to constitute him a "workman who has entered into or works under a contract with" the defendants as his employers? In my judgment

there is no pretence for saying that Evans was in the position of a butty man or ganger, who are not obviously contractors, and I have not therefore to discuss such a case as that of "Brown v. Butterley Coal Company" (53 L.T., N.S., 964), nor the Scotch case of "Morrison v. Baird" (10 Rettie, 271), referred to therein, in which it was averred in the pleadings that the contractor was authorized to engage men for the colliery. But it was argued for the plaintiff that the Coal Mines Regulation Act, 1887 (50 and 51 Vict., c. 58), coupled with the rules in the Act and the special rules which were applicable to the defendants' mine for the conduct and guidance of persons acting in the management of the mine, afforded evidence of the relationship of workman and employer, and not that of contractor and principal, between Evans and the defendants, and was thus evidence of the relationship of workman and employer between the deceased man and the defendants. It was argued thus:—It was said that by section 75 of the Coal Mines Regulation Act, 1887, as also by the special rules, the word "mine" included every shaft in the course of being sunk; that the certificated manager, by rule 2 of the special rules, had to appoint such competent persons as might be necessary for carrying out the provisions of the Act; that by rule 174 and the following rules as regards sinkers there must be a chargeman in each shift who should have full charge of the sinking operations; that Evans filled this post of chargeman over the sinkers, and therefore it was said that Evans was placed under the control of the defendants when acting as chargeman. Suppose this to be so—and as regards the duties of chargeman which Evans had to perform I think it was so—how is this material unless the control of the defendants over Evans be such as to alter the contractual relations between Evans and them from that of contractor and principal to that of workman and employer? Of this, in my judgment, the Act and rules do not afford a scintilla of evidence. The statutory control given by the statute and rules over persons in the mine does not in any way alter the relationship of the contracting parties *inter se*; they simply give control by the mine-owner over persons in the mine so as to enforce the prescribed regulations for carrying on without danger the mining operations. It was at one time suggested in argument for the plaintiff that, by reason of the Coal Mines Regulation Act and rules, there could not exist in a mine the position of a contractor and mineowner, for every one therein was contemplated by the Act and rules to be in the position of workman towards the mineowner; but Mr. Greer, in his excellent argument, very soon pointed out that this was not so, and he referred to sections in the Act, and especially to section 8, subsection 2, which showed that the point is untenable. His Lordship then referred to another alleged piece of evidence in support of the plaintiff's case which he said the facts failed to support, and continued:—As there was no evidence, so far as the contract of November 16, 1896, is concerned, of the deceased man being a workman in the employment of the defendants when he met with the accident, and there was no evidence dehors the contract of his having been so, in my judgment there was no evidence to go to the jury in support of the plaintiff's case, and I think that my brothers Wille and Kennedy came to a correct conclusion, and that this appeal must be dismissed with costs.

LORD JUSTICE RIGBY and LORD JUSTICE VAUGHAN WILLIAMS delivered judgment to the same effect.

Solicitors—Wood and Wootton, for T. Milburn, Workington, for the plaintiff; A. Toovey, for Lightfoot and Lightfoot, Maryport.]

Court of Appeal (A. L. Smith, Rigby, } 1898.
and Vaughan Williams, L.J.J.) Aug. 10.

ATTORNEY-GENERAL V. EARL GREY.*

Revenue—Estate duty—Gift *inter vivos*—Settlement—Reservation of interest to settlor—Duty payable on death of settlor—Finance Act, 1894, secs. 1 and 2 (1).

Decision of Divisional Court (*ante*, p. 123 and [1898] 1 Q.B., 318) affirmed.

This was an appeal by the defendant from the judgment of a Divisional Court (Mr. Justice Grantham and Mr. Justice Channell) holding the defendant liable upon an information by the Attorney-General for estate duty under the Finance Act, 1894 (reported *ante*, p. 123; ([1898] 1 Q.B., 318). The information was to the following effect:—By a deed dated October 19, 1885, made between Henry (third) Earl Grey (since deceased) of the one part and the defendant, then Albert Henry George Grey, Esq., of the other part, reciting that the said Henry Earl Grey was absolutely seized of or entitled to considerable family estates and to other estates and real property purchased or acquired by him in the county of Northumberland, but that a portion of the said estates was subject to several life annuities amounting to £2,200 a year, and reciting that another portion of the said estates was subject to a mortgage of £200,000, and reciting that the said third Earl Grey was also possessed of personal estate, comprising arrears of rent, &c., and the furniture and effects in and about the mansion-house in which the earl then resided at Howick, and farming stock, crops, and other effects, and reciting that the defendant, Albert Grey, was a nephew of the said third Earl Grey and heir-presumptive to the peerage, and that the said Earl Grey was desirous of giving his real and personal estate to the said Albert Grey; it was witnessed that in consideration of the natural love and affection which the said earl bore to his nephew, and for other considerations therein appearing, the said earl did thereby convey to the defendant all the real estate of him, the third earl, and all leaseholds and terms of years (if any) belonging to him, to hold the same to the defendant in fee simple, subject nevertheless as to the parts of the property charged therewith to the payment of the said annuities and to the mortgages affecting the same, to the use that the third Earl Grey should thenceforth during his life receive an annual rent-charge of £4,000, to be issuing out of the said hereditaments (other than such parts as the third Earl Grey was to occupy and enjoy under the trusts thereafter declared), and subject to this rent-charge all the hereditaments thereby conveyed were to be held to the use of the defendant in fee simple, but as to the said mansion-house at Howick and the premises to be enjoyed therewith subject to the trusts thereafter contained, and as to the leaseholds, &c., for the whole term or interest of the said third earl therein. And it was also witnessed that the third Earl Grey did thereby assign unto the defendant all rents owing, and also all furniture and effects in or about the said mansion-house and premises at Howick, and all stock, crops, effects, and other the personal property of the third Earl Grey other than money at his bankers' or elsewhere, and private papers, his wardrobe, and effects in his own personal use, to hold the premises thereby assigned to the defendant subject to the trusts in the deed for his own use. And it was declared that the mansion-house at Howick, together with the gardens, &c., as then occupied by the third earl should be held upon trust to permit him to occupy

*Reported by F. G. RUCKER, Esq., Barrister at-Law.

and enjoy the same during his life. And the defendant covenanted with the third earl that he would (1) pay the annuities charged on the property; (2) pay the mortgage debt of £200,000 and other charges on the property; (3) pay to the said third Earl Grey the said annual rent-charge of £4,000; (4) at the cost of the defendant keep the mansion-house and buildings at Howick insured, and maintain it in repair and manage the garden; (5) supply to the third earl (free of cost to him) all such farm and garden produce as he might require for consumption at the mansion-house; (6) pay at the death of the third earl his funeral and testamentary expenses, and also all the debts of the third earl to the full exhaustion of all the property, real and personal, of the third earl; (7) retain unsold and farm certain lands at Howick. And it was provided that in the event of the defendant's dying in the life term of the third earl or of any breach by the defendant of any covenant therein contained it should be lawful for the said third Earl Grey to revoke the deed, either wholly or in part, but save in the event aforesaid the deed was to be irrevocable, but any revocation under that power was to be without prejudice to the title of any purchaser or mortgagee from the defendant under a sale or mortgage made previously to revocation. By an indenture, dated September 26, 1894, between the same parties the third Earl Grey, in consideration of £5,000, conveyed and released to the defendant the rent-charge of £4,000 per annum, and released the covenant to retain unsold and to farm the lands near Howick, to the intent that the lands charged with the payment of the £4,000 per annum might be released, and the deed also did away with the power of revocation. The third Earl Grey died on October 9, 1894. The average net annual income of the property comprised in the deed was very considerably in excess of £4,000. The Crown claimed estate duty on the principal value of the whole of the property comprised in the said deed, as being property passing on the death of the third earl within sections 1 and 2 (1) (c) of the Finance Act, 1894, which incorporates section 38 of 44 and 45 Vict., c. 12, as amended by section 11 (1) of 52 and 53 Vict., c. 7. The defendant contended that no such duty was payable, though he had paid duty in respect of the mansion-house and the effects therein. The Divisional Court held that estate duty became payable as claimed, and gave judgment for the Crown. The defendant appealed.

Mr. Cozens-Hardy, Q.C., and Mr. Bremner appeared for the defendant; the Attorney-General (Sir R. E. Webster, Q.C.), the Solicitor-General (Sir R. B. Finlay, Q.C.), and Mr. Vaughan Hawkins appeared for the Crown.

The Court, having taken time to consider, delivered judgment dismissing the appeal.

LORD JUSTICE A. L. SMITH read the following judgment:—In my opinion the Crown succeeds in this case, and the appeal by the present Earl Grey fails. By the Finance Act of 1894, not only property which passes upon death, but also property which shall be deemed within the meaning of the Act to pass upon death is made liable to estate duty; and the question is, whether the property upon which the Crown claims duty in this case is property which is deemed to pass within the meaning of the Act upon the death of the late Earl Grey, which took place on October 9, 1894. By deed bearing date October 19, 1885, the late earl, in consideration of the natural love and affection which he bore to his nephew, the present Earl Grey, conveyed to the present earl, the defendant in this information, all his manors, messuages, farms, lands, rent-charges, and other hereditaments, and all leaseholds belonging to the late earl, in fee simple, to the use that the late earl should during his life receive an annual rent-charge of £4,000 a year issuing out of the hereditaments thereby

conveyed, and should be also entitled during his life to occupy and enjoy that part of the hereditaments which consisted of the mansion house at Howick and its appurtenances, together with the furniture, plate, books, pictures, and articles of household use or ornament, wines, stores, garden implements, horses, carriages, and other things whatsoever in or about the said mansion house and premises. By this deed the present earl covenanted with the late earl to pay certain annuities and mortgage and bond debts, and to indemnify the late earl and his estate from all loss and damage in respect thereof, and to pay the late earl the annual rent-charge of £4,000 per annum, and at the death of the late earl to pay his funeral and testamentary expenses, including all stamp and other duties, and also the debts of the late earl to the full exhaustion of all the property, real and personal, of the late earl. By this deed it was provided that, in the event of the present earl dying in the lifetime of the late earl or of any breach by the present earl of any of the covenants on his part therein contained, it should be lawful for the late earl to revoke the said deed, either wholly or in part, but save as aforesaid the said deed was to be irrevocable, and it was stipulated that any revocation under the power was to be without prejudice to the title of any purchaser or mortgagee from the present earl under a sale or mortgage made previously to such revocation. The above is a sufficient statement of the deed to raise the point which I have in hand; it will be found set out at length in the information in this case. By an indenture made on September 26, 1894, between the late and present earl, the late earl, two weeks before his death, which occurred, as I have said, on October 9, 1894, in consideration of £5,000 paid to him by the present earl released unto the present earl the rent-charge of £4,000 a year, as also the power of revocation contained in the indenture of October 19, 1885; but, as I understand, the late earl remained in possession of the mansion house and its amenities, as by the deed of October 19, 1885, is provided, until his death. The question is whether the property contained in the indenture of October 19, 1885, was property which is deemed to pass upon the death of the late earl within the meaning of the Finance Act of 1894 so as to be liable to estate duty. That brings me to section 2 (1) (c) of the Act of 1894. By it "property passing on the death of the deceased shall be deemed to include . . . property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." In "Attorney-General v. Beech" ([1898] 2 Q.B., 147) I commented upon this class of legislation, and I have nothing further to say thereon. Now, what is it that section 38 of the Customs and Inland Revenue Act of 1881, as amended by section 11 of the Customs and Inland Revenue Act of 1889, as amended by the Finance Act of 1894, has enacted? Section 38 (2) of the Act of 1881 so amended must for the present purpose be read as follows:— "Any real, personal, or movable property to be included in an account shall be property of the following descriptions—viz., (a) any property taken under a disposition made by a person dying after August 1, 1894, purporting to operate as an immediate gift *inter vivos* . . . which shall not have been *bona fide* made 12 months before the death of the deceased—this clause does not apply to the present case—or property taken under any gift whenever made—this means whether made within or without 12 months before death—of

which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.¹ In my judgment the meaning of this section is that, if there be a gift, no matter when made, of property *inter vivos*, then that property must be included in an account and therefore liable to estate duty, unless the donee has *bona fide* assumed possession and enjoyment of the property immediately upon the gift and has thenceforward retained the possession and enjoyment thereof to the entire exclusion of the donor, or, if he has taken and retained the possession to the entire exclusion of the donor, then that this possession and enjoyment has been without any benefit by contract or otherwise to the donor. To escape estate duty both these events must concur. This being my opinion as to the true construction of section 38 (2) (a) of the Customs and Inland Revenue Act of 1881, as it now stands incorporated into section 2 (1) (c) of the Finance Act of 1894, how upon the facts of this case can it be said that the present earl, the donee, has either *bona fide* assumed possession immediately upon the gift, or has thenceforward retained the possession and enjoyment of the property contained in the deed of October 19, 1885, to the entire exclusion of the late earl, the donor, or that he has done so without any benefit by contract or otherwise accruing to the donor, the late earl? That the present earl, the donee, has contracted with the late earl, the donor, to pay him £4,000 a year as well as to bear the other liabilities of the late earl, as appears by the deed of October 19, 1885, for the benefit of the late earl cannot be disputed; and, whichever limb of the subsection be taken, in my judgment this case comes within it, and therefore falls within the description of property deemed to pass within section 2 (1) (c) of the Act of 1894, and consequently estate duty is payable. It was argued by the Crown that the case also falls within subsection (c) of section 38 (2) of the Customs and Inland Revenue Act of 1881, and that under this subsection the property was chargeable with estate duty as being property which was deemed to pass within section 2 (1) (c) of the Act of 1894. This may well be so, but as in my opinion section 38 (2) (a) of the Act of 1881 is fatal to the appellant, the present earl, it is unnecessary in this case to give a judgment as to the meaning of subsection (c), and I therefore say nothing about it. In my judgment the Crown succeeds, and the appeal must be dismissed, with costs.

LORD JUSTICES RIGBY and VAUGHAN WILLIAMS delivered judgments to the same effect.

Q.B. Div.
(Kennedy, J.) }

1898.
Aug. 10.

THE BECHUANALAND EXPLORATION COMPANY (LIMITED)
V. THE LONDON TRADING BANK (LIMITED).*

Negotiable Instrument—Debentures—Transfer by delivery—Usage—Deposit to secure advances.

Judgment was delivered in this case. The action was brought to recover 20 debentures of the Beira Junction Railway (Limited) for £100 each. These debentures were stolen from the plaintiffs by their secretary, one Evans, since deceased, and deposited by him with the defendants in the ordinary course of business to secure advances made to him by the defendants. By their defence the defendants pleaded that the debentures were issued subject to the

condition that they should be transferable by delivery if not registered, and that it is the custom of merchants, bankers, and others to buy and sell such debentures and to advance loans of money upon the security of them by mere delivery as negotiable instruments transferable by delivery; that the plaintiffs, having allowed the debentures to be in the power of Evans, were estopped from denying that the debentures were transferable by delivery.

Mr. Cohen, Q.C., and Mr. J. A. Hamilton appeared for the plaintiffs; Mr. Joseph Walton, Q.C., and Mr. Scrutton for the defendants; Mr. Douglas-Pemberton held a watching brief on behalf of Lord Gifford.

MR. JUSTICE KENNEDY, in the course of reading an elaborate written judgment, said,—The main issue, and in my view really the sole issue, in the case is whether these debentures ought or ought not to be treated as negotiable instruments so as to give the defendants, who became *bona fide* holders for valuable consideration, a good title to the extent of their advances to Evans upon the debentures as against the plaintiffs, who claim to recover the property of which Evans fraudulently deprived them. The debentures are, according to their tenor, payable to bearer or, when registered, to the registered holder for the time being on presentation of the debenture. Endorsed upon each of them are several printed conditions. The third, fourth, fifth, and sixth of the conditions are in substance as follows:—(3) Except when registered this debenture is transferable by delivery, but the company will at any time, upon the request of the bearer whilst unregistered, register him and his nominee in the register below mentioned as the holder of this debenture, and endorse a note of such registration thereon, and the company will also at any time, upon the request in writing of the registered holder, his executors or administrators, cancel the registration and the note thereof endorsed thereon, and thereupon this debenture will again become transferable by delivery. The fourth condition provides for the register, and the fifth for the registration of debenture-holders therein. Under the sixth condition every transfer of the debenture when registered is to be in writing under the hand of the registered holder or his legal personal representative, and before registration of the transfer proof must be given to the company of the title and identity of the transferee. The 11th condition provides that the principal moneys shall immediately become payable if a certain default is made in due payment of interest or a winding-up order is made or a resolution is passed otherwise than for purposes of reorganization, reconstruction, or amalgamation. Now, it is, I think, unquestionable, and it was not disputed at the Bar, that such a debenture as this, if viewed according to its tenor, merely and without regard to mercantile usage, does not belong to the class of negotiable instruments which the law has recognized as such, by virtue either of the ancient law merchant or by virtue of statute (such as bills of exchange, promissory notes, and Exchequer bills), and the delivery of which confers a good title to the person who acquires them in good faith and for value, notwithstanding a defect in the title of the transferor. It is most like a promissory note payable to bearer; but it is prevented from ranking as such by its conditions. Evidence was, however, adduced by the defendants of a usage of the mercantile world in recent times to treat "debentures to bearer" of this kind as negotiable instruments; and the defendants contend that if I am of opinion that the usage has been proved I ought to recognize and give effect to it by upholding their title to these debentures. The plaintiffs contend that the usage has not been proved; they further contend, as a matter of law, that evidence of it was not properly

*Reported by J. E. ALDOUS, Esq., Barrister-at-Law.

receivable; that, even if the custom was proved, it cannot, being of recent introduction, be treated as part of that law merchant which Courts of Justice are bound to know and recognize. There are therefore to be decided two distinct questions—the first of fact; the second of law. Is there a usage of the mercantile world to treat such debentures as negotiable instruments, passing like promissory notes or bank-notes by mere delivery from hand to hand accordingly? If there is such a usage, ought it in a Court of law to have the effect of attaching the quality or incident of negotiability to the contract contained in the debenture, so that the property in that chattel and all rights upon it may, upon delivery of it, be acquired by a person who is not the owner? His Lordship then reviewed the evidence and said:—Upon the question of fact, I am of opinion the defendants have sufficiently proved the usage of merchants which they sought to establish, both in point of extent and duration. Indeed, in respect of duration, I am led by what appears in the report of “*Crouch v. Crédit Foncier of England*” (L.R., 8 Q.B. 374)—a case upon which in regard to the point of law the plaintiffs mainly rely—to infer that the time during which it has been the mercantile practice to treat these debentures to bearer as negotiable instruments really exceeds the time which appears from the oral evidence adduced before me by the defendants. The debenture in the case referred to was issued by an English trading company in 1849. Assuming the usage or custom proved in the present case, I have to say whether, in my judgment, I ought to give effect to it. The plaintiffs contend that I ought not to do so, and that evidence to prove it was not admissible. As to the admission of evidence, if the grounds which I proceed to consider of the plaintiffs’ contention as to the absolute incapacity of modern mercantile usage to obtain legal ratification in respect to the negotiability of instruments issued in England by an English company, and not recognized as negotiable by the ancient mercantile law and not made such by statute, are good, it follows, I agree, that evidence of such a modern mercantile usage is irrelevant and, therefore, inadmissible. The contention of the plaintiffs rests upon the reasoning of the considered judgment of the Court of Queen’s Bench in “*Crouch v. Crédit Foncier of England*.” The defendants assert that the judgment has been authoritatively disapproved, although it may be that the decision may be justified upon the ground suggested in the judgment of the Exchequer Chamber in “*Goodwin v. Roberts*.” The matter is one of commercial importance and of considerable legal difficulty. The propositions of law which are involved in this judgment may be summarized thus:—1. The general rule of law is that a chose in action cannot be transferred at law at all, and parties cannot merely by their own act annex to a contract the incidents of negotiability, that is to say, a right of action thereon, in the holder for the time being in his own name and a title both to the document containing the contract and to all rights under the contract, irrespective of defect in title of the person from whom the holder acquired it. 2. Such incidents can be annexed to a contract only by virtue either of statute or of the ancient usage of merchants which has been adopted by and now forms part of the law. 3. The modern usage of merchants cannot annex such incidents to a contract if the instrument containing it be made by an English company in England, which does not come within the category of negotiable instruments created by statute or adopted by the common law from the “ancient law merchant.” 4. The modern usage of merchants may annex the character of negotiability to bonds and like instruments of a foreign or colonial Government. The correctness

of the second and third propositions is, it appears to me, essential to the validity of the judgment and essential also to the success of the plaintiffs’ case in this action. So far as I am aware there was no appeal against the judgment, but in 1875 came the case of “*Goodwin v. Roberts*” (L.R., 10 Ex., 76, 337; 1 A.C., 47). It appears to me that upon the vital question of the effect of modern mercantile usage, such as, I think, has been sufficiently proved in the present case, it is impossible to treat the reasoning of the Court of Queen’s Bench in “*Crouch v. Crédit Foncier of England*” and the reasoning of the Exchequer Chamber in “*Goodwin v. Roberts*” as capable of reconciliation. I read the judgment of the Exchequer Chamber in the later case as plainly disapproving of the reasoning of the judgment in the earlier case. It cannot, I think, be maintained that the reasoning of the judgment upon this question of the effect of modern mercantile usage in “*Goodwin v. Roberts*” was unnecessary to the decision; nor, I think, can it be maintained that the two judgments are capable of reconciliation upon the ground that the instrument in question in the earlier case was an English instrument, and the instrument in question in the latter case was, though issued by a London agent, to all intents and purposes the scrip of a foreign Government. Further, in “*Rumball v. Metropolitan Bank*” (2 Q.B.D., 194) a Divisional Court treated “*Goodwin v. Roberts*” as decisive in an action in which a similar question arose upon an English instrument—a scrip certificate to bearer issued by a joint stock company. It appears to me that having regard to the decisions of the Exchequer Chamber in “*Goodwin v. Roberts*” and “*Rumball v. Metropolitan Bank*,” coming, as I have, to the conclusion that there has been a sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable, I cannot refuse to follow these decisions, which appear to me to practically overrule the decision in “*Crouch v. Crédit Foncier of England*” and to govern this case. Further, I see no negligence or any conduct raising an estoppel in what the plaintiffs did, but for the reasons which I have given there will be judgment for the defendants with costs, but execution may be stayed.

Judgment for the defendants.

[Solicitors—Waltons, Johnson, Bubb, and Wharton, for the plaintiffs; Clapham, Fitch, and Co., for the defendants; Ingle, Holmes, and Sons, for Lord Gifford.]

Q.B. Div. }
(Bigham, J.) }

1898.
Aug 10.

CLINK V. HICKIE, BORMAN, AND CO.*

Ship—Charterparty—Demurrage—Colliery
guarantee—Construction.

Judgment was delivered in this case. The main question for decision turned on the construction of a document called a colliery guarantee, which is a contract, relating to the loading of coal, entered into by colliery proprietors in South Wales with shipowners. The case was one of considerable importance to shipowners, because it has become a matter of frequent occurrence for this colliery guarantee to be incorporated, by reference, into charterparties. The plaintiffs in the present action claimed £996 16s. damages for 32 days’ detention of their ship the *Samoena* at the port of loading by the defendants, who were the charterers of the ship. The defendants contended that the demurrage

*Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

time must be computed by reference to the provisions of the colliery guarantee, and that the demurrage so computed amounted to not more than 20 days 12 hours, and the defendants brought £650 into Court, which sum, they said, was sufficient to satisfy the plaintiffs' claim. The material parts of the charterparty and the colliery guarantee are set out in the judgment.

Mr. Joseph Walton, Q.C., and Mr. D. C. Leck appeared for the plaintiffs; Mr. Rufus Isaacs, Q.C., and Mr. F. Laing for the defendants.

MR. JUSTICE BIGEAM read the following judgment. This action is brought by the plaintiffs, who are the owners of a steamer called the *Samoena*, to recover damages for detention or demurrage of their vessel at Cardiff. On January 25, 1898, the plaintiffs by a charterparty of that date chartered the *Samoena* to the defendants to carry a cargo of coal from Cardiff to Japan. The charterparty provided that the vessel should load her cargo "in days to be arranged colliery working days, as her colliery guarantee form," which, put into intelligible English, means that the cargo was to be loaded in a certain number of days to be subsequently fixed by agreement between the shipowner and the charterer, such days to be colliery working days as defined by a document called a colliery guarantee. The charterparty was quite silent as to demurrage at the port of loading, but it provided that the discharge should be "at the average rate of not less than 100 tons a working day, or to pay demurrage at 4d. per ton register per working day." After this charterparty had been entered into the defendants in the ordinary course made their arrangements with the colliery proprietors for the supply of the coal with which the vessel was to be loaded, and they obtained from the colliery proprietors the undertaking which is called a "colliery guarantee." It is dated February 3, 1898, and by it the colliery proprietors, Davis and Son (Limited), undertake with the defendants to load the *Samoena* in 15 days, but in the computation of these 15 days it is stipulated that all public holidays and colliers' holidays shall be excluded, and also all time from 5 p.m. on Saturday to 7 a.m. on Monday. This means that in making up the 15 days (days of 24 hours each) holidays and the hours from 5 p.m. to 12 p.m. on Saturdays and from midnight on Sundays to 7 a.m. on Mondays are not to be reckoned. The contract then goes on to provide that "for the purpose of this guarantee all holidays shall be deemed to commence at 5 p.m. the working day preceding and to end at 7 a.m. the working day following such holiday." It is argued that this last provision relates only to the 15 loading days, and not to days on which the vessel may be kept on demurrage; but I do not agree with this contention. The words are "for the purpose of this guarantee." That means for all the purposes of this guarantee, and as will be seen the purposes of the guarantee include, not only the fixing of the lay days, but also the arrangement as to the demurrage, if any. Moreover, the sentence which follows the clause just quoted, and which begins, "In case the vessel, whether in demurrage or not," seems to me to show that this part of the guarantee is not confined to the matter of lay days, but is of general application. The contract then proceeds to deal with the subject of demurrage, and provides, first, as to what the rate shall be. In this case it was to be at £13 per day, and after fixing the rate the contract shows how the demurrage is to be computed—"demurrage is to be in accordance with the above scale, payable per colliery working day." Now, I have no doubt that this means that in computing the demurrage you are to exclude all holidays and all hours from 5 p.m. before a holiday and from midnight to 7 a.m. after a holiday. In this way you get at what is called a colliery working day within the meaning of the

guarantee, and you give effect to the words "for the purpose of this guarantee all holidays shall be deemed to commence at 5 p.m. the working day preceding and to end at 7 a.m. the working day following such holiday." So I read the colliery guarantee. Now, when the defendants obtained this document they submitted it to the plaintiffs' broker, who had negotiated the charterparty. At first the number of lay days inserted in the guarantee was 16. To this the broker objected, saying that the ship must be loaded in a shorter time. The result of this remonstrance was that the number of lay days was reduced from 16 to 15. The broker, who had read the whole of the guarantee, then said that he objected on behalf of the shipowners to the rate of demurrage. He said £13 a day was too little, and that the shipowners—that is, the plaintiffs—ought to have 4d. a ton, which would amount to considerably more. The defendants urged that they probably could not get the colliery proprietors to agree to pay such a rate, to which the broker answered that that was the defendants' business, not his. The result was that the defendants agreed to pay the 4d., and to take their chance of getting it from the colliery if they could. This agreement supplemented the charterparty, which, as I have said, was silent on the question of demurrage at the port of loading. It was an agreement made after reading the colliery guarantee; it was made on the basis of that guarantee, and it amounted to this—that the shipowners—the plaintiffs—should be paid demurrage on the basis of the colliery guarantee, with this one exception—viz., that the rate, instead of being £13 a day, should be 4d. per ton per day. I have put my construction on the guarantee, and it is agreed that if my construction is right, and if the plaintiffs contracted to take 4d. a ton calculated on the basis of the guarantee, as I find they did, then the amount paid into Court is sufficient to satisfy the plaintiffs' claim. I therefore give my judgment for the defendants, with costs. His Lordship added that he understood that there were a great many of these cases, and he thought that it would be in the interests of both shipowners and charterers, and of the colliery proprietors in their turn, if they would all do their best to come to terms. These disputes had unfortunately arisen out of circumstances over which none of these parties had any control, and his Lordship was sure that they would only aggravate their positions by bringing their cases into Court. If they could possibly settle the matters in dispute by agreement amongst themselves that would be the best, cheapest, and most satisfactory way of getting rid of the disputes.

[Solicitors—Lowless and Co., for the plaintiffs; Ince, Colt, and Ince, for the defendants.]

Court of Appeal (Lindley, M.R., } 1898.
Chitty and Collins, L.J.J.) } Aug. 11.

IN RE THE STOCKPORT RAGGED INDUSTRIAL AND REFORMATORY SCHOOLS.*

Charity—Commissioners—Jurisdiction—Exemptions from—Charitable Trusts Act, 1853, sec. 62—Consent of Charity Commissioners to mortgage.

Decision of Stirling, J. (*ante*, p. 302 and [1898] 1 Ch., 610), reversed.

This was an appeal by the Charity Commissioners from a decision of Mr. Justice Stirling, reported *ante*, p. 302, and (1898) 1 Ch., 610. The matter came before the Court on a petition presented by the trustees

*Reported by D. FITZGERALD, Esq., Barrister-at-Law.

of the above-named charity under the provisions of Sir S. Romilly's Act (52 Geo. III., c. 101), asking for the sanction of the Court to a proposed mortgage of part of the property vested in the trustees. The Stockport Industrial Schools were established by a trust deed in 1866, the school buildings being conveyed to trustees upon trust to permit them to be used as a ragged industrial and reformatory school under a committee of management. The trustees were empowered to sell the original buildings and apply the proceeds of sale in providing larger schools. The petition stated that the schools were now unsuitable, and the buildings, though new schools had been built, were too small for the purposes of the trust. Notice had been given by the Government inspectors that unless the buildings were enlarged the number of children must be reduced. Under these circumstances the trustees proposed to sell the old schools and apply the proceeds, together with other moneys in hand and a further sum to be raised upon mortgage of the new premises, in buying a new site and building larger schools. The petition came before the Court on November 6, 1897, when his Lordship gave the necessary sanction, but at that time the Charity Commissioners had not been served with notice of the petition and did not appear. Subsequently they became aware of the order which had been made, and on December 1, 1897, they applied to the Judge to stay the drawing up of the same in order that they might have an opportunity of submitting that the presentation of the petition required their sanction under section 17 of the Charitable Trusts Act, 1853. The drawing up of the order was accordingly stayed, and the petition was reargued. Mr. Justice Stirling held that the case was within the 62nd section of the Charitable Trusts Act, 1862, which exempts from the operation of the Act, among others, institutions wholly supported by voluntary contributions; and was not taken out of the operation of that section by a proviso at the end of the section that the exemption should not extend to any cathedral, collegiate chapter, or other schools. The Commissioners appealed. The appeal was to determine what the Commissioners considered an important point of law, and they had given their consent and were willing to pay the costs of the institution.

Mr. Cozens-Hardy, Q.C. and Mr. Vaughan Hawkins were for the Charity Commissioners; Mr. Ingle Joyce for the Attorney-General; and Mr. Henry Johnston for the trustees of the school.

The MASTER of the ROLLS said.—This case, he was sorry to say, turned upon that very obscure enactment the 62nd section of the Charitable Trusts Act, 1853. His Lordship was of opinion that upon that, which was treated in the Court below as the main point, and was the most important point in the case—namely, the question whether the proviso at the end of section 62 taking out of the exemption from the operation of the Act "any cathedral, collegiate chapter, or other schools" applied to all schools or only schools of a like character to those specified—the decision of Mr. Justice Stirling was absolutely right. But, in his opinion, on the point that had not been so fully argued before Mr. Justice Stirling, he thought Mr. Justice Stirling had gone wrong. As to the exclusion of all schools from the exemptions contained in section 62, though the Court

hesitated to press too far the doctrine of construction, that a phrase was to be cut down by the context—the maxim *nositur a sociis*—there were cases in which to carry out the obvious intention of an Act or the parties to an instrument that maxim was to be applied, and if ever there was a case to which the maxim was applicable this was one. If all schools were taken out of the exemption, there was no possible use in referring particularly to cathedral, collegiate, and chapter schools; and, on the other hand, the words of the earlier part of the section showed that it was the intention of the Legislature to exclude all Roman Catholic institutions, including Roman Catholic schools. This institution was a charity within the meaning of the Act; but if it came within the operative part of section 62, as it was not within the proviso, the decision of Mr. Justice Stirling was right. That section excluded from the operation of the Act institutions wholly supported by voluntary subscriptions; and, further, where the institution was supported partly by voluntary subscriptions and partly by income from endowment it enacted that the powers and provisions of the Act should be confined to that part of the charity which was supported by income from endowment. Now, it was to be observed that the circumstances of this case differed from the case "*In re Clergy Orphan Corporation*" ((1894) 3 Ch., 145; 10 *The Times* L.R., 672), which Mr. Justice Stirling relied on in that there there was an income from voluntary subscriptions and a building that had been provided out of voluntary subscriptions; but here there was an income from voluntary subscriptions, and one of the buildings was one that was not shown to have been so provided. One view was that an occupation in respect of this rent should be considered as income coming from this property as part of the income supporting the institution, and thus make the consent of the Charity Commissioners necessary to the mortgages; it was not necessary, however, to strain the Act by such a construction. For two cases only were provided for—the case where there was an income wholly from voluntary subscriptions, and the case where there was an income partly from voluntary subscriptions and partly from endowment; but in this case there was also an income from Government grant, payments by guardians and School Boards, and on this ground he held the case to be outside the section altogether. The section, however, was so obscure and difficult to understand that he declined to do more than decide each case as it arose. He would not decide, contrary to the spirit of the Act, that the Charity Commissioners had any jurisdiction over the income arising from voluntary subscriptions. He held that the school building could not be mortgaged without the consent of the Charity Commissioners.

LORD JUSTICE CHITTY delivered judgment, also holding that Mr. Justice Stirling was right in cutting down the proviso exempting schools from the operation of the section to schools in the nature of cathedral, collegiate, or chapter schools, whatever the meaning of the latter word was, but that the consent of the Charity Commissioners was necessary to mortgaging the school buildings.

LORD JUSTICE COLLINS concurred.
[Solicitors—Andrew, Wood, and Purves; Clabon; Solicitor for the Treasury.]

END OF VOL. XIV.

ANNUAL DIGEST

OF

THE TIMES LAW REPORTS.

VOL. XIV.

(1897-98.)

LONDON :

PRINTED AND PUBLISHED BY GEORGE EDWARD WRIGHT,

AT THE TIMES OFFICE, PRINTING HOUSE SQUARE.

[Entered at Stationers' Hall]

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